

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

THE HOPI TRIBE,

Plaintiff,

vs.

THE UNITED STATES

Defendant.

CASE NO. 1:12 – cv – 00045 - LB
Judge Lawrence J. Block

**MOTION TO DISMISS AND
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Pursuant to Rule 12(b)(1) of the United States Court of Federal Claims (“RCFC”), Defendant, the United States, moves to dismiss the Hopi Tribe’s complaint for lack of subject matter jurisdiction. In support of the requested relief, the United States submits the following.

INTRODUCTION

This action arises out of Plaintiff’s claims alleging that its federal reserved water rights for a quantity of water necessary to fulfill the purposes of the Hopi Reservation also creates a fiduciary duty for water quality. ECF No. 1 ¶ 26, 31. Specifically, the Hopi Tribe alleges the United States has a trust duty to ensure water quality for its Reservation and that it has breached this obligation to provide sufficient drinking water that meets Federal standards for human consumption. Id. ¶ 33. Plaintiff brings this claim with respect to the high levels of naturally occurring arsenic found in the drinking water systems that serve the Hopi villages of Mishongnovi, Polacca, Sipaulovi, Shungopavi and Keams Canyon. Id. ¶ 17. Of note, the Hopi Villages owns and operates the water supply systems for four villages, and the Bureau of Indian Affairs currently owns and operates the water supply system for Keams Canyon. Plaintiff seeks an award of monetary damages “to provide a permanent alternative source of drinking water for

the Reservation” and “temporary drinking water treatment for the Affected Villages while a more permanent water supply is being constructed.” *Id.*, Request for Relief ¶¶ 1-2.

Well before this litigation was filed, the United States has been working to secure temporary and a more permanent alternative water supply sources for the Hopi Villages. For example, the BIA has been providing bottled water to Keams Canyon since November 2011 and installed and is operating a treatment system to bring arsenic levels into compliance with the Safe Drinking Water Act (“SDWA”) standards. With respect to the other four villages, the federal government has voluntarily been exploring options to assist Hopi in securing funding to construct a new well-field along the Turquoise Trail and pipe water from this alternative cleaner water source to those four villages. This proposed project is known as the Hopi Arsenic Mitigation Project (“HAMP”). Plaintiff’s primary purpose in bringing this litigation is to secure funding for the HAMP.

Plaintiff’s breach of trust claim is jurisdictionally barred because Plaintiff has not identified any statutory or regulatory duty that mandates the United States provide an alternative water supply system for the Hopi villages. Absent a statutorily-imposed trust duty, there is no waiver of sovereign immunity and no basis for invoking this court’s jurisdiction under the Tucker Act or Indian Tucker Act. Navajo v. United States, 556 U.S. 287, 290-91 (2009) (“Navajo II”). Additionally, Plaintiff asserts that the United States has a fiduciary duty to protect and preserve the water supply, but does not allege a source of law that is money mandating nor plead any facts alleging the United States has caused or contributed to the level of arsenic in the drinking water on the eastern side of the Hopi reservation or to any contamination of the water supply system. As such, the Court should dismiss Plaintiff’s Complaint.

STANDARD OF REVIEW

Under RCFC 12(b)(1), claims over which the court lacks subject matter must be dismissed. Like other Federal courts, the CFC is a court of limited jurisdiction. Travelers Indem. Co. v. United States, 72 Fed. Cl. 56, 59 (2006). Federal courts presumptively lack subject-matter jurisdiction unless the pleadings affirmatively demonstrate otherwise. Renne v. Geary, 501 U.S. 312, 316 (1991); DaimlerChrysler Corp. v. United States, 442 F.3d 1313, 1318 (Fed. Cir. 2006). Plaintiffs who invoke the CFC's jurisdiction bear the burden of demonstrating that the court has subject-matter jurisdiction over the claims asserted by alleging "in the initial pleading . . . sufficient facts to establish the court's jurisdiction." Id. If subject matter jurisdiction is challenged, the plaintiff must "come forward with evidence establishing the court's jurisdiction . . . by a preponderance of the evidence." Id.; see also Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 88-89 (1998); M. Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323, 1327 (Fed. Cir. 2010). "[W]hen a federal court hears a jurisdictional challenges, 'its task is necessarily a limited one' . . . 'The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" Blackfeet Housing v. United States, No. 12-04C, 2012 WL 3126771 at *3 (Fed. Cl. Aug. 2, 2012) (internal citations omitted).

In deciding a Rule 12(b)(1) challenge to subject matter jurisdiction, the Court may consider the pleading allegations and exhibits and matters incorporated by reference or integral, to the claim for relief or defense, and facts of which the Court can take judicial notice. Crusan v. United States, 86 Fed. Cl. 415, 417-18 (2009). When a motion to dismiss challenges, as here, the Court's subject-matter jurisdiction, the Court may look beyond the pleadings and inquire into jurisdictional facts to determine whether jurisdiction exists. Rocovich v. United States, 933 F.2d

991, 993 (Fed. Cir. 1991). The complaint’s factual allegations are not controlling, and only uncontroverted factual allegations are accepted as true. Shoshone Indian Tribe of Wind River Reservation v. United States, 672 F.3d 1021, 1030 (Fed. Cir. 2012). “In resolving these disputed predicate jurisdictional facts, ‘a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings.’” Id. (quoting Cedars–Sinai Med. Ctr. v. Watkins, 11 F.3d 1573, 1584 (Fed. Cir. 1993)).

ARGUMENT

I. Plaintiff Does Not Identify a Source of Law That Creates an Enforceable Duty to Construct a Water Supply System and Deliver Drinking Water on the Hopi Reservation.

The United States is liable for money damages relating to trust responsibilities “only to the extent it expressly accepts those responsibilities by statute.” Blackfeet Housing, 2012 WL at *8 (quoting United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2325 (2011)).

Accordingly, the first hurdle that “must be cleared before a Tribe can invoke [the] jurisdiction” of this Court is to identify a substantive source of law that establishes specific fiduciary or other duties that the United States allegedly failed to faithfully perform. Navajo II, 556 U.S. at 290-91. Plaintiff claims the United States has breached specific fiduciary duties that arise as part of the Tribe’s reserved water right. In support, Plaintiff’s Complaint cites the 1882 reservation of land, the Act of July 22, 1958, 72 Stat. 403 (“Act of 1958”), and judicial decisions regarding the scope of the Hopi reservation. ECF No. 1 at ¶ 12. Neither Hopi’s reserved water rights nor the cited authorities contain specific prescriptions that mandate the United States construct a water supply system or deliver a certain quality of drinking water to the Hopi villages listed in the Complaint. As such, Plaintiff’s Complaint does not provide any specific fiduciary duties sufficient to invoke this Court’s jurisdiction or provide money damages.

For jurisdiction pursuant to the Indian Tucker Act, “a tribal plaintiff must invoke a rights-creating source of substantive law that ‘can fairly be interpreted as mandating compensation by the Federal Government for damages sustained.’” United States v. Navajo Nation, 537 U.S. 488, 503 (2003) (“Navajo I”) (quoting United States v. Mitchell, 463 U.S. 206, 218 (1983) (“Mitchell II”). A “money-mandating” source of law is one that must be “‘fairly interpreted’ or ‘reasonably amen[]able’ to the interpretation that it ‘mandates a right of recovery in damages.’” Adair v. United States, 497 F.3d 1244, 1250 (Fed. Cir. 2007) (quoting United States v. White Mountain Apache Tribe, 537 U.S. 465, 472–73 (2003)). In sum, “the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.” Navajo I, 537 U.S. at 506. “*If* a plaintiff identifies such a prescription, and *if* that prescription bears the hallmarks of a conventional fiduciary relationship . . . *then* trust principles (including any such principles premised on ‘control’) could play a role in ‘inferring that the trust obligation [is] enforceable by damages,’” Navajo II, 556 at 309 (citations omitted, emphasis in original). At issue here, is whether Congress has imposed any “specific prescriptions” on the United States that would require it, in this circumstance, to provide a water supply system that delivers drinking water that meets applicable federal standards under the Safe Water Drinking Act. As discussed below, as a legal matter, Plaintiffs have not pled or otherwise identified any positive law – emanating from statutes, treaties, executive orders, regulations, or similar law – that imposes such a specific fiduciary duty.

A brief discussion of federal reserved water rights and the history of the Hopi Reservation illustrates why Plaintiff’s Complaint does not set forth a specific fiduciary duty. The United States creates reservations by withdrawing land from the public domain and reserving the land for a particular purpose, such as an Indian reservation. See Shoshone-

Bannock v. Reno, 56 F.3d 1476, 1479 (D.C. Cir. 1995). With respect to Indian reservations, courts have long applied the federal reserved water rights doctrine, giving the United States, on behalf of an Indian tribe, at least all of the appurtenant unappropriated waters necessary to accomplish the purposes for which the government created the reservation. See Arizona v. California, 373 U.S. 546, 601 (1963); Winters v. United States, 207 U.S. 564, 577 (1908). The D.C. Circuit has noted that “[w]ith respect to reserved water rights on Indian reservations, these federally-created rights belong to the Indians rather than to the United States, which holds them only as trustee.” Shoshone-Bannock, 56 F.3d at 1479. Moreover, the federal reserved water rights doctrine recognizes and preserves an Indian Tribe’s aboriginal rights to water to support aboriginal activities that have been ongoing since time immemorial. United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983).

On December 16, 1882, President Arthur established the 1882 Reservation for “the use and occupancy of the Moqui [Hopi] and such other Indians as the Secretary of the Interior may see fit to settle thereon.” See I Charles J. Kappler, Indian Affairs: Laws and Treaties 805 (1904). Based on this 1882 Reservation as well as the Hopi Tribe’s aboriginal occupancy and water use within the Reservation, the United States has claimed water rights on behalf of the Hopi Tribe in the ongoing Little Colorado River Adjudication in Northern Arizona. See United States’ Second Amended Statement of Claimant on Behalf of the Hopi Tribe, November 13, 2009, filed with Arizona Department of Water Resources per Arizona law.

In 1958, Congress “sought to provide for a judicial resolution of the long-standing territorial dispute between the two tribes [Hopi and Navajo] over [the 1882] reservation in Northeastern Arizona.” Hamilton v. MacDonald, 503 F.2d 1138, 1141 (9th Cir. 1974). “The legislation authorized either tribe to commence or defend a suit against the other . . . ‘for the

purpose of determining the rights and interest of said parties . . . and quieting title thereto in the tribes” Id. (quoting the Act of 1958). After extensive litigation between the Hopi Tribe and Navajo Nation throughout the 20th Century, the lands within the 1882 Reservation were divided into parcels known as District 6, Hopi Partitioned Lands and Navajo Partitioned Lands. See Healing v. Jones, 210 F. Supp. 125, 192 (D. Ariz. 1962), aff’d, 373 U.S. 758 (1963); Sekaquapewa v. MacDonald, 575 F.2d 239 (9th Cir. 1978). In sum, the Act of 1958 established a judicial process to resolve the territorial dispute between the Hopi and Navajo tribes regarding what land constitutes the Hopi Reservation.

The fact that the United States holds the Hopi Reservation or Hopi’s reserved water rights in trust does not create an enforceable breach of trust action for water infrastructure or water quality. ECF No. 1 at ¶ 32 (“The water supply constitutes the trust property or the res . . .”). Such a conclusion fundamentally misapplies Supreme Court precedent set forth in Mitchell I and the Navajo Nation decisions (timber in Mitchell I and mineral resources in Navajo). In both decisions the Supreme Court found the specific claims and statutes at issue did not contain enforceable money mandating trust duties, and that general trust law played no role in supplementing the limited obligations established in the statutes at issue in those cases.

Most important to the discussion here, the Supreme Court did not view the United States’ general role as trustee or the mere holding of the resource in trust to be the dispositive factor. Rather, in addition, a plaintiff must identify another source of law that contains a mandatory money mandating fiduciary duty. The fact that Hopi’s reserved water quantity right originates, in part, from the United States setting aside land and holding that land in trust does not negate the requirement that it show a specific statutory duty related to the relief sought (i.e., build water infrastructure and provide a certain quality of drinking water). Further, imposing a duty under

the circumstances at issue here, to provide a certain quality of drinking water on the United States, would make the United States an insurer or guarantor against losses by natural causes, and that is not its role. As the Supreme Court has cautioned “a trustee is not an insurer of trust property.” United States v. Mason, 412 U.S. 391, 398 (1973) (tribal breach of trust claim against the government).

Courts have likewise consistently declined to construe the United States’ general trust duty regarding reserved water rights as a specific enforceable mandatory duty for water infrastructure or water quality. In fact, when asked to find a mandatory duty to develop and provide irrigation water on the Salt River Indian reservation, the Court of Claims held that the United States’ trust duty concerning tribal water rights is limited. See Salt River Pima Maricopa Indian Community v. United States, 26 Cl. Ct. 201, 202 (1992). In Salt River, the Tribe alleged that the United States breached its trust duty by failing to develop irrigation systems that would irrigate the tribal lands. The Court of Claims noted that the Tribe had not identified any statutes or regulations supporting its claim and that the doctrine of reservation water rights was limited. Id. Indian allottees have also claimed that a fiduciary duty exists that requires the United States to deliver irrigation water on an Indian reservation, but the Claims Court has declined to find a compensable fiduciary duty for those circumstances. See Grey v. United States, 21 Cl. Ct. 285 (1990). Here, this Court should hold that there is no specific fiduciary duty to construct an alternative water supply system or to develop and deliver a certain quality of drinking water to the Hopi Reservation.

Notably absent from Plaintiff’s Complaint are any allegations regarding wrongful conduct by the United States that caused or has contributed to the level of arsenic (which is naturally occurring) in the drinking water on the eastern side of the Hopi Reservation. Instead,

Plaintiff's complaint relies upon the general trust relationship (pursuant to which the United States brings and prosecutes Indian water rights for a quantity of water) and asks this Court to infer a specific duty to supply a certain quality of drinking water. See generally ECF No. 1. There is no question that the United States Government has a "general trust relationship" with Tribes. See Mitchell II, 463 U.S. 206, 225 (1983); Lincoln v. Vigil, 508 U.S. 182, 194-95 (1993). As recently reiterated by the Supreme Court, "Congress may style its relations with the Indians as 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to a trust relationship between private parties at common law." United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2323 (2011) (citing United States v. Mitchell, 445 U.S. 535, 542 (1980) ("Mitchell I") and Mitchell II, 463 .S. at 224). Thus while the general trust relationship between the United States and the Tribe may "reinforc[e]" the conclusion that the relevant statute or regulation imposes fiduciary duties," the general "trust relationship alone is insufficient to support jurisdiction under the Indian Tucker Act." Navajo I, 537 U.S. at 506 (quoting Mitchell II, 463 U.S. at 225); see also United States v. Navajo Nation, 556 U.S. 287 (2009) ("Navajo II") (When "the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, ... neither the Government's 'control' over [Indian assets] nor common-law trust principles matter.").

To be explicitly clear, pursuant to the general trust duty, the United States has vigorously argued on behalf of the Tribe in the ongoing water rights adjudication, has contributed financial resources and high-level personnel to negotiating resolution of Hopi's water rights, and has used discretionary funding to assist the Tribe in securing an alternative water supply, which may include the completion of the HAMP. While, the United States fully intends to continue to assist

Hopi in reaching its water quality goals, Plaintiff's reliance on the general trust relationship does not provide a source of law for the finding of a mandatory trust duty here.

Plaintiff's Complaint cites United States v. Gila Valley Irrigation District, 920 F. Supp. 1444, 1445 (D. Ariz. 1996), aff'd, 117 F.3d 425 (9th Cir. 1997) for the proposition that quantity and quality of water are "inseparable." ECF No. 1 at ¶ 31. Plaintiffs overstate the holding in that case. In that case, the District of Arizona looked only at how junior appropriators' conduct impacted the senior appropriator's ability to use its water downstream. In that case, the court followed the principle that most western states follow:

What diminution of quantity, or deterioration of quality, will constitute an invasion of the rights of the first appropriator will depend on the special circumstances of each case, considered with reference to the uses to which the water is applied. . . . In all controversies, therefore, between him and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant.

Id. (quoting Atchison v. Peterson, 87 U.S. 507, 514-15 (1874)); see also Arizona Copper Co. v. Gillespie, 230 U.S. 46, 56-58 (1913) (upholding injunctive relief to prevent an upstream user from placing pollutants from mining activities into the stream, which was making the water unusable for the downstream irrigation use). That court did not make broad pronouncements about the relationship between water rights and water quality, but instead focused on the *actions* of the junior user in relation to the ability of the senior water user to exercise its water right in accordance with its intended use. Here, the issues in Plaintiff's Complaint do not involve claims by a senior water user against a junior water user. Plaintiff's Complaint does not even identify any action by the United States that has led to or contributed to the degradation of the drinking water on the Hopi Reservation. In sum, Plaintiff's complaint does not set forth a specific enforceable fiduciary duty and should be dismissed.

II. The Act of 1958 and the Safe Drinking Water Regulations Cannot be Fairly Interpreted as Money-Mandating.

Plaintiff's Complaint should also be dismissed because it does not identify a money-mandating source of law. "The claimant must demonstrate that the source of substantive law (s)he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" White Mountain Apache, 537 U.S. at 216-17 (citations omitted). Here, Plaintiff alleges that the United States failed to provide the Tribe with water of sufficient quality to maintain the reservation's purpose as a homeland. ECF No. 1 at ¶ 33. To support its claim, Plaintiff cites the Act of 1958 and the Safe Drinking Water Act ("SDWA") regulation that prescribes the maximum contamination standard for arsenic in drinking water. Neither the Act of 1958 nor the Environmental Protection Agency's regulations impose a duty on the United States to provide the Tribe with a certain quality of drinking water and, neither provides an express or implicit right to be paid money damages.

When a statute is found to mandate a right to recovery in damages, it is considered to be money-mandating. See Perri v. United States, 340 F.3d 1337, 1340 (Fed. Cir. 2003). A statute is not money-mandating where "it does not specify the amount to be paid or the basis for determining such amount." Id. "The allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum." Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007 (Ct. Cl. 1967); see also Perri, 340 F.3d at 1342. "Unless the statute requires the payment of money damages, there has been no waiver of the United States' sovereign immunity from liability from such damages, and the Court of Federal Claims [does] not have jurisdiction to entertain the claim." Perri, 340 F.3d at 1340-41.). The determination of whether an Act is money-mandating is based on the text of the statute. See

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999); see also Sursely v. Peake, 551 F.3d 1351, 1355 (Fed. Cir. 2009).

The Act of 1958 does not create a substantive entitlement for compensation. As discussed in detail above, the Act of 1958 provides a mechanism for judicial resolution of what land comprises the Hopi Reservation. Nothing in the language of the Act of 1958 expressly states or implies a fair inference to money damages, much less an inference of money damages for failing to construct a water system that provides a certain quality of drinking water. Likewise, the SDWA regulations cited by Plaintiff only contain the maximum contaminant level for arsenic in drinking water and do not expressly or impliedly contain language mandating money damages. See 40 C.F.R. § 141.62 (b) and (j); see also North Slope Borough v. Andrus, 642 F.2d 589, 611-612 (D.C. Cir. 1980) (holding there are no specific enforceable fiduciary trust duties in the Marine Mammal Protection Act, the Endangered Species Act, the National Environment Policy Act, or in the Outer Continental Shelf Land Act).

Additionally, a money-mandating duty cannot be fairly interpreted from any statute or regulation as fairly implying a damages remedy where Congress has provided an alternative remedy for the alleged wrongful conduct. See United States v. Bormes, 133 S. Ct. 12, 18-20 (2012). Here, Congress provided a civil remedy against the United States or any agency of the United States “who is alleged to be in violation of any requirement” of the Safe Drinking Water Act’s (“SDWA”). 42 U.S.C. § 1449 (a)(1). Presumably, were Plaintiff able to state a SDWA claim against the United States for failing to provide clean water, they could request that a district court order remediation of the drinking water supply system to meet the EPA proscribed standard for arsenic. We note that Plaintiff owns and operates the drinking water supply system for four of the villages at issue in this litigation and EPA has already ordered remediation of the

water supply system that BIA owns and operates, which provides water to the other Hopi Village at issue.¹

In sum, the Tribe cannot point to any statute or regulation that imposes a duty to provide them a certain quality of water, and in any event, the sources of law Plaintiff identifies are not money mandating. The SDWA, for example, has express remedy provisions and the Court should not imply a money damages remedy for failing to construct a water supply system or to deliver contaminate free drinking water. See Lebeau v. United States, 474 F.3d 1334, 1343 (Fed. Cir. 2007), cert denied, 551 U.S. 1446 (2007). “To permit recovery for a breach of trust claim in a case such as this . . . would defeat Congressional intent.” Id. In light of the Congressionally imposed remedial scheme, one cannot fairly interpret additional remedies not articulated by Congress. See Bejay v. United States, 16 Ct. Cl. 107, 121-124 (1987). Plaintiffs’ Complaint should be dismissed.

CONCLUSION

For all of the foregoing reasons, the Court should dismiss Plaintiff’s Complaint.

Dated: January 5, 2013

Respectfully submitted,

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¹ As noted above, the BIA has been complying with the EPA’s Administrative Order, has installed a reverse osmosis facility and will continue to comply regardless of the outcome of this litigation.

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