No. ________

IN THE

Supreme Court of the United States

Sawtooth Mountain Ranch, LLC,
Lynn Arnone, and David Boren,

Petitioners,

v.

United States Forest Service, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners' predecessors sold an easement to the United States in order to preserve the land's environmental character and to permit members of the public to use the easement as a trail. The property was unimproved and the grantors expected it to remain that way. When the property owners learned that the government intended to build a paved road instead, they sued. The trial court held that they waited too long and granted summary judgment to the government. That allowed it to construct a raised and paved roadway across the otherwise pristine landscape. The Ninth Circuit affirmed, in an opinion raising these questions:

1. Whether equitable tolling is available for statutes of limitation, highlighting a conflict between *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493, 1500 (2022), holding that such relief is "presumptively" available, and the earlier decisions in *United States v. Beggerly*, 524 U.S. 38, 49 (1998) and *Block v. North Dakota*, 461 U.S. 273, 287 (1983), holding that the statute of limitations must be "strictly" applied.

2. Whether the only remedy for a regulatory taking is cash payment, a conclusion of the Ninth Circuit that conflicts with recent decisions of this Court, like *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Lingle v. Chevron U.S.A. Inc.*,

544 U.S. 528 (2005), holding that takings relief is not limited to compensation but can be declaratory or injunctive, depending on the circumstances.

3. Whether a constitutional right can be eliminated by a statute — in this case, whether the "self-executing" just compensation provision of the Fifth Amendment can be eliminated by a statute purporting to impose an artificial time limit in which to sue to enforce that constitutional guarantee.

PARTIES TO THE PROCEEDING

Petitioner Sawtooth Mountain Ranch LLC is an Idaho Limited Liability Company. Petitioner David Boren is an Idaho resident who is the organizer and sole member of Sawtooth Mountain Ranch LLC. Petitioner Lynn Arnone is an Idaho resident married to David Boren. They are collectively referred to in this petition as "Ranchers."

United States Forest Service; Sawtooth National Forest; Jim Demaagd, Forest Supervisor; Sawtooth National Recreation Area; Kirk Flannigan, Area Ranger; United States Department of Agriculture; Thomas J. Vilsack, Secretary of Agriculture; Federal Highway Administration; United States of America; are Respondents.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner Sawtooth Mountain Ranch LLC certifies that it has no parent or subsidiary companies and no publicly held corporation owns 10% or more of its stock.

RELATED CASES

- *Sawtooth Mountain Ranch, et al., v. United States Forest Service, et al.*, 9th Cir. No. 22-35324, mem. opinion (Nov. 26, 2023).

- *Sawtooth Mountain Ranch, et al., v. United States Forest Service, et al.*, 9th Cir. No. 22-35324, order denying rehearing (Jan. 11, 1014).

- *Sawtooth Mountain Ranch, et al., v. United States of America, et al.,* USDC No. 1:19-cv-00118-CWD, memorandum decision and order (Feb. 24, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review a judgment of the Ninth Circuit Court of Appeals.

INTRODUCTION

The law regarding statutes of limitation is in disarray. This is due in large part to a series of old cases routinely treating such statutes as "jurisdictional." That was taken to mean that failure to file suit within the stated period would deprive the courts of jurisdiction to consider the suit. Many of those older decisions were made with little thought or consideration. Indeed, this Court has referred to them as "*drive-by jurisdictional rulings* that should be accorded *no precedential effect* on the question whether the federal court had authority to adjudicate the claim in suit." *Wilkins v. United States*, 598 U.S. 152, 160-61 (2023) (quoting *Arbaugh v. Y&H Corp*., 546 U.S. 500, 511 (2006) (emphasis added)).

The Court probably thought it had settled the issue when it concluded "that most time bars are *not jurisdictional*." *United States v. Wong*, 575 U.S. 402, 410 (2015) (emphasis added). In the specific context at bar, the Court held in its last Term that the statute of limitations in the Quiet Title Act (QTA), 28 U.S.C. §§ 2409a, was not jurisdictional. *Wilkins*, 598 U.S. at 159.

But lower courts like the Ninth Circuit Court of Appeals apparently refuse to accept that. In this case, for example, the Ninth Circuit applied a "strict" construction to the statute of limitations

that, in effect, applied it as a jurisdictional statute through the back door.

Worse than that, the Ninth Circuit ignored this Court's teaching in *Boechler*, *P.C. v. Commissioner*, 142 S. Ct. 1493, 1500 (2022), where the Court was clear that "nonjurisdictional limitations periods are ***presumptively*** subject to equitable tolling." (Emphasis added.) Instead of considering equitable tolling, the Ninth Circuit rigidly applied the statute of limitations.

Certiorari is needed to clarify the proper application of statutes of limitation and the impact on them of equitable tolling.

But there is more. The Ninth Circuit also created further uncertainty in two aspects of takings law:

- First, the court assumed that the ***only*** remedy for a taking is compensation, so that any request for either declaratory or injunctive relief is not available. That conflicts with multiple decisions of this Court.
- Second, the court held that a statute can undo a constitutional guarantee. It did this by holding that the "self-executing" just compensation guarantee of the Fifth Amendment can be eliminated by a limitation statute passed by Congress. Congress lacks the authority to override the Constitution.

The upshot is that, despite this Court's efforts to bring some rationality to the standards governing both takings law and statutes of limitations, the law applied in lower courts is confused. This case

provides an appropriate platform to set matters straight.

OPINIONS BELOW

The Ninth Circuit Court of Appeals' unpublished opinion is reproduced at App.1. The Ninth Circuit's unpublished Order denying rehearing is reproduced at App. 8. The District Court's unpublished Amended Judgment is reproduced at App. 10.

JURISDICTION

The Ninth Circuit Court of Appeals filed its opinion on November 16, 2023. The timely petition for rehearing was denied on January 11, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "…. nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. Petitioners own an operating cattle ranch in Idaho.

Petitioners (Ranchers) own 1781.07 acres known as the Sawtooth Mountain Ranch, located within the Sawtooth National Recreation Area in Idaho. (ER-78.) They acquired the Ranch in 2016 from the Piva family, which had operated a cattle ranch on the property for many years. (ER-18.) Ranchers continued that use. (ER-78.)

The Piva family had allowed snowmobile use of a dirt path across the property. (ER-78.) In 2005, that use was formalized in an easement granted to the United States in a Conservation Easement Deed. (ER-79.)[1] The dirt path meets the definition of an esthetic trail as defined in the Forest Service Trail Construction and Maintenance Notebook:

"No discussion of trails is complete without attention to esthetics. We're talking scenic beauty here. Pleasing to the eye. The task is simple. An esthetically functional trail is one that fits the

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[1] Since the equipment usage on the Easement's trail was limited to snowmobiles and snow grooming equipment, it raised no concern about equipment, machinery or motorized vehicles that would permanently alter or damage the natural landscape or scenic beauty of the property because the whole point of the Easement Deed was to preserve the Conservation Values of the Sawtooth National Recreation Area (SNRA) Act. (ER-224.)

setting. *It lies lightly on the land and often looks like it just happened.*" [2]

The purpose of the Conservation Easement Deed was to maintain the statutory values of the SNRA, 16 U.S.C. § 460aa et seq., so as to prevent "any use of the Property that will significantly impair or interfere with the Conservation Values of the Property," and to "confine the use of the Property to such activities as are consistent with the purposes of this Easement." (ER-79.) Plans to transform the existing trail from a natural trail that "lies lightly on the land" to a highly developed gravel commuter route are antithetical to the preservation of the Conservation Values in both the Easement Deed and the SNRA Act. The Easement itself was created and defined in Part VI, section K of the Conservation Deed as follows:

> "Nothing herein contained shall be construed as affording the public access to any portion of the Property except the United States is hereby granted the right to permit public use of the following:
>
> (1) A strip of land *to be utilized as a trail* in that portion of the Easement area within Secs. 9,15, and 16, as shown on Exhibit D, attached hereto and made a part hereof. The total right-of-way width of the trail easement shall be 30 feet. *The following uses are allowed on*

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[2] https://www.fs.fed.us/t-d/pubs/pdfpubs/pdf07232806/pdf07232806dpi72.pdf. (Emphasis added.)

> *the trail: snowmobile, snow grooming equipment, bicycle, horse, and foot travel*. The Grantee [United States] may erect appropriate signs to delineate the public use areas where needed.
>
> (2) A strip of land along Velley Creek, to be utilized *for foot travel only*, extending from the centerline of Valley Creek to a point parallel and being 20 feet distant beyond each mean high water line of Valley Creek. The Grantee may erect appropriate signs to delineate the public use areas where needed." (Emphasis added.) (ER-79-80.)

Absent from the easement is any language permitting construction activities or permanent placement of any substance on the "strip of land."

The easement was granted as part of a document intended to preserve the natural beauty of the area, in line with the intent of the SNRA Act, 16 U.S.C. § 460aa et seq. (ER-79.) That statute's general purpose is "to assure the preservation and protection of the natural, scenic, historic, pastoral, and fish and wildlife values and to provide for the enhancement of the recreational values associated therewith …." 16 U.S.C. § 460aa. The Conservation Deed states that members of the Piva Family (i.e., the grantors) "intend that the Conservation Values of the Property be preserved and maintained by the *continuation of land use patterns*, including those *currently existing*, that do not significantly impair or interfere with those values." (ER-84, emphasis added.) As the parties agreed in the Conservation Deed:

> "It is the purpose of this Easement to assure that the Property's scenic, natural, historic, pastoral, and fish and wildlife values … be maintained forever and to prevent any use of the Property that will significantly impair or interfere with the Conservation Values of the Property." (ER-141.)

Thus, looking within the four corners of the Conservation Deed, and construing the document as a whole, it is apparent that that document dealt with more than simply granting the government an easement for a trail. The deed's larger purpose was to preserve the Property for the Conservation Values listed in the preamble, i.e., "scenic, natural, historic, pastoral, and fish and wildlife values." (ER-85, 140.) These Conservation Values do not include public recreation. The intent was to maintain and preserve the Property as it was in 2005. (ER-84, 141.)

II. The United States Announces That it Intends to Construct a Paved Road That Exceeds the Bounds of the Easement.

In early 2014, the government announced its intention to create an engineered commuter route over the rustic trail on the easement on Sawtooth Mountain Ranch. The commuter route would provide alternative access between the City of Stanley and Redfish Lake, then accessible only via Highway 75. The government's expansion plan was summarized in a "proposed action" that was published in the Sawtooth National Forest's *Schedule of Proposed Actions* in January 2014. (ER-80.) It was at this time that the government asserted

that the Conservation Deed allowed construction across the Ranch despite the numerous provisions in the deed precluding construction and promoting conservation and preservation of the existing use. That was confirmed in 2018 when the government formally approved the project. (ER-82.)

III. Proceedings Before the District Court.

Upon realizing the government's intention to do construction work far beyond what the easement authorized, Ranchers sued to quiet their title to the land. (ER-61.) The complaint demonstrated the way in which the government's current plan far exceeded anything allowed by the easement. Had the government actually wanted this extensive ability to change the landscape — albeit in contravention to the intent and wording of the SNRA Act — the time to effect that was in the words of the Easement deed themselves. But those words — drafted by the government — do not authorize anything but the passive uses that had gone on theretofore. Thus, Ranchers' lawsuit.

The district court, with little analysis, decided that it lacked jurisdiction over the case because the complaint was purportedly filed too late (ER-5, 20) and entered summary judgment in favor of the government (ER-23) based on the jurisdictional nature of the statute of limitations. But "too late" was exactly one of the key factual issues in this case at the district court, i.e., did the statute of limitations begin to runat the time of the creation of the easement for a dirt path or at the time the government made concrete its plans to overburden the easement with a paved commuter route. The

district court deprived the Ranchers of an opportunity to argue the facts on this critical issue.

IV. Proceedings on Appeal.

The case was briefed and argued in the Ninth Circuit at the same time that this Court was considering the nature of the QTA's statute of limitations in *Wilkins*. *Wilkins* was decided before oral argument in the Ninth Circuit. That should have eased the Ninth Circuit's task, as the decision that the QTA statute of limitations was not jurisdictional meant that the district court had erred fundamentally.

Instead of simply reversing and remanding for a decision unsullied by that plainly erroneous "jurisdictional" determination, the Ninth Circuit decided to affirm anyway. It relied on **its own** decision in *Wilkins* (App. p. 2), the one that the Ninth Circuit knew this Court had **reversed** on certiorari, and concluded that the Circuit's rule was that the statute of limitations could not be waived and was thus an active part of the case even though the government had not raised it as an affirmative defense.

The Ninth Circuit then purported to hold what was essentially an evidentiary determination (on review of a dismissal as a matter of jurisdiction) and conclude that suit was filed too late even if the statute of limitations was not jurisdictional.

At most, that "evidence" was in conflict. As noted above, the easement deed that granted the government its interest was made pursuant to a statute intended to maintain the land in pristine

condition, placing more restrictions on it than had existed before.

Moreover, the grantors of that easement believed that the right they granted the public to use the easement "as a trail" would be to continue the use of the undeveloped trail that had been in existence. In their view, the use they had granted members of the public as a matter of grace would be transferred to the government for use as a matter of right — but nothing about the use would change.

The Ninth Circuit chose to give conclusive weight to a letter written about the time of the easement's creation by a member of the Piva family, but one who had no interest in the land at that time, purporting to record some conversations had with the government about how it might plan to use the easement in the future. But, as noted above, nothing formal was done (or even announced) by the government until years later. Instead of returning the matter for trial of this critical issue, the Ninth Circuit took it upon itself to decide it, giving conclusive weight to a letter by a non-owner of the property that was contradicted by the allegations of the complaint and the words of the easement deed.

The Ninth Circuit justified its action legally by referencing *Beggerly* and *Block* and their conclusions that the QTA's statute of limitations must be "strictly" applied.

That reading of *Beggerly* and *Block* did an end-run around *Boechler* and *Wilkins*, essentially reinstating the QTA's limitation as jurisdictional.

This Court's review is essential to establish the primacy of *Wilkins*'s holding that the QTA's statute of limitations is ***not*** jurisdictional and that *Boechler*'s presumptive application of equitable tolling must be applied. The older decisions in *Beggerly* and *Block* must be restricted in light of the Court's recent decisions.

REASONS FOR GRANTING CERTIORARI

I. The Court Should Grant Certiorari to Eliminate the Conflict About the Application of Equitable Tolling of Statutes of Limitations Created by the Court's Decisions in *Beggerly* and *Boechler*.

This Court has addressed the question of equitable tolling recently and has produced results that are contradictory and sow confusion in the lower courts. Clarification can only come from this Court.

In *United States v. Beggerly*, 524 U.S. 38, 49 (1998), the Court held — at a time when statutes of limitation were considered to be jurisdictional, i.e., matters that deprived courts of jurisdiction once the statutory period had expired — that the QTA's 12-year limitation period must be "strictly" construed and applied.

Since then, the Court concluded a years-long process during which it finally concluded in *Wilkins v. United States*, 598 U.S. 152 (2023) that statutes of

limitation in general, and the QTA statute in particular, were ***not*** jurisdictional.[3]

The Ninth Circuit held here that the rigid rule of *Beggarly* (that used to be called "jurisdictional") had to prevail here, and then joined its obeisance to *Beggarly* with another, even older, case: *Block v. North Dakota*, 461 U.S. 273, 287 (1983). It relied on *Block* for the proposition that the QTA's statute of limitations "must be strictly observed." (App. p. 5) But *Block*'s statute of limitations discussion has been disowned by this Court because *Block* did not directly consider whether the QTA's statute of limitations was jurisdictional. Rather, it made one passing reference in the conclusion of its opinion, 461 U.S. at 292, without any analysis of the issue. The Court itself has "described such unrefined dispositions as *drive-by jurisdictional rulings* that should be accorded *no precedential effect* on the question whether the federal court had authority to adjudicate the claim in suit." *Wilkins*, 598 U.S. at 160-61 (quoting *Arbaugh v. Y&H Corp*., 546 U.S. 500, 511 (2006) (emphasis added)). Yet the Ninth Circuit held that "drive-by jurisdictional ruling" to be controlling.

In the final decision before *Wilkins*, *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493, 1500 (2022),

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[3] See *Arbaugh v. Y&H Corp*., 546 U.S. 500, 515-16 (2006); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 164-65 (2010); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013); *United States v. Wong*, 575 U.S. 402, 410 (2015); *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 21 (2017); *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493, 1500 (2022); *Wilkins v. United States*, 598 U.S. 152 (2023).

the Court added another layer of protection against the harsh application of statutes of limitation by making it clear that "nonjurisdictional limitations periods are ***presumptively*** subject to equitable tolling." (Emphasis added.) Thus, the statute at issue here should be "presumptively subject to equitable tolling" under *Boechler*.

The conflict and confusion exist because, even though *Boechler* was decided nearly a quarter-century *after Beggerly*, the Ninth Circuit in this case refused to apply *Boechler*'s presumption and concluded that the old *Beggerly* decision absolutely forbade equitable tolling. In effect, the Ninth Circuit reinstated the "jurisdictional" limitations rule through the back door. The conflict between these two approaches can only be resolved by this Court.

A. There is Conflict and Confusion on How to Apply the Concept of Equitable Tolling.

The Ninth Circuit's decision in this case vividly demonstrates the confusion wrought by the Court's existing decisions on the interface between quiet title cases and the application of equitable tolling.

One would have thought the issue was resolved in *Wilkins*, the most recent decision in this line and one dealing directly with the precise statute of limitations involved here, i.e., the one in the QTA. There, the Court held that the QTA statute of limitations was merely a "mundane" claim processing rule that was not "jurisdictional." 598 U.S. at 159.

This was a classic case for the application of equitable precepts. What the Ranchers and their predecessors believed about the government's interest in the easement needs to begin with the words of the easement deed. As stated in the document creating the easement, both the Government and the property owners "desire to *expand the restrictions* imposed by the Original Easement on the property through the conveyance of additional rights to the United States … because the Property contains significant scenic, natural, historic, pastoral, and fish and wildlife values [collectively referred to as Conservation Values] …." (ER-140, emphasis added). The preservation intent was clearly expressed in terms of maintaining the status quo:

> "**WHEREAS**, Grantors intend that the Conservation Values of the Property be preserved and maintained by the *continuation* of land use patterns, including those *currently existing*, so as not significantly to impair or interfere with those values; and
>
> "**WHEREAS** Grantors further intend, as owners of the Property, to convey to the United States the right to preserve and protect the Conservation Values of the Property in perpetuity …." (ER-141, emphasis added.)

* * *

> "It is the purpose of this Easement to assure that the Property's scenic, natural, historic, pastoral, and fish and wildlife values … be *maintained forever* and to *prevent any use of the Property* that will significantly impair or interfere with the Conservation Values of the Property." (ER-141, emphasis added.)

Equitably, the beginning of the statute of limitations needs to account for the clear wording of the deed by which the government obtained its title as well as the formal announcement of its intent to build a paved and raised roadbed to replace the natural, and almost invisible, dirt path that had existed for years. Such a decision could lead to the equitable tolling of the statute of limitations. But the Ninth Circuit took it upon itself to eliminate equitable considerations and reinstate the rigid statutory period that this Court had just held needed to be subject to equitable tolling.

The decision here needs to blend with the Court's decisions generally protecting the rights of private property owners. The Court recently summarized that history this way:

> "As John Adams tersely put it, [p]roperty must be secured, or liberty cannot exist. Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851). This

> Court agrees, having noted that protection of property rights is necessary to preserve freedom and empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021) (internal punctuation simplified).

B. *Boechler* Demonstrates a Superior Methodology for Dealing with Quiet Title Cases. *Beggerly* Should Either be Overruled or at Least Properly Cabined Where it Can do No Harm.

Common sense should prevail over rigidity. Essentially, that is the rule established by *Boechler*. *Boechler* took the non-jurisdictional determinations and carried them a step further in order to provide protection to the rights of private property owners: they are subject to further examination to determine whether equitable precepts provide additional reasons to avoid application of an otherwise applicable statute of limitations. The reason for doing so, of course, simply expands on the Court's rationale for doing away with the so-called jurisdictional nature of statutes of limitations. Rigid rule applications had unintended "harsh consequences" for individuals. See *Wong*, 575 U.S. at 409.

The Ninth Circuit arrogated that determination to itself, when it decided that it could examine all the facts (at least all that had surfaced during the lower

court's examination of legal issues — issues largely colored by the "jurisdictional" determination) and decide issues that otherwise should have gone to trial.

Aside from the other issues presented by this case, the Ninth Circuit's determination that it could wrench this factual decision from a jury and determine it on its own is enough to warrant this Court's review. As this Court explained:

> "Once those officials who have the power to make official policy on a particular issue have been identified, *it is for the jury to determine whether their decisions have caused the deprivation of rights at issue*." *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989) (emphasis added).

What the Ninth Circuit ignored was the bedrock this Court laid down in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000):

> "the court must draw all reasonable inferences in favor of the nonmoving party, and it ***may not make credibility determinations or weigh the evidence***. [Citations.] 'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are ***jury functions***, not those of a judge.' [Citations.]" (Emphasis added.)

And yet, that is precisely what the Ninth Circuit did to justify its affirmance.

II. This Court Should Grant Certiorari to Clarify That the Remedy for Government Action that Violates the Fifth Amendment's "Takings" Clause Can be *Either* Compensation *or* Declaratory *or* Injunctive Relief, Depending on What it Takes to Vindicate the Constitution in the Circumstances.

It took this Court the better part of a decade to rid the country of California's erroneous notion that the only remedy for the taking of property within the meaning of the Fifth Amendment was invalidation of the offending regulation. Nothing more. No compensation for any taking of property, whether permanent or temporary. Compare the decisions beginning with *Agins v. City of Tiburon*, 447 U.S. 255 (1980) and ending with *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).[4] *First English* held that, when the Fifth Amendment spoke of "just compensation," then those whose property was taken by government action could recover a monetary judgment.

In this case, the Ninth Circuit took the holding in *First English* to mean that the *only* remedy for a regulatory taking in violation of the Fifth Amendment was compensation. Thus it concluded that, because the Ranchers' complaint had not sought compensation, but only invalidation of the agency's action, it could have no claim for Fifth Amendment relief at all. (App. p. 6)

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[4] That history is recounted in *First English*, 482 U.S. at 311.

The Ninth Circuit's action goes beyond mere "error." It is a bowdlerization of the *First English* decision. Where *First English expanded* the relief available under the Fifth Amendment, the Ninth Circuit's decision *eliminates* the available relief, in conflict with settled decisions of this Court.

Thus, for example, in one of the Court's most recent takings cases, the issue was whether a California regulation authorizing labor unions to "take access" to farms violated the takings clause. *The complaint claimed the regulation caused a taking but sought no monetary relief*. It sought only to invalidate the regulation as a Fifth Amendment violation. And that is what the Court did, after concluding that the regulation effected a taking of private property without compensation. As no compensation was made, the regulation was invalid under the Fifth Amendment and the Court struck it down. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

The same was true of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). There, the issue was the validity under the Fifth Amendment of conditions that the California Coastal Commission had placed on issuance of a development permit. Those conditions mandated that the applicants provide access to strangers across their property. The Court held that the conditions violated the takings clause *and invalidated the conditions*. *See also Dolan v. City of Tigard,* 512 U.S. 374 (1994) (conditions *invalidated* as taking); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (legislation challenged as taking; remedy sought was *declaratory relief and injunction*);

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) (same re economic regulation); *Babbitt v. Youpee,* 519 U.S. 234, 234–235 (1997) (same re native American property/probate regulation).

Thus, this Court's recent decisions are clear that a property owner may seek declaratory and injunctive relief — in addition to or instead of compensation — when government action has worked a Fifth Amendment taking of property, depending on what remedy is needed in the circumstances.

The Ninth Circuit's decision conflicts with this Court's plain holdings. It also conflicts with other Circuit court decisions. See, e.g., *Barber v. Charter Township*, 31 F.4th 382, 389 (6th Cir. 2022) (authorizing injunctive relief and relying on *Cedar Point*).

III. The Court Should Grant Certiorari to Ensure that the Constitution Prevails Over Statutes.

Under our system of government, the Constitution is preeminent. It cannot be undercut by statutes. The issue here is whether a constitutional provision held to be "self-executing," i.e., requiring no Congressional action to enliven it, can be restricted or eliminated by a mere statute. In brief, it cannot.

Because the right to just compensation arises directly from the Constitution, Congress cannot abrogate this right by statute. As the Court put it in *Jacobs v. United States*, 290 U.S. 13, 17 (1933), "the right to just compensation could not be taken away

by statute or be qualified …." In *Jacobs*, the question was whether the failure of Congress to provide for interest on awards of just compensation could override the general Constitutional command for payment of compensation for takings, as interest is part of just compensation. The Court answered curtly that it could not, because the Constitution prevailed in protecting the rights it guarantees. In other words, "acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution." *Phelps v. United States*, 274 U.S. 341, 344 (1927).

A. The Constitution is paramount.

The Constitution is our paramount authority. *Marbury v. Madison*, 5 U.S. 137, 177 (1803):

> "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. [¶] …. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that *an act of the legislature, repugnant to the constitution, is void*." *Id.* at 176-77 (emphasis added).

The Constitution — in this case, particularly the 5th and 14th Amendments — is thus supreme against legislative reduction or evasion. The district court permitted a statute to condone the government's overburdening of the easement in a

way that took an interest in Ranchers' property in violation of the constitution. And the Ninth Circuit affirmed. To the extent that any legislation, e.g. under the QTA, 28 U.S.C. § 2409a, can be read as restricting or eliminating the rights under constitutional guarantees, that legislation is "repugnant to the constitution [and] void."

As Chief Justice Marshall put it, "If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply." *Marbury*, 5 U.S. at 177-78.

B. The Just Compensation Clause is a Constitutional Guarantee that This Court has held to be both Self-Executing and Irrevocable. It Does Not Depend Upon Legislative Grace.

Owners' rights to be secure in their property is one of the primary objects for which the national government was formed. In *United States v. Jones*, 132 S.Ct. 945, 949 (2012), the Court recalled Lord Camden's holding in *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765), "The great end for which men entered into society was to secure their property." This Court explained, "In any society the fullness and sufficiency of the securities which surround the individual in use and enjoyment of his property constitute one of the most certain tests of the character and value of government." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 324 (followed by *Olson v. United States*, 292 U.S. 246, 254 (1934)).

This Court held the Fifth Amendment guarantee of compensation does not "depend on the good graces of Congress," explaining:

> "[A] landowner is entitled to bring an action in inverse condemnation as a result of the "self-executing character of the constitutional provision with respect to compensation".... As noted in Justice Brennan's dissent in *San Diego Gas*, it has been established at least since *Jacobs* [*v. United States*, 290 U.S. 13 (1933)] that claims for just compensation are grounded in the Constitution itself." *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 315-16 (1987).

The Court reiterated recently that the Just Compensation Clause is "self-executing." *Knick v. Township of Scott*, 588 U.S. 180, 192 (2019).

In *First English*, the Solicitor General (as amicus curiae) urged that the Fifth Amendment was merely "a limitation on the power of the Government to act, not a remedial provision." (See 482 U.S. at 316, n.9.) The Court rejected that argument, concluding that it was the Constitution itself that both established the right and dictated the remedy. *Id.*

Indeed, even before *San Diego Gas* and *First English*, this Court found:

> "whether the theory … be that there was a taking under the Fifth Amendment, and that therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution, or that there was an implied

> promise by the Government to pay for it, is immaterial. In either event, the claim traces back to the prohibition of the Fifth Amendment…." *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

The Fifth Amendment "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela*, 148 U.S. at 325.

When the government takes an owner's property the government has a "categorical duty" to comply with the Fifth Amendment. See *Arkansas Game and Fish Comm'n v. United States*, 133 S.Ct. 511, 518 (2012) and *Horne v. Department of Agriculture*, 135 S.Ct. 2419, 2428 (2015). Although the general remedy may be compensation, there are times (as here and in cases like *Nollan, Dolan, Eastern Enterprises,* and *Babbitt* noted above) when the appropriate remedy is invalidation or declaratory relief. The federal government may not escape this "categorical duty" by creating a statutory scheme that truncates the Constitutionally guaranteed compensation when property is taken. Thus, in *First English*, this Court held that California had "truncated" the Fifth Amendment's rule by refusing compensation for any part of the time that the regulation precluded use of the property. 482 U.S. at 317. So, here, the Ninth Circuit "truncated" the rule by precluding injunctive or declaratory relief when needed.

More than that, the Court recently held that the duty to pay just compensation when government takes private property is "irrevocable." *Knick*, 588 U.S. at 192. A right that is both Constitutional and "irrevocable" cannot be eliminated by a statute purporting to place a time restriction on claiming that remedy.

In a somewhat different context, the Court had no trouble in explaining the priority of the Constitution over lower forms of regulation, noting that "[t]he protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 583 (1986). Governmental "grace" cannot overcome the Constitution.

To be sure, statutes of limitation are valid — when confined to their proper spaces. Thus, to the extent that the QTA deals with issues of *less than* constitutional dimension, it may freely establish a limitation period within which to file suit. However, such statutory limitations would be, as *Marbury* put it, "repugnant to the constitution [and] void" to the extent that they purported to impact constitutionally protected rights. 5 U.S. at 176-77.

Even if we were dealing only with a federal *statute*, rather than a federal Constitutional right, the result would be the same. Under federal law, an act occurring in violation of a statutory mandate is void *ab initio* and not subject to a statute of limitations when it is challenged. *Ewert v. Bluejacket*, 259 U.S. 129, 138 (1922).

As this Court put it bluntly in a more recent

regulatory taking case, the law cannot "put an expiration date on the Takings Clause." *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001). *Palazzolo* dealt with the ability of a property owner to sue for a regulatory taking when the challenged regulation was enacted before the plaintiff acquired title to the property. The Court held that it would violate the Constitution to hold that such a happenstance of timing could prevent an injured property owner from filing suit. Hence, "no expiration date" on the Takings Clause.

The same is true here, where Ranchers acquired the property after the easement in question was created. As in *Palazzolo,* they retain the right to sue. *See also United States v. Lee*, 106 U.S. 196 (1882), where property wrongfully taken in 1862 was restored to its rightful owners by this Court in 1882 — twenty years later.

CONCLUSION

The Ninth Circuit has once again ignored Constitutional dictates designed to protect private property owners. Its brief opinion found three different ways to violate the Fifth Amendment. This must stop. The petition for certiorari should be granted.

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APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAWTOOTH MOUNTAIN RANCH, LLC; LYNN ARNONE; DAVID BOREN, Plaintiffs-Appellants, v. UNITED STATES FOREST SERVICE; SAWTOOTH NATIONAL FOREST; JIM DEMAAGD, Forest Supervisor; SAWTOOTH NATIONAL RECREATION AREA; KIRK FLANNIGAN, Area Ranger; UNITED STATES DEPARTMENT OF AGRICULTURE; THOMAS J. VILSACK, Secretary of Agriculture; FEDERAL HIGHWAY ADMINISTRATION; UNITED STATES OF AMERICA, Defendants-Appellees.	No. 22-35324 D.C. No. 1:19-cv-00118-CWD MEMORANDUM* (Filed Nov. 16, 2023)

Appeal from the United States District Court
for the District of Idaho
Candy W. Dale, Magistrate Judge, Presiding

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

Argued and Submitted October 5, 2023
Seattle, Washington

Before: WARDLAW and M. SMITH, Circuit Judges, and HINKLE, District Judge.

Sawtooth Mountain Ranch, LLC, Lynn Arnone, and David Boren (collectively, the "Ranch") appeal the district court's order granting summary judgment in favor of the Defendants (hereafter, the "USFS"). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The Ranch's claims brought under the Quiet Title Act ("QTA") are untimely under the QTA's twelve-year statute of limitations. 28 U.S.C. § 2409a(g). A quiet title claim filed under the QTA accrues when the plaintiff or its predecessors-in-interest "knew or should have known of the claim of the United States." *Id.* Although the QTA's statute of limitations is nonjurisdictional, it must be enforced when properly raised as an affirmative defense. *See Wilkins v. United States*, 598 U.S. 152 (2023); *United States v. Beggerly*, 524 U.S. 38, 49 (1998). Although the USFS did not previously raise the statute of limitations as a defense to the Ranch's two QTA claims now on appeal, it was clearly established in our Circuit prior to the Supreme Court's decision in *Wilkins* that the QTA's statute of limitations is jurisdictional and cannot be waived. *See Wilkins v. United States*, 13 F.4th 791, 794-95 (9th Cir. 2021), *rev'd*, 598 U.S. 152 (2023). Because the district court *sua sponte* ordered the parties to brief the statute of limitations issue, the USFS has properly

preserved its arguments that the Ranch's QTA claims are time-barred. We therefore find that the USFS has not waived its now-affirmative defense.

2. Reviewing the district court's dismissal of the Ranch's QTA claims on statute of limitations grounds de novo, we find ample, undisputed evidence in the record that, as early as *2005*, the Ranch's predecessors-in-interest ("the Pivas" or "the Piva family") had actual notice of both the USFS's claimed interest in the trail easement and the USFS's intent to construct a trail for public use across the easement. *See Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1005 (9th Cir. 2011); *cf. Michel v. United States*, 65 F.3d 130, 132 (9th Cir. 1995) (noting that in QTA disputes over easement access, actual or constructive knowledge of government action inconsistent with the easement, as opposed to mere awareness of a claimed government interest, may be required to start the running of the statute of limitations).

In May of 2005, the Pivas executed a Conservation Easement Deed with the USFS. Among other provisions, the Deed granted the government "the right to permit public use of . . . [a] strip of land to be utilized as a trail" (the "trail easement") along a far-eastern portion of the ranch property. According to a letter written by Robert Piva to the USFS in June 2005[1] and an email written by Piva to the USFS in 2014, "Piva

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[1] The district court found that Piva's letter was likely written in June 2005. The parties do not dispute that the undated letter was written at that time, and the Ranch does not assert that the district court's factual finding was clearly erroneous.

ranch owners" met with representatives of the USFS "on site of the proposed trail" shortly after the Conservation Easement Deed was executed to discuss the USFS's "proposed trail" across the easement. Piva's letter recounts that certain Piva family members had concerns with the USFS's "trail proposal as it [then] existed," "if put into use in the future." Almost a decade later, Piva wrote that, since the meeting between the Pivas and the USFS on the ranch property, "nothing of substance in the [USFS's] *proposed trail plan* ha[d] changed." (Emphasis added).

The Ranch does not dispute the authenticity of Piva's letters nor their factual content, and the Ranch has not addressed the letters in its briefing below or on appeal other than to confirm that Piva's correspondence provides "evidence" of the "Piva Family's knowledge . . . at the time the Deed was granted." Although there is not direct evidence of Piva's ownership interest in the ranch property in 2005, there is circumstantial evidence that he attended the meeting and the undisputed content of his letters substantiates that "Piva ranch owners" as early as 2005 had actual knowledge of the government's "proposal" to install a "trail system" along the easement.

Additional undisputed evidence in the record substantiates, in the alternative, that a reasonable landowner would have known as early as 2005 of the government's intent to construct a trail akin to the one that the USFS ultimately proposed and the Ranch now challenges. *See Shultz v. Dep't of Army*, 886 F.2d 1157,

1160 (9th Cir. 1989). The Ranch has argued, and the parties do not dispute, that no "visible" trail existed along the easement, at least during spring, summer, and fall months, prior to the execution of the 2005 Deed. Nor do the parties dispute that the 30-foot-wide trail easement crosses wetland areas. Given the wetland areas, a reasonable landowner would have recognized the need to construct at least some graded pathway to facilitate the public uses of the trail contemplated within the Deed, including foot travel, biking, horseback riding, and snowmobiling.

In combination, the lack of a visible trail and the existence of wetlands along the easement would have put a reasonable landowner on notice of the government's need to construct at least some partially graded and compacted trail surface along the "strip of land to be utilized as a trail" as early as 2005. The Ranch's QTA claims, filed in 2019, go to both the construction and nature of the trail, and therefore fall outside of the QTA's limitations period. *See Block v. North Dakota*, 461 U.S. 273, 287 (1983) (noting that, as a limitation on the government's waiver of sovereign immunity, the QTA's statute of limitations "must be strictly observed").[2]

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[2] Although the district court dismissed the Ranch's QTA claims and granted summary judgment for the USFS based on its since-corrected view that the QTA's statute of limitations was jurisdictional, we "may affirm on any ground supported by the record." *Lima v. U.S. Dep't of Educ.*, 947 F.3d 1122, 1125 (9th Cir. 2020); *cf. Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 254 (2010) (noting that remand is not appropriate where "remand

3. The district court correctly concluded that the statute of limitations period is not tolled. The Supreme Court has held that "[e]quitable tolling of the already generous statute of limitations incorporated in the QTA . . . is incompatible with the Act." *Beggerly*, 524 U.S. at 49. In *Wilkins*, the Court cited to *Beggerly*'s "nonjurisdictional reasons why tolling specifically [is] unavailable" under the QTA as support for the Court's holding that the QTA's statute of limitations is nonjurisdictional. 598 U.S. at 164 (describing *Beggerly*'s "careful analysis of whether the text and context [of § 2409a(g)] were consistent with equitable tolling"). Because equitable tolling is unavailable under the QTA, the district court correctly concluded that the limitations period is not tolled.

4. Finally, the Ranch argues for the first time on appeal that it would violate the Fifth Amendment's Takings Clause to enforce the QTA's statute of limitations against it. We decline to reach this issue, which is both forfeited and unripe. *Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006) (noting that we adhere to "the general rule that the court will not consider an issue raised for the first time on appeal"). The Ranch's QTA action seeks only declaratory and injunctive, not monetary, relief. And even if the Ranch obtained a judgment against the United States, there is no guarantee the government would "elect" to retain its interest in the trail easement upon payment of

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would only require a new Rule 12(b)(6) label for the same Rule 12(b)(1) conclusion").

compensation, as opposed to relinquishing its challenged interest altogether. *See* 28 U.S.C. § 2409a(b).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAWTOOTH MOUNTAIN RANCH, LLC; LYNN ARNONE; DAVID BOREN, Plaintiffs-Appellants, v. UNITED STATES FOREST SERVICE; SAWTOOTH NATIONAL FOREST; JIM DEMAAGD, Forest Supervisor; SAWTOOTH NATIONAL RECREATION AREA; KIRK FLANNIGAN, Area Ranger; UNITED STATES DEPARTMENT OF AGRICULTURE; THOMAS J. VILSACK, Secretary of Agriculture; FEDERAL HIGHWAY ADMINISTRATION; UNITED STATES OF AMERICA, Defendants-Appellees.	No. 22-35324 D.C. No. 1:19-cv-00118-CWD District of Idaho, Boise ORDER (Filed Jan. 11, 2024)

Before: WARDLAW and M. SMITH, Circuit Judges, and HINKLE,* District Judge.

The panel unanimously votes to deny the petition for panel rehearing (Dkt. 40). Judges Wardlaw and M. Smith vote to deny the petition for rehearing en banc,

* The Honorable Robert L. Hinkle, United States District Judge for the Northern District of Florida, sitting by designation.

and Judge Hinkle so recommends (Dkt. 40). The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

SAWTOOTH MOUNTAIN RANCH LLC, LYNN ARNONE, and DAVID BOREN, Plaintiffs, v. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF AGRICULTURE; THOMAS J. VILSACK,[1] Secretary of Agriculture; UNITED STATES FOREST SERVICE; SAWTOOTH NATIONAL FOREST; JIM DEMAAGD, Forest Supervisor; SAWTOOTH NATIONAL RECREATION AREA; KIRK FLANNIGAN, Area Ranger; UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION, Defendants.	Case No. 1:19-cv-00118-CWD **MEMORANDUM DECISION AND ORDER** **RE: Quiet Title Act Claims One and Two**[2] (Filed Feb. 24, 2022)

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[1] Sonny Perdue is no longer Secretary of Agriculture. Because Mr. Perdue was sued in his official capacity, his successor, Thomas J. Vilsack, is substituted as a defendant pursuant to Fed. R. Civ. P. 25(d).

[2] Plaintiffs' claims under the Quiet Title Act are distinct from their environmental claims. Accordingly, the Court filed a separate memorandum decision and order addressing Claims Three through Nine. (Dkt. 50.)

INTRODUCTION

This case arises out of the United States Forest Service's acquisition of a Conservation Easement Deed in 2005 encumbering Plaintiffs' property, and the Forest Service's related efforts to develop a public trail connecting the town of Stanley with Redfish Lake in one of the most iconic recreation areas in Idaho—the Sawtooth National Recreation Area.

Currently, visitors to Stanley or Redfish Lake must use Highway 75 to travel between the two destinations. Upon completion of the 4.4 mile long public trail, of which approximately 1.5 miles traverses Plaintiffs' Property within the confines of an easement, travelers by foot, horseback, and bicycle will have an alternative, non-motorized transportation route during the summer between Stanley and the Redfish Lake entrance station.

Plaintiffs are opposed to construction of what they characterize as a "commuter trail" through their Property. Pls.' Mot. at 2. (Dkt. 114.) Plaintiffs contend the Forest Service and the Federal Highway Administration have exceeded the scope of the public access easement granted to the Forest Service by way of the 2005 Deed between the Forest Service and prior owners of the Property by engaging in "construction activities" inconsistent with the rights granted to the Government.

Plaintiffs filed this lawsuit on April 9, 2019. (Dkt. 1.) Before the Court are the parties' cross-motions for summary judgment and a related motion filed by Plaintiffs pursuant to Fed. R. Civ. P. 56(d). Considered here, apart from Plaintiffs' seven environmental claims, are Claims One and Two, brought pursuant to the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a. Claim One seeks a declaration that Defendants have exceeded the scope of the Conservation Easement Deed, and Claim Two seeks a declaration that the proposed use of the Trail is incompatible with the Conservation Values and rights enumerated in the Conservation Easement Deed.

The Court conducted a hearing on the motions on September 8, 2021, and, following the hearing, requested supplemental briefing regarding the application of *Wilkins v. United States of America*, 2021 WL 4200563 (9th Cir. Sept. 15, 2021), if any, to the Plaintiffs' QTA claims. (Dkt. 128.) After fully considering the parties' arguments, briefing, supplemental briefing, administrative records, and applicable legal authorities, the Court finds it lacks subject matter jurisdiction over Claims One and Two, because these claims are time-barred under the QTA. The Court will deny Plaintiffs' motion for summary judgment and the related motion brought under Fed. R. Civ. P. 56(d), and grant Defendants' motion on these two claims, as explained below.

FACTS[3]

Plaintiffs own or have ownership-related interests in real property in Custer County, Idaho, adjacent to the southern end of the town of Stanley, and westward of State Highway 75, in a contiguous parcel including all or part of Sections 4, 5, 8, 9, 10, 15, 16 and 17 of T.10 N., R. 13 E., Boise Meridian ("Property"). The Property is located within the Sawtooth National Recreation Area (SNRA), and consists of approximately 1,781.07 acres. Decl. of Boren ¶ 3. (Dkt. 11-2.)

The SNRA is located in south-central Idaho, covering more than 756,000 acres. (AR 1127.) The SNRA is a Congressionally-designated special area, created in 1972 "to assure the preservation and protection of the natural, scenic, historic, pastoral, and fish and wildlife values and to provide for the enhancement of the recreational values associated therewith. . . ." 16 U.S.C. § 460aa. Redfish Lake and Little Redfish Lake are popular summer destinations located within the SNRA six miles south of the town of Stanley. (AR 1127.) The Redfish Lake Complex "is the single most popular destination in the SNRA. Its many facilities have the capability to host around 2,200 visitors during peak times in the summer months," and tourism in

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[3] Unless otherwise indicated, the facts are taken from the Second Amended Complaint, and the administrative records submitted by the Forest Service and the Federal Highway Administration ("FHWA"). Citations to the Forest Service's record will be noted as AR, while citations to the Federal Highway Administration's record will be noted as FHWA AR. The respective administrative records are filed at Docket Nos. 93 and 98.

the area "is most active during the two month peak summer season in July and August." (AR 1048.) State Highway 75 connects Redfish Lake to Stanley, with high speed traffic and heavy summer traffic volumes. (AR 1128.) There currently is no alternative transportation route connecting Stanley and Redfish Lake during the summer. (AR 1128.)

In the early to mid-1990's, SNRA staff began discussing the idea of constructing a trail connecting Stanley and Redfish Lake to provide an alternate means of travel between the two areas. (AR 1126.) At that time, the Forest Service envisioned a trail that would allow for non-motorized summer travel, and serve pedestrians, bicyclists, and equestrians. (AR 0938.)

SNRA staff commenced with evaluating and negotiating the terms of a conservation easement with the Pivas,[4] Plaintiffs' predecessors in interest, in or about 2004. (AR 0666.)[5] The Forest Service engaged Bradford Knipe to appraise the proposed Conservation Easement in its entirety, which included a provision for a Public Trail Easement crossing the eastern portion of the Property. (AR 0685, 0698.) Mr. Knipe valued the Conservation Easement as it existed at that time at $1,840,000.00. (AR 0688 - 0689.) When conducting his

[4] The Piva family, and various family trusts and partnerships, previously owned the Property. (AR 0824.) The Court refers to Plaintiffs' predecessors in interest as the Pivas.

[5] Forest Service staff conducted a field inspection, interviews, and other activities throughout 2004, as reflected on the Land Transaction Screening Process Summary. (AR 0666.)

evaluation, Mr. Knipe considered the impact of a "30 foot wide trail/snowmobile easement crossing the eastern portion of the subject property," noting that "an owner buyer would likely be concerned about the loss of privacy on the subject property and the probability of trespassing outside of the easement area by public users." (AR 0698.) Mr. Knipe appraised the Public Trail Easement portion of the Conservation Easement, which he described as "a greenbelt or public pathway easement," at $581,840.00. (AR 2824, 2825.)

On May 10, 2005, the United States, by and through the Secretary of Agriculture, and the Pivas, executed a Conservation Easement Deed encumbering the Property. The Deed was recorded in the records of Custer County on May 20, 2005, as record number 321391. (AR 0824.) The Pivas accepted $1,840,000.00 in exchange for the Conservation Easement. (AR 0824, 0825.)

Per the terms of the Conservation Easement Deed, the Pivas, as Grantors, agreed as follows: to "hereby grant and convey in perpetuity, with general warranty of title, unto the United States . . . all right, title and interest in the land described in Part II[6] below, except those rights and interests specifically reserved by the Grantors in Part III below and those affirmative obligations retained by Grantors in Part V below."

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[6] Part II is the Property Description, which incorporates the legal description and encumbrances of the Property set forth on Exhibit A to the Deed.

Part III of the Deed enumerates the reserved rights of the Pivas. These rights include:

> C. The right to prevent trespass and control access to the Property by the general public except for specific access rights granted to or acquired by the United States, including the access granted in Part VI, Section K of this Easement.

The access rights granted to or acquired by the United States and set forth in Part VI, Section K are as follows:

> K. Nothing herein contained shall be construed as affording the public access to any portion of the Property except that the United States is hereby granted the right to permit public use of the following:
>
> > (1) A strip of land to be utilized as a trail in that portion of the Easement area within Secs. 9, 15, and 16, as shown on Exhibit D, attached hereto and made a part hereof. The total right-of-way width of the trail easement shall be 30 feet. The following uses are allowed on the trail: snowmobile, snow grooming equipment, bicycle, horse, and foot travel. The Grantee may erect appropriate signs to delineate the public use areas where needed.
> >
> > (2) A strip of land along Valley Creek, to be utilized for foot travel only, extending from the centerline of

> Valley Creek to point parallel and being 20 feet distant beyond each mean high water line of Valley Creek. The Grantee may erect appropriate signs to delineate the public use areas where needed.

(AR 0833.)[7] Exhibit D is a map depicting the 30 foot wide right of way as it meanders through the Piva Ranch Property. (AR 0850.)[8]

After the parties executed the Conservation Easement Deed, Robert Piva authored a letter to Sara Baldwin, Area Ranger of the USFS-Sawtooth National Recreation Area, in May or June of 2005. (AR 0723 – 0726.)[9] In it, Mr. Piva objects to the inclusion of the Trail Easement in the Deed, indicating that the Pivas "would never have agreed to a summer use trail

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[7] Section K(1) is referred to by the parties as the Trail Easement. The entire project is referred to by the parties as the Trail Project, while the trail itself is referred to as the Trail, or the Stanley Redfish Trail. The Court will use these references as well.

[8] This is the same map considered by Mr. Knipe in the 2004 appraisal report. (AR 2824.)

[9] It is not clear when the letter was drafted, as it is undated other than a reference to "May 2005" in the Administrative Record index. From the letter's context, it may have been written sometime after June 9, 2005, as Mr. Piva refers to learning of the Trail Easement upon receiving an email from the Administrator of the SNRA, dated June 9, 2005, requesting permission to publish an announcement of the purchase of the Piva Ranch easement. (AR 0724.) A later email from Mr. Piva refers, however, to an "original letter . . . written to Area Ranger Sara Baldwin in May of 2005." (AR 0788.) There are no other letters from Mr. Piva addressed to Ms. Baldwin in the record, nor does the record contain a June 9, 2005 email from Ms. Baldwin to Mr. Piva.

system across ranch property," because the "location and use of a summer trail system across Piva ranch property constitutes a significant government 'takings' due to loss of large tracts of grazing land." (AR 0725, 0726.) Mr. Piva explained that "[e]xtensive public use of the trail will effectively preclude use of grazing lands . . . on either side of the trail." (AR 0725.) Other concerns expressed by Mr. Piva included harassment of livestock by persons or dogs, as well as other liability issues. *Id.* One solution proposed was a land trade, while another solution was acquisition of "the trail site Piva bench lands" by the Government. (AR 0726.) Neither alternative came to fruition.

The Forest Service undertook efforts to implement the Trail Project in or about August of 2008, and began planning the Trail Project in 2012. (AR 0904, 0161, 1126.) The Stanley Redfish Trail, as proposed, was an improved six-and- R Q H-half foot wide, 4.4-mile-long, gravel-paved, multi-use trail that would connect Pioneer Park in Stanley to the Redfish Lake Entrance Station. (AR 0294.)[10] Approximately 1.5 miles of the Trail is located within the 30-foot trail easement area on the Property. (AR 0294.) Before formal publication of the proposed Trail Project, Robert Piva wrote to Matt Phillips, the trail's architect, on March 30, 2014. (AR 0877.) In the email, Mr. Piva referenced the

[10] A future project was proposed to develop a two mile, fully accessible, multi-purpose, non-motorized public trail from the Redfish Lake Entrance Station to Redfish Lake, to "seamlessly connect Stanley and Redfish Lake." (AR 2664.) The notice of proposed action for Phase 2 of the Redfish to Stanley Trail was published by the Forest Service on July 1, 2015.

proposed "public hiking trail," reiterating that the Pivas would "never allow[] public access across our ranch when it is stocked with cattle. . . ." (AR 0877.) The Forest Service later published the proposed Trail Project on July 1, 2014, in the Sawtooth National Forest's Schedule of Proposed Action. (AR 2648 – 2655.)

Plaintiffs[11] purchased the Property in the Fall of 2016, subject to the 2005 Conservation Easement Deed. Second Am. Compl. ¶ 79. (Dkt. 50.) Shortly after the purchase of the Property, the Forest Service notified Plaintiffs of the status of its plan to construct the Stanley Redfish Trail. (AR 001.)[12] The Forest Service approved the Trail Project in a Decision Memo issued by Area Ranger Kirk Flannigan on June 6, 2017. (AR 0294-0304.)

Plaintiffs filed a complaint on April 9, 2019, seeking declaratory and injunctive relief against the Forest Service and its personnel. (Dkt. 1.) In addition to claims asserted under various environmental statutes, the complaint alleged the Forest Service was in violation of the Conservation Easement Deed, and Plaintiffs sought review under the Administrative

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[11] Sawtooth Mountain Ranch, LLC, holds title to the Property, while Mr. Boren is the organizer and sole member of Sawtooth Mountain Ranch, LLC. He is married to Lynn Arnone. Second Am. Compl. ¶¶ 5 – 7. (Dkt. 50.)

[12] Kirk Flannigan, Area Ranger, wrote to Plaintiffs on November 30, 2016, indicating the Forest Service's planning efforts to develop the Trail were well underway, and that once planning efforts were complete, the intent was to "build this trail in the current easement location." (AR 001.)

Procedure Act, 5 U.S.C. § 706(2). On May 10, 2019, Plaintiffs filed a motion for preliminary injunction. Plaintiffs argued the Forest Service's actions were contrary to the terms of the 2005 Conservation Easement Deed.[13] On June 13, 2019, the Court issued a memorandum decision and order denying Plaintiffs' motion, explaining Plaintiffs failed to state a claim upon which relief could be granted because Plaintiffs did not bring suit pursuant to the Quiet Title Act, 28 U.S.C. § 2409a. (Dkt. 24.)

Plaintiffs filed an amended complaint on August 8, 2019, which asserted three claims under the Quiet Title Act. (Dkt. 29.) The first claim concerned the boundaries of the easement, while Claims Two and Three concerned different aspects of the scope of the easement. Defendants filed a motion to dismiss Claim One for lack of subject matter jurisdiction, and sought dismissal of two defendants named in Claims One, Two and Three. Defendants did not raise the statute of limitations as grounds for dismissal. The Court granted Defendants' motion. (Dkt. 44.)

Thereafter, Plaintiffs filed the Second Amended Complaint which, after further briefing, was deemed filed on May 8, 2020. (Dkt. 50, 59.) Claims One and Two seek to quiet title to the Property and prevent the construction of the Trail as proposed.

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[13] Plaintiffs argued also that the Forest Service's actions were contrary to the National Environmental Policy Act, 42 U.S.C. § 4321 *et. seq.* ("NEPA"). Plaintiffs' environmental claims are discussed in a separate memorandum decision and order.

STANDARD OF REVIEW

Summary judgment is appropriate where a party can show that, as to any claim or defense, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). Material facts are those that may affect the outcome of the case. *See id.* at 248. The Court does not determine the credibility of affiants or weigh the evidence set forth by the non-moving party. All inferences which can be drawn from the evidence must be drawn in a light most favorable to the nonmoving party. *T. W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 - 31 (9th Cir. 1987) (internal citation omitted). However, Plaintiffs bear the burden of satisfying the Court as to its jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

DISCUSSION

Under the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, the United States may be named as a party defendant in a civil action to "adjudicate a disputed title to real property in which the United States claims an interest. . . ." Disputes over the right to an easement and suits seeking a declaration as to the scope of

an easement fall within the purview of the QTA. *Robinson v. United States*, 586 F.3d 683, 686 (9th Cir. 2009).

While the QTA waives the sovereign immunity of the United States in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest," any such action must be brought within the applicable limitations period. 28 U.S.C. § 2409a(a). A civil action to quiet title is "barred unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. § 2409a(g). "Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." *Id.* The phrase, " 'should have known' imparts a test of reasonableness." *Shultz v. Dep't of Army, U.S.*, 886 F.3d 1157, 1160 (9th Cir. 1989) (quoting 28 U.S.C. § 2409a(g)). A claim accrues when the United States' actions "would have alerted a reasonable landowner" to the adverse interest of the United States. *Id.* "The crucial issue in the statute of limitations inquiry is whether the plaintiff had notice of the federal claim, not whether the claim itself is valid." *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189, 1197 (9th Cir. 2008).

The limitations period is jurisdictional and cannot be waived. *Wilkins v. United States*, 13 F.4th 791, 795 (9th Cir. 2021). Therefore, a jurisdictional bar may be raised at any time, and the Court may address it *sua sponte*. *Humboldt County v. United States*, 684 F.2d 1276, 1280 (9th Cir. 1982); *Park County, Mont. v.*

United States, 626 F.2d 718, 720 (9th Cir. 1980).[14] The QTA's statute of limitations is strictly construed. *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273 (1983). If a suit is barred by the QTA's statute of limitations, the Court has "no jurisdiction to inquire into the merits." *Id.* at 274.

ANALYSIS

Plaintiffs' first claim under the QTA challenges the scope of the Trail Easement. Plaintiffs argue that the Trail Easement does not authorize "construction or maintenance" of a "commuter trail" for summer use.[15] Plaintiffs' second claim contends the proposed Trail is not compatible with the Conservation Values and rights reserved to the Grantors in the 2005 Conservation Easement Deed.

Plaintiffs argue their claims are not time barred, because Plaintiffs were not "on notice" of the Government's adverse claim until the Forest Service formally announced its plan to construct a "developed

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[14] Plaintiffs' assertion that the Forest Service conceded the Court's jurisdiction over Plaintiffs' QTA claims is rejected. *See* Pl. Supp. Brief at 7 n.1. (Dkt. 130.) If at any time the Court determines it lacks subject-matter jurisdiction, the Court must dismiss the cause of action. Fed. R. Civ. P. 12(h)(3). Further, the defense of lack of subject matter jurisdiction is expressly preserved against waiver. Cmt. 1966 Amendment, Fed. R. Civ. P. 12(h)(3). Thus, the Court may determine the question of its jurisdiction at any time.

[15] Plaintiffs have never objected to winter use of the Trail by snowmobiles or snow grooming equipment. *See Second Am. Compl.* ¶¶ 82, 110, 111. (Dkt. 50.)

commuter trail." Pls.' Supp. Brief at 8, n.3. (Dkt. 130.)[16] Plaintiffs insist that, until plans for development of the Trail became concrete and particularized, which occurred no earlier than July 1, 2014, the date of publication in the Schedule of Proposed Actions, the Forest Service took no action inconsistent with Plaintiffs' (or their predecessors') ownership interests. Therefore, Plaintiffs argue neither they nor their predecessors in interest "would [ ] have reasonably known that Trail construction would occur." *Id.* at 10. Thus, Plaintiffs contend the statute of limitations did not accrue until the Forest Service impermissibly expanded the "scope of the Conservation Easement by undertaking construction activities" inconsistent with the "plain language of the Easement." Pls.' Supp. brief at 10.

Put simply, Plaintiffs contend that their interests peacefully coexisted with those granted to the Government, and the clock did not begin to run on their QTA claims until the Forest Service announced its intent to begin construction activities. Plaintiffs insist the Forest Service asserts a "new interest that is fundamentally incompatible with" the Conservation Values expressed in the Deed, and "seeks to expand a preexisting claim." *See Werner v. United States*, 9 F.3d 1514, 1519 (11th Cir. 1993.) The Court views it differently.

[16] Plaintiffs' complaint indicates they believed the Property subject to the Easement "would only be used as it exists in its current state – as an undeveloped path that is well hidden within the landscape during the summer and serves as a snowmobile trail in the winter." Second Am. Compl. ¶ 110. (Dkt. 50.)

The property right that Plaintiffs challenge—the right to permit public use—is the same property right that Plaintiffs' predecessors in interest granted to the Government in May of 2005. The Forest Service's plan to actually construct a serviceable trail within the 30 foot Easement area, and thereby facilitate public use, did nothing to expand the public use rights granted to the Government in 2005. The Government's interest has been adverse to that of the Grantors ever since the Conservation Easement Deed was executed and recorded. The Forest Service's decision to act upon its rights, and develop the "strip of land to be utilized as a trail in that portion of the Easement area . . . as shown on Exhibit D," and thereby facilitate "bicycle, horse, and foot travel," did nothing to expand its rights. Rather, the plan to construct the Trail and create a six-and-one-half foot wide, 4.4-mile-long, gravel-paved, multi-use trail brought to fruition the Government's right to permit public use of a trail within the Easement area.

Plaintiffs' thinly veiled attempt to couch their claims in terms of impermissible "construction activities" that "expand the scope of the easement," rather than what it really is—opposition to public use of a well-delineated trail by summer visitors to Redfish Lake—is revealed by the complaint and Plaintiffs' briefing. For instance, Plaintiffs allege a "high-traffic commuter Trail" will interfere with their right to use and enjoy their Property, and will present problems between cattle and people. Second Am. Compl. ¶ 113. (Dkt. 50.) Plaintiffs express concern for trail users such

as individuals in wheelchairs or pushing strollers. *Id.* In their brief, Plaintiffs openly claim that "construction of a commuter trail, which invites large numbers of people, undermines the Grantors' reserved interests" of cattle ranching and quiet enjoyment. Pls.' Mem. at 16. (Dkt. 114-5.)

Plaintiffs insist they were under the impression when they purchased the Property that the land would remain in its current state, i.e., undeveloped, with any path that may have existed[17] within the Easement area "well hidden" during the summer. Second Am. Compl. ¶ 110. But development—in this case construction of a six-and-one-half foot wide, 4.4-mile-long, gravel-paved, multi-use trail—begets an increase in public use. And public use is exactly what the Forest Service has had the right to allow pursuant to the Trail Easement since May of 2005.

Public use, not construction, is exactly what the Pivas, and now Plaintiffs, were aware could occur. For instance, the record reflects the Pivas were aware of the potential for extensive public use of a summer trail. Mr. Piva's May 2005 letter referred to the Trail as a "public trail across the ranch." He outlined "enormous problems" with the concept of a "summer use trail system across ranch property." These problems included contacts between livestock and humans, especially those accompanied by dogs and bicycles, and the

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[17] The Forest Service disputes that there was any visible pathway crossing the Property for pedestrian, bicycle D Q Gequestrian use within the Easement area in 2005. Def. Brief at 3 n. 2. (Dkt. 115.) The dispute is not material.

potential preclusion of use of grazing lands by livestock on either side of the trail because of "extensive public use of the trail." Mr. Piva referred also to the Trail Easement as a "significant government 'takings' due to loss of large tracts of grazing lands," and his later 2014 email referred to the trail as a "public hiking trail."[18]

Only now, when the Forest Service has actually developed (and implemented) plans[19] to facilitate public use, do Plaintiffs complain. Whether the trail was a "well hidden path" or a six-and-one-half foot wide, gravel-paved multi-use trail is of no moment for accrual of the statute of limitations in this case. The 12-year limitations period begins when a plaintiff knows or should know of the government's adverse land claim. 28 U.S.C. § 2409a(g). This standard does not require the Government to provide explicit notice of its claim, nor must the Government's claim be "clear and unambiguous." *Block II*, 789 F.2d at 1313. "Knowledge of the claim's full contours is not required. All that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff's." *Id.* (quoting *Knapp v. United States*, 636 F.2d 279, 283 (10th Cir. 1980)). "As long as the interest claimed is a 'cloud on title,' or a reasonable claim with a substantial basis, it constitutes a 'claim' for purposes of triggering the twelve-year statute of limitations." *Richmond,*

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[18] Although Mr. Piva's two letters are in the Administrative Record, Plaintiffs failed to comment on this evidence in their briefing.

[19] Construction of the Stanley Redfish Trail began on or about June 17, 2019.

Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 769 (4th Cir. 1991). Even invalid government claims trigger the limitations period for QTA claims. *See id.*

Simply put, the limitations period is triggered when a landowner has reason to know that the Government claims some type of adverse interest in that land. *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 738 (8th Cir. 2001) (citing *Patterson v. Buffalo Nat'l River*, 76 F.3d 221, 224 (8th Cir. 1996)). Here, adversity did not arise simply because the Forest Service began "construction" of the Trail. Rather, the adverse interest of permitting or otherwise facilitating public use of a trail within the Easement area was known at the time the Conservation Easement Deed was executed and recorded in May of 2005. And, to the extent that there may have been implied limitations to the volume of public use by virtue of the Deed's preservation of Conservation Values or the rights reserved to the Grantors, that conflict was also known at the time the Deed was executed and recorded.

Even if the Court credited Plaintiffs' arguments, the Court cannot conclude, as a matter of law, that the QTA limitations period was tolled. As explained, the QTA limitations period accrues when a plaintiff or his predecessor in interest has reason to know of a cloud on his title. *See Richmond*, 945 F.2d at 769. The inescapable corollary to this principle is that the QTA limitations period is not tolled when government action simply compounds a pre-existing cloud on title. *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 744 (8th Cir.

2001). Viewing Plaintiffs' position charitably, the 2014 Notice of Proposed Action, and the 2017 Decision Memo, did no more than confirm the cloud that already existed on the Property by virtue of the 2005 Conservation Easement Deed. That cloud is public use, whether by construction of a developed trail or some other alternative.

The statute of limitations is not tolled simply because the Forest Service had not officially proposed until 2014 a trail that could actually be used by the public for bicycle, horse, and foot travel within the Easement area. *State of Cal. ex rel. State Land Comm'n v. Yuba Goldfields, Inc.*, 752 F.2d 393, 397 (9th Cir. 1985) (deeds constituted notice of the federal claim); *Humboldt County v. United States*, 684 F.2d 1276 (9th Cir. 1982) (limitations period began when agreement signed, not when government built road). Further, it is well established that the United States does not abandon its claims to property by inaction. *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189, 1199 (9th Cir. 2008) (citing *United States v. California*, 332 U.S. 19, 40 (1947)). Here, there is no dispute that the public access rights granted to the Government constitute a "claim," and that Plaintiffs, and their predecessors in interest, were on notice of the Deed recorded in May of 2005. To hold otherwise, and confirm there was no justiciable controversy until construction activities began and conditions changed, does not comport with the limited waiver of sovereign immunity Congress intended. *See Vincent Murphy Chevrolet Col, Inc. v. U.S.* 766 F.2d 449, 452 (10th Cir. 1985) (declining to toll statute of

limitations based upon changed conditions; restrictions contained in 1965 quitclaim deeds were enforceable).

Put simply, the accrual of Plaintiffs' claims for purposes of the statute of limitations is not affected by the Forest Service's failure to formally announce or otherwise implement a plan for development of the Trail until July of 2014. By virtue of the language in the 2005 Conservation Easement Deed, Plaintiffs' predecessors in interest had actual notice of the Government's right to permit public use of a strip of land within the Easement area for a trail allowing bicycle, horse, and foot travel. This adverse interest, regardless of any actual adversity until the construction of a developed trail began, existed from the time the Deed was executed. Consequently, the statute of limitations on Plaintiffs' claims under the QTA expired before Plaintiffs filed their complaint in 2019, some fourteen years later. *Cf. Saylor v. United States*, 315 F.3d 664, 670 (6th Cir. 2003) (rejecting the plaintiffs' argument that the statute of limitations should start to run from the date the plaintiff became aware of its claim). Therefore, the Court finds that it lacks subject matter jurisdiction and must dismiss Claims One and Two from this lawsuit.

Plaintiffs' related motion, filed pursuant to Fed. R. Civ. P. 56(d), will be denied. Plaintiffs sought permission to conduct additional discovery if the Court considered the Forest Service's extrinsic evidence submitted in support of its arguments related to

Plaintiffs' QTA claims. The Court did not consider the evidence, and therefore the motion will be denied as moot.

CONCLUSION

An appreciation of the full contours of the Forest Service's claim is not needed to start the QTA's clock. *Knapp*, 636 F.2d at 283. It is enough that Plaintiffs or their predecessors in interest were area of the existence of an adverse right held by the Government. That right—the right to permit public use—existed long before the Forest Service detailed its construction plans to develop the Stanley Redfish Trail for use during the summer by bicycle, horse, and foot travelers. "Records, not actions, were enough to put the plaintiffs on notice" here. *George v. U.S.*, 672 F.3d 942, 947 (10th Cir. 2012). The Court rejects Plaintiffs' attempt to reframe the conflict and tease out a rule that a plaintiff need not bring suit until the Government acts to enforce its rights as inconsistent with the plain language and application of the QTA. Plaintiffs' claims under the QTA are time-barred.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED:

1) Plaintiffs' Motion for Summary Judgment on Claims One and Two of the Second Amended Complaint (Dkt. 114) is **DENIED**.

2) Defendants' Motion for Summary Judgment on Claims One and Two of the Second Amended Complaint (Dkt. 116) is **GRANTED** for lack of subject matter jurisdiction.

2) Plaintiffs' Motion Pursuant to Federal Rule of Civil Procedure 56(d) (Dkt. 118) is **DENIED as MOOT**.

DATED: February 24, 2022

[SEAL] /s/ Candy W. Dale
Candy W. Dale
Chief U.S. Magistrate Judge