No. 10-35175

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM CARLO JACHETTA,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; BUREAU OF LAND MANAGEMENT; DEPARTMENT OF PUBLIC FACILITIES, STATE OF ALASKA,
Defendants-Appellees,
and
ALYESKA PIPELINE SERVICE COMPANY,
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

FEDERAL DEFENDANTS-APPELLEES' ANSWERING BRIEF

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INTRODUCTION

Plaintiff-Appellant William Carlo Jachetta has a 110-acre Native Allotment in Alaska. He alleges that the defendants -- the United States, the Bureau of Land Management (an agency within the United States Department of the Interior), the Alyeska Pipeline Service Company, and the State of Alaska -- caused damage to his allotment. Jachetta seeks monetary relief as well as an injunction preventing future damage to his allotment and access to his allotment by the defendants. Jachetta's basic theory with respect to the federal defendants is that the United States, through the Bureau of Land Management, wrongfully issued permits to the State and Alyeska Pipeline to utilize resources on and appurtenant to Jachetta's allotment. In doing so, according to Jachetta, the federal defendants breached their duty to protect his allotment and appurtenant interests. The district court correctly dismissed Jachetta's claims against the United States and the Bureau of Land Management because Jachetta failed to identify any waiver of the federal government's sovereign immunity from suit for his claims.

STATEMENT OF JURISDICTION

Jachetta filed this lawsuit on November 26, 2008 in the United States District Court for the District of Alaska. His Third Amended Complaint, which names as defendants the United States, the Bureau of Land Management, the Alyeska Pipeline Service Company, and the State of Alaska, is the relevant one for this appeal. On January 6, 2010, the district court, finding "no just reason for delay," entered separate judgments under Federal Rule of Civil Procedure 54(b) dismissing Jachetta's claims against the State, Excerpts of Record (ER) 4, and dismissing Jachetta's claims against the United States and Bureau of Land Management (collectively, the United States), ER 5. Jachetta's claims against Alyeska Pipeline remain pending in the district court.

Jachetta timely filed a notice of appeal on February 22, 2010. ER 2, 155. That notice of appeal was not effective until February 23, 2010, when the district court disposed of Jachetta's motion to alter or amend the judgment entered in favor of the United States.[1] Fed. R. App. P. 4(a)(4)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

[1] The district court granted Jachetta's motion to amend the judgment, and entered an amended judgment in favor of the United States, specifying that the dismissal was for lack of jurisdiction. ER 1.

ISSUES PRESENTED

Whether the Federal Tort Claims Act waives the United States' sovereign immunity to lawsuits alleging inverse condemnation and breach of fiduciary duties.

Whether Jachetta's claim for monetary damages and injunctive relief based on alleged harm to his allotment is within a limited waiver of the United States' sovereign immunity for suits seeking the issuance of an original allotment.

Whether Jachetta identifies any waiver of the United States' sovereign immunity from suit for what Jachetta calls his civil rights claims.

STATEMENT OF THE CASE

In July 2004, the United States granted Jachetta a 110-acre Native Allotment. ER 99-100. According to the grant, the allotment is "deemed the homestead of the allottee and his heirs in perpetuity," and it is inalienable and nontaxable unless Congress provides otherwise or the Secretary of the Interior (or his designee) approves a deed of conveyance. ER 99. Jachetta alleges that the United States wrongfully and in breach of its fiduciary duties authorized the State and a pipeline

company to use his allotment and appurtenant interests as a material site. ER 26-33.

Jachetta's operative complaint asserts five claims and seeks monetary relief as well as an injunction prohibiting the defendants from entering Jachetta's property and from extracting or attempting to extract resources from the allotment. ER 27-33. The district court dismissed Jachetta's claims against the United States because he failed to identify an applicable waiver of sovereign immunity. ER 9-17. Jachetta filed a notice of appeal. ER 2-3.

BACKGROUND

I. JACHETTA'S ALLOTMENT APPLICATION

The Alaska Native Allotment Act authorized the Secretary of the Interior, in his discretion and subject to other requirements, to allot up to 160 acres of "vacant, unappropriated, and unreserved nonmineral land in Alaska . . . to any Indian, Aleut, or Eskimo of full or mixed blood who resides in and is a native of Alaska." 43 U.S.C. § 270-1 (1970 ed.). The Alaska Native Claims Settlement Act repealed the Alaska Native Allotment Act in 1971, but preserved all applications for allotments

pending before Interior on December 18, 1971. 43 U.S.C. § 1617(a) (2006).

On December 10, 1971, Jachetta signed an application for a Native Allotment in Alaska. ER 126, 132. As was a common practice at the time for filling-out and processing Native Allotment applications in Alaska, Jachetta left the part of the application describing the land being applied for blank, apparently so that the Department of the Interior's Bureau of Indian Affairs could fill-in the legal description for Jachetta based on Jachetta's explanation of the land to a Bureau employee.[2] ER 126, 132. It turned out that, in Jachetta's case, that led to protracted administrative proceedings.

On December 16, 1971, the Bureau of Indian Affairs filed Jachetta's Native Allotment application with the Department's Bureau of Land Management. ER 132. The filed application sought an allotment of approximately 50 acres, which is often referred to as Parcel A. *Id.* The application did not include a description of the 110-acre

[2] *See, e.g.*, *Heirs of Okalena Wassillie*, 175 IBLA 355, 358 (2008); *United States v. Melgenak*, 127 IBLA 224, 228 (1993); *Nora L. Sanford (On Reconsideration)*, 63 IBLA 335, 336 (1982).

parcel that is the subject of this lawsuit, which is typically referred to as Parcel B. *Id.*

In June 1977, a Bureau of Land Management field examiner, accompanied by Jachetta, conducted an examination of Parcel A to verify use and occupancy of the property. *Id.* Based on the information collected, the examiner determined that Jachetta had complied with the Alaska Native Allotment Act. *Id.* The examiner's report made no mention of Parcel B. *Id.*

Almost six years later, in May 1983, the Tanana Chiefs Conference transmitted a memorandum based on an affidavit by Jachetta to the Bureau of Indian Affairs requesting certification or amendment of Jachetta's allotment application to include the 110-acre Parcel B. *Id.* The Bureau of Indian Affairs forwarded Jachetta's affidavit to the Bureau of Land Management. *Id.* In the transmission, the Bureau of Indian Affairs informed the Bureau of Land Management that its files did not substantiate Jachetta's claim that he applied for two tracts at the time of his original application. *Id.* The Bureau of Indian Affairs acknowledged, however, that when Jachetta made his request there was a rush of applications and the experience recounted

in Jachetta's affidavit was a common occurrence. ER 133. The Bureau of Indian Affairs requested that Jachetta's claim as to Parcel B "be honored and be given a field test to determine its validity." ER 133, 138.

In April 1986, the Bureau of Land Management determined that Jachetta's application for Parcel A (the 50-acre parcel) had been legislatively approved, *see* 43 U.S.C. § 1634(a), but denied Jachetta's request to amend his application to include Parcel B. ER 133. Jachetta appealed the Bureau of Land Management's decision denying the amendment of his application to the Interior Board of Land Appeals. ER 131-37. The Board set aside the Bureau of Land Management's decision and held that Jachetta was entitled to a hearing on whether he timely applied for Parcel B. ER 136-37. The Board referred the case to the Hearings Division for further proceedings. ER 137.

A hearing was held in August 1989 before an Administrative Law Judge where testimony was received regarding the circumstances surrounding the filing of Jachetta's application. ER 125. The ALJ found that Jachetta established that he had an application for Parcel B pending before the Department of the Interior on December 18, 1971.

ER 130. The Bureau of Land Management appealed to the Interior Board of Land Appeals. ER 115-22. In August 1995, the Board affirmed the ALJ's decision, stressing the deference due the ALJ's credibility determinations. ER 119-22. The Board returned the case to the Bureau of Land Management for further processing. ER 121-22. The Bureau then, following a field examination of Parcel B, requested that Jachetta supply additional witness statements demonstrating his use and occupancy of Parcel B and when that occurred. ER 111-14.

After that, the Bureau of Land Management filed a contest to Jachetta's application for Parcel B. ER 101-09. That is, the Bureau challenged Jachetta's entitlement to an allotment at Parcel B. A hearing on the contest was held before an Administrative Law Judge, and the parties were given the opportunity to present evidence and testimony. ER 103-05. After examining the evidence, the ALJ determined that Jachetta was entitled to an allotment for Parcel B. ER 105-09. No administrative appeal was taken and the United States issued Jachetta an allotment for Parcel B on July 22, 2004. ER 99-100.

II. JACHETTA'S ALLEGATIONS REGARDING ACTIVITIES ON PARCEL B

Prior to the Bureau of Land Management issuing Jachetta an allotment for Parcel B, indeed even before the Bureau of Land Management learned that Jachetta had applied for that allotment, the Bureau granted permits to third parties, including Defendants State of Alaska and Alyeska Pipeline for the use of Parcel B as a "material site." ER 26; Brief of William Carlo Jachetta (Br.) 8 (asserting permit issued in December 1968).[3] Jachetta alleges that Alyeska Pipeline and/or the State extracted materials from Parcel B beginning in 1973, and continuing through today, without payment. ER 27.

III. JACHETTA'S LAWSUIT

The relevant complaint is the Third Amended Complaint. The complaint alleges that the United States "is responsible for, and has a duty, to protect [sic] Mr. Jachetta's Allotment and interests appurtenant thereto from third-parties' unlawful takings, including, but not limited to Alyeska Pipeline Service Company and the State of Alaska." ER 25. Jachetta maintains that the United States "wrongfully

[3] As relevant to Jachetta, permits to Alyeska Pipeline and the State were rejected or rescinded by May 25, 2004 and September 27, 2004, respectively. ER 75-79, 89.

issued permits" to Alyeska Pipeline and the State for utilization of resources located on and appurtenant to Parcel B for the purposes of developing and operating a "material site." ER 26. He seeks monetary and injunctive relief for gravel extracted by Alyeska Pipeline and the State as well as Alyeska's alleged destruction of vegetation, removal of trees and other resources, placement of barriers, and prevention Jachetta's "rightful use and occupancy" of Parcel B. ER 27, 33.

The complaint alleges five causes of action. The first is a claim for "inverse condemnation, in that public uses were made of resources appurtenant to [Parcel B], but no payment was made." ER 27. The second cause of action seeks preliminary and permanent injunctive relief to prevent any future "inverse condemnation." ER 28. The third claim asserts that "Defendants' actions of contaminating or otherwise polluting [Parcel B] constitute a nuisance" and seeks damages. ER 29. Jachetta asserts in his fourth cause of action that the United States "had a fiduciary and trust duty to protect and preserve, for and behalf [sic] of Native allottees, such as Mr. Jachetta, property rights and interest in allotments, including, but not limited to, [Parcel B]." *Id.* He further alleges that the United States' "conflict of interest and its

refusal to defend [his] restricted title against unlawful takings, and/or its refusal to account for and pay over to [Jachetta] all profits derived from his lands, and the sale of resources at less than fair value, constitute breach of fiduciary duties owed [Jachetta]." ER 30. The complaint's final cause of action alleges civil rights violations pursuant to 42 U.S.C. §§ 1983 and 1985. *Id.* In that claim, Jachetta maintains that the conduct of the defendants has "subjected or caused and continues to subject and cause [Jachetta] to be deprived of rights, privileges and/or immunities secured by the United States Constitution." ER 32.

IV. THE DISTRICT COURT'S DECISION

The United States moved to dismiss Jachetta's complaint pursuant to Federal Rule of Civil Procedure 12(b) for lack of jurisdiction and for failure to state a claim upon which relief may be granted. The district court granted the motion, ER 9-17, holding that Jachetta had failed to identify a waiver of sovereign immunity for his claims against the United States (the court therefore did not address the numerous other grounds for dismissal raised by the United States in its motion, ER 17).

The district court first recognized that general jurisdiction statutes do not waive the United States' sovereign immunity. ER 14. As a result, Jachetta could not rely on 28 U.S.C. § 1343, a general jurisdiction statute, to supply the applicable waiver of sovereign immunity. *Id.* Instead, he must identify a "specific statute [that] expresses Congress's consent to suit." *Id.*

The district court next held that Jachetta's reliance on 25 U.S.C. § 357 was misplaced because that section "waives sovereign immunity in limited circumstances not applicable in this case." ER 14. Section 357, the court explained, does not authorize an action for inverse condemnation, which was what Jachetta alleged in his lawsuit. ER 14-15 (citing *United States v. Clarke*, 445 U.S. 253, 255-59 (1980)).

The district court also held that the Federal Tort Claims Act was inapplicable to Jachetta's claims. ER 15. The first and second claims in Jachetta's complaint, the court found, are taking, not tort, claims. *Id.* The court also explained that the fifth cause of action alleged civil rights violations, not tort claims. *Id.* With respect to the third and fourth causes of action, while on the surface they may appear to be tort claims, the court recognized that "[t]he Alaska Supreme Court has held

that where the injury suffered by a breach of fiduciary duty is economic, the claim sounds in contract, not in tort." *Id.* Thus, the Federal Tort Claims Act did not provide a waiver of sovereign immunity for those causes of action either. The court also observed that to the extent Jachetta seeks compensation in excess of $10,000 for a taking of property by the United States without just compensation, jurisdiction over such a claim lies exclusively in the Court of Federal Claims. *Id.* (citing *Broughton Lumber Co. v. Yeutter*, 939 F.2d 1547, 1556-57 (Fed. Cir. 1991)).

The district court next rejected Jachetta's argument that 25 U.S.C. § 345 and 28 U.S.C. § 1353 supply a waiver of sovereign immunity for his claims. Those statutes, the court held, only waive federal sovereign immunity as to suits seeking an original allotment. ER 16-17. The court explained that Jachetta has been issued his full allotment and instead his complaint "centers around use of the allotment he had not authorized." *Id.*

Finally, the district court held that nothing in the Alaska Native Allotment Act or the statute repealing it "provides any jurisdiction in the federal courts regarding allotments or any other type of claims." ER

17. The court also noted that Jachetta "ma[de] no argument regarding these sections in his Opposition." *Id.*

Finding there was no just cause for delay, the district court entered judgment for the United States under Federal Rule of Civil Procedure 54(b). ER 1, 4, 8.

STANDARD OF REVIEW

This Court reviews a district court's dismissal for lack of jurisdiction de novo. *Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001). While a complaint is generally construed in favor of a plaintiff, that principle applies to factual assertions that have not been challenged and does not extend to a plaintiff's legal assertions. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986). A complaint's factual allegations must state a plausible claim for relief; a mere possibility is insufficient. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009). In resolving a motion to dismiss for lack of jurisdiction, a district court may properly examine materials beyond the complaint without converting the motion to one for summary judgment. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

SUMMARY OF ARGUMENT

Absent a statutory waiver of sovereign immunity, the United States and its agencies cannot be sued at all. Any waiver of sovereign immunity must be unequivocally expressed in statutory text and strictly construed in favor of the sovereign. The terms of a sovereign immunity waiver define a court's jurisdiction to entertain the suit against the sovereign. None of the statutory provisions that Jachetta invokes waives the United States' immunity from suit and the district court's judgment should be affirmed.

Jachetta first contends that the Federal Tort Claims Act (FTCA) waives the United States' immunity from suit as to his first four claims. The FTCA provides a limited waiver of the United States' immunity from suit for common law claims for damages caused by the negligent or wrongful act or omission of a federal employee where, if the United States were a private person, it would be liable to the plaintiff under the law of the place where the act or omission occurred. Jachetta's first two claims are constitutional claims for inverse condemnation (i.e., an alleged taking of property without just compensation in violation of the Fifth Amendment) and therefore plainly are outside the FTCA.

Jachetta's third and fourth claims similarly are not within the FTCA. Both of those claims are premised on an allegation that the United States breached its fiduciary duties to Jachetta as an Alaska Native. There are at least two reasons why such a claim does not come within the FTCA. First, Jachetta's contention starts from an incorrect premise. The United States is not, in fact, a common law fiduciary with respect to Native Americans and therefore common law fiduciary duty principles play no role in defining the United States' obligations in its special relationship to Native Americans. Second, and in any event, a claim for breach of fiduciary duty is not a tort claim under Alaska law and therefore the FTCA is inapplicable to Jachetta's claims.

Jachetta similarly errs when he relies on 25 U.S.C. § 345 as a waiver of sovereign immunity for his claims of injury to his allotment (Parcel B). That statutory provision only provides a waiver for a claim seeking issuance of an original allotment. It is undisputed that Jachetta has been issued an allotment for Parcel B, and therefore Section 345 is irrelevant to the claims Jachetta tries to bring in this lawsuit.

Jachetta's final claim is for what he calls civil rights violations. Although ambiguous, he seems to assert that the United States violated his civil rights by taking his property without paying just compensation. Regardless of the exact nature of Jachetta's civil rights claims against the United States, he identifies no applicable waiver of the United States' immunity for those claims. He rests his argument on 28 U.S.C. § 1343(a)(3), but that statutory provision only provides district court jurisdiction over certain claims; it does not by its terms waive the United States' immunity from suit. Thus, to invoke that jurisdictional provision, Jachetta still needs to identify a statutory provision explicitly waiving the United States' immunity, and he fails to do so. Jachetta invokes 25 U.S.C. § 357, but the Supreme Court has explained that that provision only allows a state (or those entities authorized by state law to exercise condemnation authority) to bring a condemnation action with respect to an allotment in federal court and that the United States must be joined as an indispensable party. Jachetta's claim, however, is in inverse condemnation, a lawsuit the Supreme Court has held cannot be maintained under 25 U.S.C. § 357. Jachetta also cites to 42 U.S.C.

§§ 1983 and 1985, but by their plain terms those too do not waive the United States' immunity.

The district court's judgment dismissing Jachetta's claims against the United States should be affirmed.

ARGUMENT

It is axiomatic that, absent a waiver, sovereign immunity shields the United States and its agencies from suit. *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). "[T]he [Supreme] Court has recognized the general principle that the United States, as sovereign, is immune from suit save as it consents to be sued and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) (internal quotation marks, citations, and alterations omitted). "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text [and is] strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996). It is a plaintiff's burden to establish that the federal courts have jurisdiction over its claim, including an applicable waiver of sovereign immunity.

Cato v. United States, 70 F.3d 1103, 1107 (9th Cir. 1995); *Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987).

The district court correctly held that Jachetta failed to carry his burden of identifying an applicable waiver of sovereign immunity for his claims against the United States.[4]

I. THE FEDERAL TORT CLAIMS ACT DOES NOT WAIVE THE UNITED STATES' IMMUNITY TO JACHETTA'S FIRST FOUR CLAIMS

Jachetta asserts (Br. 16-29) that the Federal Tort Claims Act waives the United States' immunity from suit for the first four claims in his complaint. The district court correctly rejected that argument.

A. Federal Tort Claims Act Background

The Federal Tort Claims Act (FTCA) is the exclusive remedy for tortious conduct by the United States. *F.D.I.C. v. Craft*, 157 F.3d 697, 706 (9th Cir. 1998). It provides a limited waiver of sovereign immunity by which a plaintiff may bring common law claims against the United States for damages caused by "the negligent or wrongful act or

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[4] In the district court the United States raised a number of additional bases for dismissing Jachetta's complaint, including that Jachetta did not timely pursue his claims and that his complaint fails to state a claim. We do not press those here because the district court did not address them, but in the event this Court reverses (which it should not), those grounds for dismissal will still be available to the United States on remand.

omission" of any federal employee where "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). Here, Jachetta alleges acts or omissions that injured Parcel B, which is in Alaska; thus, Alaska law applies to any tort claim Jachetta may have.

B. The Federal Tort Claims Act Does Not Apply to Jachetta's First Two Claims, Claims That Allege Inverse Condemnation

Jachetta's first two claims clearly do not allege a tort. In those two claims Jachetta seeks monetary and injunctive relief for alleged "inverse condemnation." ER 27-28. They are claims that the United States took his property without paying just compensation required by the Fifth Amendment. *See United States v. Clarke*, 445 U.S. 253, 257 (1980) (explaining "[t]he phrase 'inverse condemnation' appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted"). Such a taking claim is a claim based on the United States Constitution, not a tort claim, let alone a tort claim based on Alaska law. *See Meyer*,

510 U.S. at 477-78 ("[T]he United States simply has not rendered itself liable under [the FTCA] for constitutional tort claims."); *cf. Myers v. United States*, 323 F.2d 580, 583 (9th Cir. 1963) (FTCA inapplicable to taking claim). Any taking claim, as a claim founded upon the Constitution, must be brought either in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a)(1), or, if the amount sought as compensation does not exceed $10,000, it may be brought in the district court under the so-called Little Tucker Act, 28 U.S.C. § 1346(a)(2). *See also Broughton Lumber Co. v. Yeutter*, 939 F.2d 1547, 1556-57 (9th Cir. 1991). Jachetta has not, however, asserted the Little Tucker Act as a jurisdictional basis for his district court taking claim, nor has he limited his claim to $10,000 or less.[5]

To the extent Jachetta suggests (Br. 21-25) that his first two claims actually allege the tort of trespass and therefore are within the FTCA's waiver of immunity, he is incorrect. This Court has emphasized that a plaintiff's "repeated characterization . . . of the taking by the United States as one of trespass and the commission of waste upon the lands in question does not convert the claims to cases sounding in tort

[5] Indeed, the tort claim Jachetta submitted to the agency sought $2.5 million. ER 68-73.

and thereby confer jurisdiction on the District Court under the Federal Tort Claims Act." *Myers*, 323 F.2d at 583. Jachetta cannot now try to characterize as a trespass what his compliant clearly pleads as a taking claim. In any event, as Jachetta's brief demonstrates (Br. 25), his claim is not that the United States committed a trespass; his claim is that "the United States, as the owner of legal title, *had a duty at law to prevent trespass*. Instead the United States encouraged trespass." (Emphasis added). Jachetta's supposed trespass claim then is simply a restatement of his breach of fiduciary duties claim -- his fourth claim for relief. As explained in the next subsection, the FTCA does not provide a waiver of sovereign immunity for Jachetta's breach of fiduciary duties claim.

C. Jachetta's Third And Fourth Claims Do Not Sound In Tort

Jachetta's third and fourth claims -- nuisance and breach of fiduciary duties -- although attempting to, do not sound in tort. With respect to the nuisance claim, Jachetta alleges "Defendants' actions of contaminating or otherwise polluting the subject property constitute a nuisance." ER 29. But Jachetta does not assert that the United States actually did anything on Parcel B, such as remove sand, gravel, or other

material. Instead, Jachetta's contention with respect to the United States is limited to the allegation that the United States wrongfully issued permits to the State and Alyeska Pipeline, which he tries to characterize as a tort. Thus, Jachetta's supposed nuisance claim is another manifestation of what Jachetta brings as a breach of fiduciary duties claim. The FTCA is, therefore, only available to Jachetta if his breach of fiduciary duties assertion falls within the FTCA. As explained below, it does not.

The premise of Jachetta's breach of fiduciary duties claim is that the United States is a common law fiduciary with respect to Jachetta. But that is not the case. The United States has no fiduciary duty to Alaska Natives simply because they are Natives. *See North Slope Borough v. Andrus*, 642 F.2d 589, 611-13 (9th Cir. 1980). Absent specific language in a treaty or statute, "the legal obligations of a true guardianship do not prevail." *Skokomish Indian Tribe v. France*, 269 F.2d 555, 560 (9th Cir. 1959); *see also Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006). The United States' duties as a "trustee" arise only from specific treaty or statutory requirements, not from judge-created norms reflecting policy judgments developed at

common law for non-sovereign actors. *See Gros Ventre*, 469 F.3d at 810-12; *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 573-74 (9th Cir. 1998); *see also United States v. Navajo Nation*, 129 S. Ct. 1547, 1558 (2009). As a result, a claim against the United States alleging a breach of fiduciary duty must be based on specific rights-creating or duty-imposing treaty or statutory prescription that establishes the specific fiduciary or other duties of the United States that the government allegedly has failed to fulfill. *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003). Monetary claims against the United States founded upon statute or treaty are claims that must be asserted under the Tucker Act or the so-called Indian Tucker Act (the latter is available only to tribes). 28 U.S.C. § 1491(a)(1) (Tucker Act); 28 U.S.C. § 1505 (Indian Tucker Act); *see also Skokomish Indian Tribe v. United States*, 410 F.3d 506, 511 (9th Cir. 2005) (en banc).[6] Such monetary claims are not tort claims cognizable under the FTCA. Indeed, there is a long line of Supreme Court cases addressing when monetary relief may be available for alleged breach of trust by the United States and all

[6] Where the monetary claim does not exceed $10,000, the district court has concurrent jurisdiction with the Court of Federal Claims under the so-called Little Tucker Act, 28 U.S.C. § 1346(a)(2), but Jachetta has not invoked that statute as a basis for a waiver of sovereign immunity.

involve claims brought in the Court of Federal Claims asserting jurisdiction under the Tucker Act or Indian Tucker Act. *See generally United States v. Mitchell*, 445 U.S. 535 (1980); *United States v. Mitchell*, 463 U.S. 206 (1983); *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *United States v. Navajo Nation*, 537 U.S. 488 (2003); *United States v. Navajo Nation*, 129 S. Ct. at 1557-58. Jachetta identifies no decision where a claim for monetary relief brought by a Native American against the United States for an alleged breach of fiduciary duty has proceeded under the FTCA.

In sum, the relationship between the United States and Alaska Natives is not in the nature of a common-law fiduciary relationship and therefore state tort fiduciary-beneficiary concepts are inapplicable. *See United States v. Navajo Nation*, 129 S. Ct. at 1557-58. Put another way, if the United States were a private person in Alaska, 28 U.S.C. § 1346(b)(1), it would owe no fiduciary duty to Jachetta. The unique nature of the United States' relationship with Alaska Natives is not in the nature of the traditional common law fiduciary-beneficiary relationship such that a common-law breach of trust action would lie.

The FTCA therefore is inapplicable to Jachetta's breach of fiduciary duties claim.

In any event, even if the United States' role were in the nature of a common-law fiduciary, a claim for breach of fiduciary duties would not sound in tort under Alaska law. The Alaska Supreme Court has most often addressed the nature of a breach of fiduciary duty claim in the context of determining the applicable state statute of limitations -- two years if a tort claim, but six years if a contract claim. Early on, Alaska courts would inquire "whether the gravamen of the plaintiff's compliant lies in contract or tort." *Breck v. Moore*, 910 P.2d 599, 603 (Alaska 1996). Applying that analysis proved difficult and led to what the Alaska Supreme Court called the "substantial irreconcilability" of cases. *Lee Houston & Assocs. v. Racine*, 806 P.2d 848, 853 (Alaska 1991). Thus, the court explained that:

> [r]ather than attempting to characterize the source of the plaintiff's rights in terms of the common law distinctions between tort and contract, we now look to the nature of the injury.

Breck, 910 P.2d at 603. Where the claim is economic loss, the Alaska Supreme Court treats the action as a contract one, but where the claim alleges personal or reputational injury, it is treated as a tort. *Id.* Here,

Jachetta seeks monetary compensation for economic loss and therefore under Alaska law his breach of fiduciary duties claim sounds in contract and is not within the FTCA.

Even authority that Jachetta relies on supports that conclusion. For example, Jachetta contends (Br. 19) that *Shields v. Cape Fox Corp.*, 42 P.3d 1083 (Alaska 2002), stands for the proposition that the Alaska Supreme Court has "rejected the argument that an action for breach of fiduciary duties sounds in contract." *Shields* addressed whether a comparative fault instruction (which is available "[i]n all actions involving fault of more than one person") should have been given to the jury on a breach of fiduciary duty claim. 42 P.3d at 1087, 1089. In that case, the Alaska Supreme Court held that it was plain error not to give the instruction. *Id.* at 1089-90. The implication that Jachetta seeks to draw is that, because a comparative negligence instruction was required, the breach of fiduciary duty claim was a tort claim and necessarily so too is his claim. But what the *Shields* court said was:

> [T]he fiduciary duty claim is based on a duty implied by law as a result of a contractual undertaking. *Insofar as the duty requires due diligence it is merely a particular application of a negligence standard.* To say that this claim should not be subject to a comparative fault instruction would be to elevate form over substance.

42 P.3d at 1090 (emphasis added). As discussed, however, a breach of fiduciary duty claim against the United States must identify a specific rights-creating or duty-imposing treaty or statutory prescription that establishes the specific fiduciary or other duties of the United States that the government allegedly has failed to fulfill. Such a claim is not "merely a particular application of a negligence standard," so *Shields* does not support Jachetta's contentions. *Id.* Jachetta's breach of fiduciary duties claim does not sound in tort under Alaska law and the district court therefore correctly concluded it does not come within the FTCA's limited waiver of sovereign immunity.

II. 25 U.S.C. § 345 DOES NOT PROVIDE AN APPLICABLE WAIVER OF SOVEREIGN IMMUNITY

Although included in the FTCA section of his brief (Br. 27), Jachetta seems to argue (as he did in his opposition to the United States' motion to dismiss in the district court) that 25 U.S.C. § 345 waives the United States' sovereign immunity to his claims. Jachetta also invokes 28 U.S.C. § 1353, which this Court has described as a "recodification of the jurisdictional portion of" 25 U.S.C. § 345. *Scholder v. United States*, 428 F.2d 1123, 1126 n.2 (9th Cir. 1970). Like the

plaintiff in *Scholder*, Jachetta does not argue that there is any difference between 28 U.S.C. § 1353 and 25 U.S.C. § 345 that is material here. (In the argument heading for this section of his brief, Jachetta also mentions 25 U.S.C. § 357 but presents no argument in this section of his brief as to that statutory provision and therefore has waived any such contention, *United States v. Tisor*, 96 F.3d 370, 376 (9th Cir. 1996); *Northwest Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 923 (9th Cir. 1988)). The district court correctly held that 25 U.S.C. § 345 is inapplicable to Jachetta's claims.

25 U.S.C. § 345 contemplates two types of suits involving allotments: suits seeking the issuance of an allotment and suits involving the interests and rights of an allotment or patent holder after he or she has acquired it.[7] *United States v. Mottaz*, 476 U.S. 834, 845

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[7] In its entirety, 25 U.S.C. § 345 provides:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts

(1986). The statute, however, only waives the United States' sovereign immunity from suit as to the first type of lawsuit -- a suit seeking the issuance of an original allotment. *Pinkham v. Lewiston Orchards Irrigation Dist.*, 862 F.2d 184, 187 (9th Cir. 1988). Here, it is undisputed that the United States has granted Parcel B to Jachetta as an allotment. Thus, the district court correctly held that 25 U.S.C. § 345 does not provide a waiver of sovereign immunity that is applicable to Jachetta's claim.

In response, Jachetta relies (Br. 27-29) on this Court's decision in *United States v. Pierce*, 235 F.2d 885 (9th Cir. 1956), to argue that the district court has authority to hear his claim against the United States

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> are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

for an accounting and restitution of resource payments arising from activities on Parcel B. But this Court decided *Pierce* before *Mottaz* and *Pinkham*, which make clear that 25 U.S.C. § 345 does not waive the United States' immunity to suit for a claim such as Jachetta's. Those statements of law in *Mottaz* and *Pinkham* are controlling, regardless of whether the factual situations in which they arose are identical to those presented here.

Jachetta maintains (Br. 29) that his suit should be allowed to proceed under 25 U.S.C. § 345 because "[t]here are no policy concerns implicating sovereign immunity in such a proceeding." But that argument has it exactly backwards. The baseline (irrespective of policy) is that the United States is immune from suit, and only Congress may waive that immunity, a waiver that must be unequivocally expressed in statutory text. *Lane v. Pena*, 518 U.S. at 192. And to the extent Jachetta argues that as a matter of sound policy his suit should be allowed to proceed, that disregards the Supreme Court's clear instruction that "policy, no matter how compelling, is insufficient" to "waive [sovereign] immunity." *Library of Cong. v. Shaw*, 478 U.S. 310, 321 (1986).

Finally, Jachetta suggests (Br. 26) that "under a bundle of sticks theory of property law, his allotment has not been fully conveyed to him" because Parcel B is missing "rock, sand and gravel." Jachetta does not dispute, however, that the Supplemental Native Allotment the United States issued him for Parcel B includes the entire legal description of the land for which he applied. That is the end of the matter with respect to the waiver of sovereign immunity contained in 25 U.S.C. § 345. What is more, 25 U.S.C. § 345 only waives the United States' immunity to a suit *seeking an allotment*. So even if Jachetta's bundle of sticks theory had merit (which it does not), he has sued only for monetary relief and an injunction to stop future entry onto Parcel B, relief that is not included in 25 U.S.C. § 345's limited waiver of sovereign immunity.

III. JACHETTA IDENTIFIES NO WAIVER OF THE UNITED STATES' SOVEREIGN IMMUNITY TO HIS CIVIL RIGHTS CLAIMS

In his complaint, Jachetta alleges civil rights claims under 42 U.S.C. §§ 1983 and 1985 against the United States, seemingly alleging a taking of his property without just compensation in violation of the Fifth Amendment. ER 30-33. In his brief on appeal (Br. 30), Jachetta

appears to premise jurisdiction for those claims on 28 U.S.C. § 1343(a)(3), which provides that

> [t]he district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . [t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

That statutory provision only provides district court jurisdiction over certain claims; it says nothing about whether the United States may be sued on any claim nor does it provide the United States' consent to be sued on any claim. The statutory "language does not by itself include any waiver of the sovereign immunity of the United States." *Salazar v. Heckler*, 787 F.2d 527, 528 (10th Cir. 1986); *see also Beale v. Blount*, 461 F.2d 1133, 1138 (5th Cir. 1972). Thus, to invoke that jurisdictional provision, Jachetta still must identify a statutory provision that "by its terms expresses Congress' consent to suits against the United States by persons in plaintiff['s] position." *Salazar*, 787 F.2d at 528. Although less than clear from Jachetta's brief, he seems to maintain that 25 U.S.C. § 357 is such a statute. It is not.

25 U.S.C. § 357 provides that Indian allotted land may be condemned under the law of the state in which the allotment is located in the same manner that land owned in fee may be condemned, with damages going to the allotment holder.[8] The Supreme Court has explained that this provision allows a state (or those entities authorized by state law to exercise condemnation authority) to bring a condemnation action with respect to an allotment in federal court and the United States must be joined as an indispensable party. *See Minnesota v. United States*, 305 U.S. 382, 386-90 (1939); *see also Clarke*, 445 U.S. at 255-58. Jachetta's lawsuit is not (and could not be) an action in condemnation. Instead, he brings an inverse condemnation action, a lawsuit that the Supreme Court has held cannot be maintained under 25 U.S.C. § 357. *Clarke*, 445 U.S. at 258 ("[T]he term 'condemned' [in 25 U.S.C. § 357] refers not to an action by a landowner to recover compensation for a taking, but to a formal condemnation

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[8] The statutory provision provides:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

25 U.S.C. § 357.

proceeding instituted by the condemning authority."). Thus, 25 U.S.C. § 357 cannot supply the necessary waiver of sovereign immunity for Jachetta's claim.

Finally, to the extent that Jachetta's brief may be read to argue that 42 U.S.C. §§ 1983 and 1985 supply a waiver of the United States' sovereign immunity, they do not. By their terms those statutes contain no explicit waiver of the United States' sovereign immunity. *See also Morse v. N. Coast Opportunities, Inc.*, 118 F.3d 1338, 1343 (9th Cir. 1997); *Davis v. U.S. Dep't of Justice*, 204 F.3d 723, 726 (7th Cir. 2000); *Affiliated Prof'l Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999) ("This Court has long recognized that suits against the United States brought under the civil rights statutes are barred by sovereign immunity.").

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel is unaware of any related case pending in this Court. Plaintiff-Appellant filed a related case in the United States Court of Federal Claims on February 18, 2010, *Jachetta v. United* States, No. 10-105. On August 26, 2010, the Court of Federal Claims dismissed that lawsuit for lack of jurisdiction under 28 U.S.C. § 1500 and because it is time-barred, 28 U.S.C. § 2501.

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CERTIFICATE PURSUANT TO CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing brief is proportionally spaced, has a typeface of 14 points or more and contains 7152 words.

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