IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

SHINNECOCK INDIAN TRIBE	)	
	)	Electronically Filed:
Plaintiff,	)	May 16, 2013
	)	
v.	)	No. 1:12-cv-00836-ECH
	)	
	)	Chief Judge Emily C. Hewitt
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

UNITED STATES' REPLY
IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

The Shinnecock Indian Nation (hereinafter "Plaintiff") claims it is due $1.1 billion in compensation because the United States District Court for the Eastern District of New York (hereinafter "Eastern District" or "District Court") dismissed its Non-Intercourse Act claims against New York and the Town of Southampton. Plaintiff brought claims against New York and others claiming that certain land transactions in 1859 were barred by the Non-Intercourse Act because the transactions were not approved by the United States. The Eastern District applied Second Circuit precedent, and dismissed the claims based on the doctrine of laches. Plaintiff's Complaint alleges the dismissal prevents them from obtaining "effective redress" for the 1859 land transactions and seeks money damages from the United States based on the Non-Intercourse Act, federal common law and customary international law. As discussed below, Plaintiff now also purports to have set forth a judicial takings claim.

The United States moved to dismiss Plaintiff's Complaint because this Court either lacks jurisdiction to consider the claims or the Complaint does not state a claim upon which relief may be granted. Nothing in Plaintiff's Response supports a different conclusion. First, Plaintiff's claims are not ripe based on the pending motion for reconsideration of the dismissal decision and appeal with the Second Circuit. Plaintiff's voluntary stay of the resolution of these motions for over six years belies any argument that they were immediately harmed by the Eastern District's decision. Judicial review is not necessary at this time and either the Eastern District or Second Circuit could reverse the previous decision, and thus, there would be no case in controversy for this Court to decide.

Second, Plaintiff's judicial takings claim (assuming Plaintiff plead such a claim in its Complaint) cannot withstand a motion to dismiss because the dismissal of Plaintiff's Non-

Intercourse Act claim does not take property protected by the Fifth Amendment. Third, Plaintiff insists that the Non-Intercourse Act requires the Eastern District hear their case on the merits. The Non-Intercourse Act governs land transactions between Indian tribes and non-Indians and contains no such guarantee that would restrict federal district courts from granting a motion to dismiss. Even if the Non-Intercourse Act could be read to create such an enforceable duty on the courts, it cannot be read as mandating compensation because the Act speaks in terms of non-governmental entities paying damages. Finally, based on established precedent in this Court, Plaintiff cannot invoke the waiver of sovereign immunity found in the Tucker Act based on customary international law or federal common law. For the reasons stated herein and in the opening motion to dismiss, the Court should dismiss Plaintiff's Complaint.

I. Plaintiff's Claims Are Not Ripe

In its opening motion to dismiss, the United States argued that Plaintiff's claims alleging the District Court's decision in 2006 to dismiss the Tribe's Non-Intercourse Act claims against the State of New York are not ripe because the Tribe has filed an appeal of that decision, which remains pending and unresolved by the Second Circuit. See ECF No. 7 ("Def.'s Mot.") at 4, 8-10. In response, Plaintiff admits that "litigation of the Nation's land claim has not run its entire course." See ECF No. 15 ("Pl's. Resp.") at 15. Even though the potential for reversal of the district court's 2006 decision remains an option, thereby alleviating the need for any decision in this Court at this time, Plaintiff argues that its claims are ready for review now because additional factual development will not assist this Court's review and the district court's entry of final judgment had an immediate legal effect. Id. at 16-18.

A ripeness dispute requires the application of a two-part test by which a court must evaluate (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of

withholding court consideration. Caraco Pharm. Labs. Ltd. v. Forest Labs., Inc., 527 F.3d 1278, 1294-95 (Fed. Cir. 2008) (citing Abbott Labs., 387 U.S. at 149). As to the former, "an action is fit for judicial review where further factual development would not 'significantly advance [a court's] ability to deal with the legal issues presented.'" Id. at 1295 (quoting Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 812 (2003)(alteration in original)). The latter anticipates an assessment of whether "withholding court consideration of an action causes hardship to the plaintiff where the complained-of conduct has an 'immediate and substantial impact' on the plaintiff." Id. (quoting Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 171 (1967)). Both prongs of the two-part test must be satisfied for a claim to be found ripe. Id. at 1299-95.

Here, Plaintiff's main argument is that a court decision by the Eastern District of New York to dismiss their Non-Intercourse Act claims against New York denies them "effective redress" for such claims. Pl.'s Compl. at ¶¶ 46-50, 60-61, 65-66. In 2006, the Eastern District of New York applied Second Circuit precedent and held that Plaintiff's claims against New York should be dismissed because the claims fall within the doctrine of laches. See Shinnecock Indian Nation v. New York, No. 05-cv-2887, 2006 WL 3501099 (Nov. 28, 2006); see also Pl.'s Compl. at ¶ 46-50. Regardless of the merits of whether the Eastern District of New York was correct (or whether the United States agrees with the Second Circuit precedent relied on by the Eastern District), Plaintiff has filed for reconsideration of that decision and an appeal to the Second Circuit. That appeal remains pending and has been stayed at Plaintiff's request for over six years.

Given this state of affairs, multiple outcomes and factual developments could impact whether this Court will ever have to address the legal questions raised by Plaintiff herein. For

example, the Second Circuit could reverse the Eastern District, thereby alleviating Plaintiff's concerns. Even if the Second Circuit upholds the Eastern District, Plaintiff could seek rehearing en banc or certiorari from the Supreme Court. Accordingly, Plaintiff's allegations in Count I and II that in 2006, the Eastern District of New York denied them recourse and "effective redress" for New York's actions in 1859 may never need to be decided in this forum. Resolution of the legal issues presented in that case are not complete until judicial appeals are exhausted. Plaintiff has not satisfied the first requirement of the ripeness test and the Court should therefore dismiss Plaintiff's Complaint as not ripe in its entirety.

Additionally, Plaintiff has not shown immediate hardship from not adjudicating its claims herein. Plaintiff argues that "the legal effect of that [2006] judgment was immediate." Pl's. Resp. at 16. It appears that the 2006 final judgment and decision of which Plaintiff complains only remains the final judicial decision if Plaintiff withdraws both its pending motion for reconsideration and appeal. But Plaintiff has told this Court that it intends to keep litigating in the district court and Second Circuit. Id.. at 15. Plaintiff's allegations of immediate, legal harm are further belied by the fact that, for over six years, they have not pursued their pending appeal or requested a decision on the pending motion for reconsideration. Moreover, even though the government has not argued whether the statute of limitations bars Plaintiff's action, Plaintiff also alleges that they had to file this case when their claims accrued and before the statute of limitations ran. Id. at 17-18. Plaintiff's speculation that the government will file a limitations defense at some point in the future serves once again to underscore how this case is not ripe. It is possible that at some point the government would argue Plaintiff has failed to bring a case within the time limits of 28 U.S.C. § 2501, but it is not proper for the United States to speculate in this briefing when that time would be. Every plaintiff faces the dilemma of filing a case before the

limitations period has run but after all the facts have been determined upon which to base the government's liability. In sum, Plaintiff's Complaint does not present ripe claims, is premature, and should be dismissed.

II. Plaintiff's Newly Asserted Judicial Takings Claim Is Not Found in the Complaint and Cannot Survive a Motion to Dismiss

To survive a motion to dismiss, the complaint must comply with Rule 8(a) of the Court of Federal Claims ("RCFC") by providing "a short and plain statement of the claim showing that the pleader is entitled to relief," such that the defendant is given "fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007) (internal quotations and citation omitted). Here, Plaintiff admits its Complaint does not "expressly enumerate a Fifth Amendment 'Takings' claim among its 'Claims for Relief.'" Pl.'s Resp. at 2, n.2. Plaintiff argues that the Complaint contains sufficient facts to support its judicial taking claim. Id. Putting aside for the moment whether or not any facts could support such a claim, the Complaint does not provide fair notice of a judicial takings claim. Plaintiff's Complaint sets forth two causes of action, both alleging that the "Defendants' courts have barred any and all means of judicial means of effective redress . . . though the imposition of newly-formed and invidiously discriminatory rule that apply only to 'Indian' claims." ECF No. 1 ("Pl.'s Compl.") at ¶¶ 61, 66. Plaintiff's Complaint makes the same allegation throughout its Complaint. Id. ¶¶ 5, 47-49. Nowhere in the Complaint does Plaintiff set forth or claim that the judiciary has taken property rights in violation of the takings clause of the Fifth Amendment. As such, the United States moved to dismiss any claims under the due process clause of the Fifth Amendment. Def.'s Mot. at 18-19. Plaintiff now clarifies it did not intend to set forth a due process claim, but instead, intended for the Court and the United States to understand that "effective redress" means "judicial takings." Pl.'s Resp. at 1, n.1. It is not for the United States

to defend against any and every conceivable claim that could result from terminology used in a complaint. It is a plaintiff's responsibility to make clear what claims are being alleged in its Complaint. Plaintiff here has not provided any notice of their judicial takings claim and has not RCFC, Rule 8.

Likewise, Plaintiff could have amended its Complaint as of right and included this new legal claim after the United States brought the deficiencies in the Complaint to Plaintiff's attention in the Motion to Dismiss. The Rules of this Court allow for a plaintiff to amend its complaint without leave within 21 days of the filing of a motion to dismiss. RCFC, Rule 15(a)(1)(B). As discussed in the comments to the corresponding rule in the Federal Rules of Civil Procedure:

> [t]his provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim.

Fed. R. Civ. P. Rule 15, 2009 Amendment cmt. Here, Plaintiff has not availed itself of the automatic opportunity to amend its Complaint, nor has Plaintiff properly moved for leave to amend. As such, the Court can decide that Plaintiff's judicial taking claim is not found within its complaint and dismiss on this basis alone.

Further, if Plaintiff were to properly move for leave to amend its Complaint to include a judicial takings claim within its "Claims for Relief" (as proposed by Plaintiff, see Pl's. Resp. at 2, n.2), such a motion should be denied on futility grounds because, for the reasons expressed below, the proposed amended complaint would not survive a Rule 12(b) motion. See Slovacek v. United States, 40 Fed. Cl. 828, 834 (1998); see also Foman v. Davis, 371 U.S. 178, 182 (1962). A party faced with the possible denial based on futility "must demonstrate that its

pleading states a claim on which relief could be granted, and it must proffer sufficient facts supporting the amended pleading that the claim could survive a dispositive pretrial motion." Normandy Apartments, Ltd. v. United States, 100 Fed. Cl. 247, 258 (Fed. Cl. 2011) (quoting Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A. de C.V., 464 F.3d 1339, 1354–55 (Fed. Cir. 2006)).

"Judicial takings" is a theory positing that the prohibition of the Fifth Amendment against takings without just compensation is equally applicable to the legislature, the executive, and the judiciary. A judicial takings theory, in addition to defending the idea that the judiciary is similar enough to the legislature to justify the application of the Fifth Amendment, must also answer the difficult questions that accompany traditional legislative or regulatory takings analyses. But, judicial decisions are not similar enough to legislative or executive actions that take property in order to justify such a radical expansion of settled doctrine. It is a uniquely judicial task to "say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803). Courts do not "make" the law, or fabricate it from whole cloth; courts interpret the law. This is a distinguishing characteristic of the judiciary and provides good reason for treating its conclusions regarding the law differently from those of the legislature or the executive. "'[T]he constitutional obligation not to 'take' property does not fall equally on all branches.'" Brace v. United States, 72 Fed. Cl. 337, 359 (2006) (quoting Roderick E. Watson, The Constitution and Property: Due Process, Regulatory Takings and Judicial Takings, Utah L. Rev. 379, 438 (2001)).

Here, assuming Plaintiff has set forth a judicial takings claim in its Complaint, the Court should still dismiss because (1) the Court lacks jurisdiction over Plaintiff's attempt to collaterally attack the decisions of the Eastern District and the Second Circuit and (2) Plaintiff did not have a compensable property interest that could be taken.

First, to the extent that Plaintiff hopes to re-litigate before this Court matters that were decided by the District Court and the Second Circuit—specifically, whether the defendants in those cases may advance a laches defense—this Court lacks subject-matter jurisdiction to scrutinize the decisions of other federal courts. Allustiarte v. United States, 256 F.3d 1349, 1351 (Fed. Cir. 2001); Vereda, Ltd. v. United States, 271 F.3d 1367, 1375 (Fed. Cir. 2001) (recognizing that the "Court of Federal Claims does not have jurisdiction to review the decisions of district courts" and "cannot entertain a taking[s] claim that requires the court to 'scrutinize the actions of' another tribunal.") (quotation marks and citations omitted). Plaintiff's remedy for reconsideration is with the District Court, the Second Circuit, or the Supreme Court. See Allustiarte, 256 F.3d at 1352 ("The proper forum for appellants' challenges to the bankruptcy trustees' actions therefore lies in the Ninth Circuit, not the Court of Federal Claims."). In fact, Plaintiff characterizes its case here as requiring this Court to review the Second Circuit's Non-Intercourse Act decisions. Pl.'s Resp. at 11 (stating that "[t]he legal harm that the *Second Circuit* thereby inflicted (and commanded the District Courts within the Second Circuit to inflict), is at the heart of the instant case . . .."). The proper forum for Plaintiff's disagreement with the Eastern District of New York (and Second Circuit precedent) is the Supreme Court, not a collateral attack in the CFC. See 28 U.S.C. § 1254 ("Cases in the courts of appeals may be reviewed by the Supreme Court . . . ."). As described above, Plaintiff here has not advanced its appeal to the Second Circuit, nor has Plaintiff attempted to petition the Supreme Court for certiorari. The CFC lacks jurisdiction to reverse a decision of the Eastern District of New York or to reconsider Second Circuit precedent. See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995) (stating that Article III courts have "the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy-with an

understanding, in short, that a judgment conclusively resolves the case because a judicial Power is one to render dispositive judgments." (internal quotations omitted) (second emphasis added)); see also Boise Cascade Corp. v. United States, 296 F.3d 1339, 1344 (2002).

Second, Plaintiff has not set forth a compensable property interest that could be taken. The United States Court of Appeals for the Federal Circuit applies a two-part test to determine whether a government act constitutes a taking under the Fifth Amendment. First, the court must determine the existence and scope of the private property right in question, and second, the court must determine whether any taking of that property right has occurred. Acceptance Ins. Cos. v. United States, 583 F.3d 849, 854 (Fed. Cir. 2009).

The first step, establishment of a private property interest that is protected by the Fifth Amendment, is a threshold element of the plaintiff's claim. See Palmyra Pac. Seafoods, LLC v. United States, 561 F.3d 1361, 1364 (Fed. Cir. 2009); Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206, 1212 (Fed. Cir. 2005). The question of whether a plaintiff has a protected property interest presents "a question of law based on factual underpinnings." Walcek v. United States, 303 F.3d 1349, 1354 (Fed. Cir. 2002) (citation omitted). The determination of whether the rights or interests claimed by a plaintiff constitutes private property rights afforded protection under the Fifth Amendment turns on "existing rules and understandings and background principles derived from an independent source, such as state, federal, or common law, [that] define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." Air Pegasus, 424 F.3d at 1213 (internal quotations and citations omitted). Importantly, "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion." United States

v. Willow River Power Co., 324 U.S. 499, 502 (1945).

The "property" that Plaintiff claims was "taken" by the Eastern District are its traditional lands and Plaintiff's causes of action under the Non-Intercourse Act. Pl.'s Resp. at 20. With regard to the land, if any actor took the land that action was not the result of a judicial decision in 2006 but occurred in 1859 upon the sale of the land. Plaintiff's cause of action under the Non-Intercourse Act is not a "property" interest that is protected under the Fifth Amendment's takings clause. Although a cause of action is "a species of property protected by the Fourteenth Amendment's Due Process Clause," Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982), the Claims Court has held that a cause of action against the government is not a property interest protected by the Fifth Amendment's takings clause.[1] Sharkey v. United States, 17 Cl. Ct. 643, 648 (1989) ("It is therefore axiomatic that plaintiffs had no legally protected property interest in a cause of action against the government."). Here, the Eastern District of New York held that under Second Circuit precedent, the defendants in that case could advance a defense based on laches. Accordingly, the Eastern District dismissed Plaintiff's Non-Intercourse Act claim. Likewise, contrary to Plaintiff's assertions with no citations, Pl.'s Resp. at 20, 22, Plaintiff did not have a vested interest or a guarantee that its Non-Intercourse Act claim would proceed on the merits. Part of the background principles that shape any expectation with respect to bringing a case is that it may be subject to a defense. Plaintiff's claim, like other litigants' claims, was subject to dismissal based on an affirmative defense. When the Eastern District dismissed Plaintiff's claim, Plaintiff had no compensable property interest and the Eastern District's order,

[1] Of note, even for due process purposes, the United States Court of Appeals for the Ninth Circuit has held that although a cause of action is a species of property, "a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained." Bowers v. Whitman, 671 F.3d 905, 914 (9th Cir. 2012) (internal quotation marks and citation omitted). Plaintiff here has not obtained a final unreviewable judgment as Plaintiff's appeal to the Second Circuit remains pending.

therefore, could not have effected a taking.

Plaintiff's reliance on the plurality opinion in Stop the Beach Renourishment v. Fla. Dep't of Envt'l Protection, 130 S. Ct. 2592 (2010) as supporting its judicial takings claim here, see Pl.'s Resp. at 19-20, is misplaced. In Stop the Beach Renourishment, the Supreme Court addressed the question of whether the Florida State Supreme Court's decision effected an uncompensated Fifth Amendment taking in case involving beachfront property owners' rights to accretions and avulsions. Id. at 2598, 2600-01. The eight Justices that participated in the decision divided evenly over whether a court could effect a Fifth Amendment taking.[2] Justice Scalia, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, contended that a state court, like a state legislature or executive, could effect an uncompensated taking. Id. at 2601-10. In separate opinions, Justice Kennedy, joined by Justice Sotomayor, and Justice Breyer, joined by Justice Ginsburg, asserted that it was unnecessary to resolve whether a judicial decision could violate the Fifth Amendment for the purposes of the case. Id. at 2613-2619. Thus, the Court did not decide whether a court may effect a Fifth Amendment taking in the type of circumstances presented here where a district court applied the law of the circuit it sits in to dismiss a case. Instead, Stop the Beach involved reliance by the plaintiffs there on a previous judicial determination of the extent of their property and then a revised determination by the state court as to that same property interest. While Plaintiff here claims to be similarly situated, Pl.'s Resp. at 20-24, the Eastern District and Second Circuit decisions do not address (nor effect a change in) property law, but instead address whether a defense is viable.

In sum, the Court should grant the motion to dismiss.[3]

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[2] Justice Stevens did not participate in the decision.

[3] Plaintiff further seeks the wrong remedy in this Court. Indeed, the plurality opinion in Stop the Beach Renourishment, which argued that the judiciary could effect a

III. Plaintiff's Complaint Does Not Set Forth Specific Money-Mandating Fiduciary Duties

In its opening motion, the United States argued that none of the sources of law cited in Plaintiff's Complaint set forth specific money-mandating fiduciary duties. In response, Plaintiff argues that the Non-Intercourse Act requires that district courts hear a case on the merits, see Pl.'s Resp. at 28-29, and that a purported violation of customary international law by a district court can result in money damages. See id. at 31.

As this Court well knows, an Indian tribe asserting a non-contract claim under the Tucker Act or Indian Tucker Act must therefore clear "two hurdles" to invoke federal jurisdiction. United States v. Navajo Nation, 556 U.S. 287, 290 (2009) ("Navajo II"). "First, the tribe 'must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.'" Id. (quoting United States v. Navajo, 537 U.S. 488 (2003) ("Navajo I"). That "threshold" showing must be based on "specific rights-creating or duty-imposing [constitutional,] statutory or regulatory prescriptions" that establish "specific fiduciary or other duties" that the government allegedly has failed to fulfill. Navajo I, 537 U.S. at 506; see United States v. Jicarilla Apache Nation, ___ U.S. ___, 131 S. Ct. 2313, 2325 (2011) (holding that specific enforceable trust duties are defined by "specific, applicable, trust-creating statute[s] or regulation[s]," not "common-law trust principles"); Navajo II, 556 U.S. at 302 (same).

Second, "[i]f that threshold is passed," the plaintiff must further show that "the relevant

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taking, suggested that the remedy for a judicial taking was reversal, not compensation. See 130 S. Ct. at 2607 (Scalia, J.) ("As we have said, if we were to hold that the Florida Supreme Court had effected an uncompensated taking in this case, we would not validate the taking by ordering Florida to pay compensation. We would simply reverse the Florida Supreme Court's judgment that the Beach and Shore Preservation Act can be applied to the Members' property.").

source of substantive law," the violation of which forms the basis of his claim, "'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes.'" Navajo II, 556 U.S. at 290-91 (quoting Navajo I, 537 U.S. at 506) (brackets and citation omitted). That second showing reflects the understanding that not "all [such provisions conferring] substantive rights" mandate the award of money damages from the government "to redress their violation," and that the limited waivers of sovereign immunity in the Tucker Acts extend only to claims that the government has violated provisions that themselves require payment of a damages remedy. United States v. Testan, 424 U.S. 392, 400-401 (1976); id. at 397-398; see also Navajo I, 537 U.S. at 503, 506; United States v. Mitchell, ("Mitchell II") 463 U.S. 206, 216-218 (1983). As discussed below and in the opening motion, Plaintiff has not met its burden to set forth specific sources of law and the Court should dismiss Plaintiff's Complaint.

1. The Non-Intercourse Act Does Not Set Forth A Specific, Enforceable, Mandatory Trust Duty Requiring the United States Courts Not Dismiss Cases

In its opening motion, the United States argued that the Non-Intercourse Act does not set forth a specific mandatory trust duty requiring the United States bring an enforcement action. Def.'s Mot. at 19-22. In its Response, Plaintiff clarifies that it was not seeking money damages for actions taken (or not taken) by the executive branch but instead states that "the fiduciary obligation of the United States is broad enough to apply to the judicial branch as well as the legislative and executive branches" and the Non-Intercourse act requires that the Eastern District "adjudicat[e] the claim on the merits." Pl.'s Resp. at 28-29. Contrary to Plaintiff's representations, there is no such requirement in the Non-Intercourse Act.

The Non-Intercourse Act speaks in terms of conveyances of land between Indian tribes and non-Indians. Indeed, the Non-Intercourse Act states:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177. The Act does not set forth specific mandatory fiduciary duties with respect to the United States. See Def.'s Mot. at 19-22. Plaintiff's reliance to the contrary on the First Circuit's decision in Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), Pl.'s Resp. at 28, misreads that case. See Def.'s Mot. at 20-21. In fact, the portion of that decision quoted by Plaintiff evidences that the First Circuit understood that while there is a cause of action contained within the Non-Intercourse Act that allows for the United States to enforce its provisions against others, the decision to "take such action" is discretionary and depends upon what "may be warranted in the circumstances." Pl.'s Resp. at 26 (quoting Passamaquoddy, 528 F.2d at 379). This understanding of Passamaquoddy is reaffirmed in the same decision by the First Circuit's statement that "no question of spelling out specific duties is presented [here]" and thus, "it would be inappropriate to attempt to spell out what duties are imposed by the [general] trust relationship." Passamaquoddy, 528 F.2d at 379. The D.C. Circuit further confirmed this understanding of the Passamaquoddy decision in Shoshone Bannock v. Reno, 56 F.3d 1476, 1483 (D.C. Cir. 1995).

The Non-Intercourse Act creates a discretionary general trust duty that permits enforcement of its provisions. See Inupiat Community of the Arctic Slope v. United States, 680 F.2d 122, 131 (Ct. Cl. 1982); see Heckmann v. United States, 224 U.S. 413, 446 (1912) ("In what cases the United States will undertake to represent Indian owners of restricted lands in suits of this sort is left, under acts of Congress to the discretion of the Executive Department.");

Shoshone–Bannock Tribes, 56 F.3d at 1482. Indeed, as Plaintiff repeatedly discusses, Pl.'s Resp. at 11-15, the United States has attempted twice to petition the Supreme Court for certiorari in order to remove the limitations on that discretion imposed by the Second Circuit's decision in Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266 (2d Cir. 2005). See 2006 WL 285801, at *12-13, 29 (Feb. 3, 2006) (arguing that the Second Circuit's holding that the doctrine of laches applies to the United States hampers enforcement of the Non-Intercourse Act); 2011 WL 1881816, at *18 (same).

Plaintiff further relies on cases decided under the "fair and honorable dealings" provision of the Indian Claims Commission Act ("ICCA") to support its conclusion that there is a specific duty to uphold the provisions of the Non-Intercourse Act. Pl.'s Resp. at 25-28 (discussing ICCA cases that resulting in damages awards for violations of the Non-Intercourse Act). In order to prevail under the "fair and honorable dealings" provision of the ICCA, plaintiffs in those cases were not required to show a specific duty in a source of law as Plaintiff here must do. Thus, those cases do not apply nor aid Plaintiff's here.

Importantly though, this Court need not reach the issue of whether the Non-Intercourse Act creates mandatory fiduciary duties for the executive or judicial branches (or whether the Act cannot be fairly interpreted as providing for money damages, see Def.'s Mot. at 20). Regardless of whether there are specific duties in the Non-Intercourse Act, the Act in no way prohibits a federal district court from dismissing a case. Likewise, the language does not remove defenses or mandate that a federal district court must hear a case brought under it on the merits. In sum, the Non-Intercourse Act does not set forth specific enforceable money-mandating fiduciary duties requiring the courts of the United States to hear claims brought under the Act on the merits. The Court should dismiss Count I.

2. Claims Based on Customary International Law and Federal Common Law Do Not Fall within the Limited Waivers of Sovereign Immunity Found in the Tucker or Little Tucker Acts

Plaintiff's Response clarifies that Plaintiff believes it has invoked the waiver of sovereign immunity found in the Tucker Act based on a "non-tort claim under the common law for a judicial breach of the United States' human rights obligations under international law." Pl.'s Resp. at 29.

First, contrary to Plaintiff's representations, Pl.'s Resp. at 29-37, common-law principles cannot serve as a substitute at the *first* step of the analysis for identifying specific statutory or regulatory rights whose violation forms the predicate for an Indian Tucker Act claim. It is well settled that the Tucker and Indian Tucker Acts themselves do "not create any substantive right enforceable against the United States for money damages," Mitchell II, 463 U.S. at 216 (citations omitted); see Testan, 424 U.S. at 398, and the text of those Acts plainly does not waive sovereign immunity from claims arising under "common law" principles. Accordingly, in the absence of a claim grounded in a violation of a particular "Act of Congress" or "regulation of an executive department," 28 U.S.C. § 1491(a)(1); see 28 U.S.C. § 1505, the Acts' statutory waivers of immunity are inapplicable. Only Congress (as the settlor of the trust) can impose duties on executive agencies, and waive sovereign immunity under the Indian Tucker Act. In other words, when a claim is not grounded in a "specific rights-creating or duty-imposing statutory or regulatory prescription[]" that the government allegedly has "failed faithfully to perform," Navajo I, 537 U.S. at 506, it therefore fails to state a claim cognizable under the Indian Tucker Act.

Moreover, regardless of whether Plaintiff is purporting (or not purporting) to rely on the United Nations Declaration on the Rights of Indigenous Peoples (Pl.'s Resp. at 32-33, 35, 37-

39), federal common law (id. at 35) or federal Indian law (id. at 36-37), Plaintiff cannot state a claim for money damages under customary international law. See Phaidin v. United States, 28 Fed. Cl. 231, 234 (1993) (noting that the Universal Declaration of Human Rights is "an authoritative statement of customary international law," but that "the Tucker Act contains no language permitting this court to entertain jurisdiction over claims founded upon customary international law" and that language providing for judicial recourse "is hortatory and cannot be fairly interpreted as mandating compensation for violations thereof."). As a general matter, multinational agreements do not create enforceable obligations. Pikulin v. United States, 97 Fed. Cl. 71, 77 (2011) (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 734-35) (holding that the Universal Declaration of Human Rights "does not of its own force impose obligations as a matter of international law" and that the International Covenant on Civil and Political Rights is "not self-executing and so [does] not itself create obligations enforceable in federal courts")); see also Garza v. Lapin, 253 F.3d 918, 925 (7th Cir. 2001) (holding that the American Declaration of the Rights and Duties of Man "is an aspirational document which, . . . [does] not on its own create any enforceable obligations on the part of any of the [Organization of American States] member nations").

The provisions of the United Nations Declaration on the Rights of Indigenous Peoples Plaintiff quotes (Pl.'s Resp. at 35) and the other multinational agreements Plaintiff cite (Pl.'s Resp. at 32)[4] do not create any enforceable rights against the United States for money damages under the Tucker Act. See Gimbernat v. United States, 84 Fed. Cl. 350, 354 (2008) ("The [Universal Declaration of Human Rights] does not contain any substantive rights enforceable

[4] Of quick note, Plaintiff cites to the United Nations Charter, the Universal Declaration on Human Rights, and the International Covenant on Civil and Political Rights in its brief, Pl.'s Resp. at 31, but none of these are found within its Complaint. Regardless, as discussed herein, this court has previously held numerous times that none of these multinational agreements contain rights enforceable against the federal government for money damages. This Court should similarly rule.

against the federal government for money damages, as required under the Tucker Act, and therefore such claims cannot be heard in this court."); Miller v. United States, 67 Fed. Cl. 195, 199-200 (2005) (holding the Court of Federal Claims lacks jurisdiction over international treaty law claims, including claims based on the International Covenant on Civil and Political Rights, "in which the government acts in its sovereign capacity."). The Court should dismiss Count II.

CONCLUSION

For the aforementioned reasons, the United States respectfully requests that the Court dismiss Plaintiff's Complaint.

Respectfully submitted May 16th, 2013,

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Assistant Attorney General

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