No. 12-1316

In the Supreme Court of the United States

PINE BAR RANCH, LLC, ET AL., PETITIONERS

v.

INTERIOR BOARD OF INDIAN APPEALS, DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners seek a declaration that the unpaved portion of a road within an Indian reservation is a public road. The questions presented are:

1. Whether petitioners are precluded from asserting that the road is a public road because petitioners already have litigated and lost that issue before the state supreme court.

2. Whether federal respondents acted arbitrarily or capriciously in informing petitioners that their records "cannot affirm" that the tribes residing on the reservation have opened the road to the public.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is unreported. The opinion of the district court (Pet. App. 7-18) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 2012. A petition for rehearing was denied on January 31, 2013 (Pet. App. 19). The petition for a writ of certiorari was filed on April 30, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners own land on both sides of the southern boundary of the Wind River Indian Reservation in the North Fork Canyon of Wyoming. Pet. App. 8. In 2003 or 2004, other landowners in North Fork Canyon

(the Luthers) asserted that the unpaved portion of Surrell Creek Road running through the reservation and crossing a portion of petitioners' land was not a public road. *Id.* at 8-9. That would mean that the Luthers' ranch was landlocked. *Ibid.* Pursuant to Wyoming's private road statute, Wyo. Stat. Ann. § 24-9-101 (West 1977), the Luthers sought permission from Fremont County, Wyoming to establish a private road to access their property across petitioners' land. Pet. App. 8. Petitioners objected, arguing that all of Surrell Creek Road was open to the public. *Ibid.* Fremont County sided with petitioners, but a Wyoming state court disagreed and entered judgment for the Luthers. *Id.* at 9. The Wyoming Supreme Court affirmed, holding that petitioners had presented insufficient evidence to establish that the unpaved portion of Surrell Creek Road is a public road. *Id.* at 9, 65-84.

b. After the Wyoming Supreme Court's decision, petitioners asked the Bureau of Indian Affairs (BIA) to resolve whether Surrell Creek Road is a public road. C.A. Supp. E.R. 17-26. Without mentioning the Wyoming Supreme Court's decision, petitioners requested a formal affirmation that Surrell Creek Road is a public road open to general public use. *Id.* at 9.

The BIA responded that its records showed that an easement for a public road right-of-way had been granted by the tribes for the paved portion of the road and that the paved portion was listed in the Reservation Road Inventory maintained by the BIA. C.A. Supp. E.R. 27. The BIA noted, however, that there were no recorded easements for the unpaved portion of the road; that the Tribes residing on the Wind River Reservation never have asserted that the unpaved portion of the road was open for public use; and that the Tribes had

not included the unpaved portion in the Reservation Road Inventory. *Ibid.* The BIA therefore stated that "[w]e cannot affirm that the [unpaved portion] of the Surrell Creek road is a public road open to public use." *Ibid.*

After unsuccessfully appealing to the BIA's Regional Director, C.A. Supp. E.R. 30-31, petitioners sought review by the Interior Board of Indian Appeals (IBIA). The IBIA viewed the issue as "a private matter without the existence of an actual case or controversy involving BIA action." C.A. Supp. E.R. 8. The IBIA concluded that the BIA's refusal to endorse petitioners' position that Surrell Creek Road was public was simply a statement regarding the status of the agency's records and thus not a BIA "action" or "decision" that "adversely affected" petitioners. *Id.* at 12. The IBIA thus dismissed the administrative appeal. *Ibid.*

2. Petitioners filed suit in federal district court under the Administrative Procedure Act (APA), alleging that the federal respondents had a mandatory duty to declare Surrell Creek Road a public road and seeking a judicial declaration that Surrell Creek is a public road. C.A. Supp. E.R. 1-6. The district court granted judgment to the federal respondents. Pet. App. 7-18. The court determined that "[petitioners] provide no compelling statutory or regulatory authority that directly requires the BIA to declare the unpaved portion of Surrell Creek Road open to the public," *id.* at 15, and that "[e]specially in view of tribal sovereignty, the BIA had no direct statutory mandate to declare Surrell Creek Road public," *id.* at 16. The court further held that "the Indian Lands exception to the government's waiver of sovereign immunity applies in this case and would bar any [Quiet Title Act] claim." *Id.* at 17 & n.5. The dis-

trict court thus concluded that it lacked jurisdiction on both grounds. *Id.* at 17-18.

3. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 1-6. The court rejected the federal respondents' argument that it lacked jurisdiction, concluding that federal respondents' dismissals of the administrative appeals constituted final agency action under the APA and that this Court's decision in *Match-E-Be-Nash-She-Wish Band* v. *Patchak*, 132 S. Ct. 2199 (2012), resolved the Quiet Title Act argument. Pet. App. 3-4. The court of appeals, however, held that issue preclusion bars the relief petitioners seek. *Id.* at 4. The court of appeals explained that "[t]he Wyoming Supreme Court found that Surrell Creek Road was not a public road" and that the Wyoming Supreme Court also "considered whether the [Civilian Conservation Corps] Act, under which [petitioner] now brings its claim, made the road a public road and held that the road was private." *Id.* at 5. "Even if issue preclusion does not bar [petitioners'] claims," the court of appeals added, "the agency did not abuse its discretion in finding that the road was not a public road." *Id.* at 6.

ARGUMENT

The unpublished decision of the court of appeals reaches the correct result and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Alleging that federal respondents raised issue preclusion for the first time on appeal, petitioners contend that the court of appeals erred in relying on issue preclusion to rule in respondents' favor. That decision, petitioners contend, creates a conflict with decisions of the Fifth and Tenth Circuits, which bar raising preclu-

sion for the first time on appeal. Pet. 6-11. The alleged conflict does not exist. Like the Fifth and Tenth Circuits, the Ninth Circuit has also held that issue preclusion and claim preclusion are affirmative defenses that cannot be raised for the first time on appeal, absent extraordinary circumstances. See *Rotec Indus., Inc.* v. *Mitsubishi Corp.*, 348 F.3d 1116, 1119 (2003) (claim preclusion), cert. denied, 541 U.S. 1063 (2004); *Deutsch* v. *Flannery*, 823 F.2d 1361, 1364 n.2 (1987) (issue preclusion). Not surprisingly, all the courts of appeals concur:[1] Rule 8(c) of the Federal Rules of Civil Procedure explicitly states that res judicata is an affirmative defense that must be timely raised in order to avoid waiver. See Fed. R. Civ. P. 8(c)(1). The decision below nowhere suggests otherwise, nor could a non-precedential memorandum decision create a conflict even if it had done so. Accordingly, the relevant law is clear; the parties do not disagree on that point of law; and no conflict exists warranting this Court's review.

Ultimately, petitioners' contention boils down to a record-specific claim that the court of appeals erred in determining that federal respondents had raised issue preclusion in the district court. That highly factbound assertion does not merit further review. In any event,

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[1] See *In re Las Colinas*, 426 F.2d 1005, 1015 n.18 (1st Cir. 1970); *Totalplan Corp. of Am.* v. *Colborne*, 14 F.3d 824, 832 (2d Cir. 1994); *In re Fine Paper Litig. State of Wash.*, 632 F.2d 1081, 1090 (3d Cir. 1980); *Georgia Pac. Consumer Prods., LP* v. *Von Drehle Corp.*, 710 F.3d 527, 533 (4th Cir. 2013); *Gilbert* v. *Ferry*, 413 F.3d 578, 580 (6th Cir. 2005); *Crowder* v. *Lash*, 687 F.2d 996, 1008 (7th Cir. 1982); *Bechtold* v. *City of Rosemount*, 104 F.3d 1062, 1068 (8th Cir. 1997); *Norfolk S. Corp.* v. *Chevron, U.S.A., Inc.*, 371 F.3d 1285, 1289 (11th Cir. 2004); *Poulin* v. *Bowen*, 817 F.2d 865, 869 (D.C. Cir. 1987); *Caldera* v. *Northrop Worldwide Aircraft Servs., Inc.*, 192 F.3d 962, 970 (Fed. Cir. 1999).

federal respondents did not waive their preclusion defense. Petitioners concede that federal respondents raised res judicata in their answer to the complaint. Pet. 9-11; see Pet. App. 87. Properly understood, at least for present purposes of waiver, res judicata incorporates both claim and issue preclusion. See, *e.g.*, *Taylor* v. *Sturgell*, 553 U.S. 880, 892 & n.5 (2008) ("The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'"). Although the doctrines apply in different circumstances, the doctrine of collateral estoppel (or issue preclusion) is a "narrower species" of res judicata. *Ryan* v. *New York Tel. Co.*, 467 N.E.2d 487, 490 (N.Y. 1984). Particularly where federal respondents broadly asserted a res judicata defense in their answer, federal respondents were entitled to narrow on appeal the preclusion argument that they made in district court to an issue preclusion argument.

Even if federal respondents had not affirmatively raised the defense below, the court of appeals had discretion to invoke the doctrine sua sponte in order to avoid wasting judicial resources. See *Arizona* v. *California*, 530 U.S. 392, 412 (2000) (citing *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting)). The court of appeals properly exercised that discretion here, where the issue of whether Surrell Creek Road was public had been decided by the Wyoming courts and where petitioners' basis for alleging the road was public was dubious.[2]

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[2] Petitioners contend (Pet. 3-4) that Surrell Creek Road is a public road because it was built using Civilian Conservation Corps (CCC) Act funds. That contention lacks merit. Pet. App. 99-103. Nothing in the text of the CCC Act indicates that roads built pursuant to that statute are public, let alone that such roads built on Indian reserva-

Petitioners' disagreement with the court of appeals' exercise of discretion does not warrant this Court's review.

2. The court of appeals correctly concluded that issue preclusion bars petitioners from re-litigating the status of Surrell Creek Road. Although the claims litigated before the Wyoming courts differed from the claims raised in federal court, issue preclusion "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor*, 553 U.S. at 892 (quoting *New Hampshire* v. *Maine*, 532 U.S. 742, 748-749 (2001)). The central issue resolved by the Wyoming courts was whether Surrell Creek Road is a public road. Pet. App. 66-84. Before the Wyoming courts, as here, petitioners contended that Surrell Creek Road was a public road because (*inter alia*) the road was built using Civilian Conservation Corps (CCC) Act funds. *Id.* at 73 & n.5, 75; see note 2, *supra*. The Wyoming courts entered final judgment on the merits, holding that Surrell Creek Road was not a public road. Pet. App. 84.

Petitioners contend (Pet. 12-25) that the Wyoming courts had no jurisdiction to interpret the CCC Act when resolving the state law claims before them and that the court of appeals thus violated the "Doctrine of Federalism" by applying issue preclusion to the Wyo-

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tions are open for use by tribal members and non-tribal members alike. *Id.* at 107-114. Petitioners also are incorrect (Pet. 27 n.2) that the BIA historically has viewed the CCC Act as creating public rights-of-way through Indian reservations. Pet. App. 102. When Surrell Creek Road was built or improved, the Secretary of the Interior had exclusive authority to establish public rights-of-way through Indian lands. See 25 U.S.C. 311; 25 C.F.R. 256.50 *et seq.* (1938).

ming Supreme Court's determinations. That is incorrect, and petitioners do not allege any conflict among the courts of appeals on the issue. The Wyoming courts are courts of general jurisdiction with concurrent jurisdiction to adjudicate cases invoking federal statutes, absent congressional specification to the contrary.[3] See *Nevada* v. *Hicks*, 533 U.S. 353, 366-367 (2001) (citing *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990)). The state court's decision could not bind the United States, the tribes, or any non-party (except in certain narrow circumstances), but it does bind those who litigated before it. See *Taylor*, 553 U.S. at 892-893. Because petitioners had a full and fair opportunity to litigate the status of the Surrell Creek Road before the Wyoming courts, issue preclusion and the Full Faith and Credit Act, 28 U.S.C. 1738, bar petitioners from taking a second bite at the litigation apple in the form of federal claims in federal court. Cf. *Kahrs* v. *Board of Trs. for Platte Cnty. Sch. Dist. No. 1*, 901 P.2d 404, 407 (Wyo. 1995) ("[Plaintiffs] will not be allowed to relitigate the termination issue simply because she styled her claims as being governmental claims.").

3. In any event, this would be an inappropriate vehicle for addressing the preclusive effect of the Wyoming Supreme Court's decision because there is an alternative basis for affirming the judgment below. The court of appeals held that "[e]ven if issue preclusion does not bar [petitioners'] claims, the agency did not abuse its

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[3] Petitioners contend (Pet. 13) that, by concluding the road was not public, the Wyoming courts were exercising "jurisdiction over Indian tribal affairs or claims arising out of or relating to their restricted tribal lands." That is not so. At most, the Wyoming courts considered a federal statute (the CCC Act) in the course of deciding a state law claim brought under the State's private road statute.

discretion in finding that the road was not a public road." Pet. App. 6.

Contrary to petitioners' assertions (Pet. 15, 17, 19, 25), federal respondents did not close Surrell Creek Road to the public. The Tribes residing on the reservation, not federal respondents, have decided not to allow the public to travel on that road.[4] C.A. Supp. E.R. 191-192. The right to exclude non-Indians from Indian reservation lands is a hallmark of Indian sovereignty. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 141-144 (1982).

For their part, the federal respondents have informed petitioners that their records "cannot affirm" Surrell Creek Road's status as a public road. C.A. Supp. E.R. 27. Federal respondents otherwise have tried not to intervene in a private dispute between neighboring ranchers that already has been resolved by the Wyoming Supreme Court. Federal respondents did not commit an abuse of discretion or violate the Constitution by correctly relaying the status of their records, and were not under a mandatory duty to declare the Surrell Creek Road open to the public.

Contrary to petitioners' contention (Pet. 25-29), the court of appeals had discretion to affirm the judgment on the merits (to the extent the BIA took final agency action at all, see p. 10, *infra*). See *Lee* v. *Kemna*, 534

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[4] Petitioners allege (Pet. 27-29) "confusion" over the Tribes' authority to control access to the Reservation. Petitioners cite a 2006 lawsuit filed by the Northern Arapaho Tribe against a former Superintendent of the Reservation who allegedly refused to recognize a permit issued by the Tribe to access Surrell Creek Road. Pet. App. 27-64. The district court, however, dismissed the lawsuit as moot because higher level BIA officials reversed the Superintendent's decision. Accordingly, any confusion created by the former Superintendent's actions was eliminated by the BIA.

U.S. 362, 391 (2002) (Kennedy, J., dissenting) ("[I]t is well settled that an appellate tribunal may affirm a trial court's judgment on any ground supported by the record.") (citing *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982)). Although the district court did not reach the merits of petitioners' claims (because the district court concluded (correctly) that it lacked jurisdiction), whether agency action is arbitrary or capricious is a legal question within the court of appeals' purview. See *Alaska, Dep't of Envtl. Conservation* v. *United States EPA*, 244 F.3d 748, 750-751 (9th Cir. 2001). Even though the court of appeals chose to address the merits in a concise manner—not unusual in an unpublished memorandum decision—that does not imply lack of due consideration.

4. Finally, the questionable jurisdictional posture of this case is another reason to deny further review. Petitioners failed to challenge final agency action, as is necessary to invoke the APA's waiver of sovereign immunity and cause of action. See 5 U.S.C. 702, 704. The BIA's letter relaying the status of its records does not constitute a "rule, order, license, sanction" or any of those things that the APA defines as "agency action." 5 U.S.C. 551(13). Even if the letter constituted "agency action," the letter does not constitute "final" agency action where no legal consequences flow from the letter. See *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). The road's status as non-public did not change as a result of the letter. C.A. Supp. E.R. 191-192. In concluding that the dismissals of the administrative appeals constituted final agency action (Pet. App. 4), the court of appeals may have overlooked that the IBIA dismissed the administrative appeal because the BIA's letter relaying the status of its records did not constitute reviewable agency action. See *id.* at 93; C.A. Supp. E.R. 10-12.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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