

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

REPLY IN SUPPORT OF MOTION TO DISMISS

I. Plaintiff must identify a source of law that creates an enforceable duty to construct a water supply system and deliver drinking water on the Hopi Reservation in order to fall within the Tucker Act’s waiver of sovereign immunity.

Plaintiff is unable to come to grips with the Supreme Court guidance in Jicarilla v. United States, 131 S. Ct. 2313, 2325 (2011), that the “Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.” Pl.’s Resp. at 29-30 (ECF No. 13) (quoting Def.’s Mot. to Dismiss at 4 (ECF No. 10)). Instead, Plaintiff advocates throughout its brief that the Court’s focus should be on the level of “control,” “actions” and “involvement” by the United States as to the Hopi Tribe’s “access to water.” Pl.’s Resp. at 1-2, 12-25, 29. Contrary to Plaintiff’s fundamental misunderstanding, the Supreme Court has held that only Congress, as the settlor of the trust can manifest an intention to impose duties which are enforceable in courts. See Jicarilla, 131 S. Ct. at 2325, n.6 (citing Restatement (Second) of Trusts § 25, cmt. a (1959)). “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.” Jicarilla, 131 S. Ct. at 2325 (internal quotations and citations omitted).

Additionally, contrary to Plaintiff's representations, Pl.'s Resp. at 25, common-law principles or "control" 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," United States v. Mitchell, 463 U.S. 206, 216 (1983) ("Mitchell II") (citations omitted); see United States v. Testan, 424 U.S. 392, 398 (1976), 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. All of the Supreme Court decisions affirm that this is the correct analysis. Again, 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," United States v. Navajo, 537 U.S. 488 at 506 (2003) ("Navajo I"), it therefore fails to state a claim cognizable under the Indian Tucker Act.

In order to find a fairly interpreted mandate for damages consistent with Supreme Court precedent, this Court must first evaluate what Congress has required, not what role the United States plays with regard to building water infrastructure on the Hopi Reservation. As discussed below, as a legal matter, Plaintiff has not pled or otherwise identified any positive law – emanating from statutes, treaties, executive orders, regulations, or similar law – that imposes a

specific fiduciary duty that falls within the Tucker Act's waiver of sovereign immunity. The Court should dismiss.

II. Plaintiff's Complaint 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.

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, i.e., its Winters v. United States, 207 U.S. 564 (1908) rights (hereinafter "Winters rights"), also creates a fiduciary duty for water quality. Compl. ¶¶ 26, 31 (ECF No. 1). Specifically, the Hopi Tribe's Complaint 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 level of 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 own and operate 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.

Plaintiff's Response Brief now alleges two breaches of trust. First, Hopi alleges that the Indian Health Service "designed and constructed wells that provide undrinkable water and violate standards set to protect public health." Id. at 28; see also id. at 32.¹ To survive a motion

¹ Plaintiff's Declaration of Lionel Puhuyesva (ECF No. 13-1) states that the wells were installed in 1968, 1970, 1978, 1979 and 1986. Id. ¶¶ 6-11. As Plaintiff raised this allegation for the first time in its Response Brief, the United States did not include a statute of limitations

to dismiss, the complaint must comply with Rule 8(a) 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) (citation omitted). Here, Plaintiff’s Complaint does not set forth the first allegation, which they raised for the first time in their Response Brief, that the Indian Health Service drilled the wells for the drinking water system and breached a trust duty in so doing. The Complaint likewise does not cite any of the statutes relied upon by Plaintiff regarding the construction or drilling of the wells. As motions to dismiss are decided upon the allegations in plaintiff’s complaint, the Court can dismiss Plaintiff’s Complaint here without addressing Plaintiff’s newly raised allegation. Moreover, even if the Complaint included this first allegation regarding well drilling, the allegation would fail for the reasons outlined in Section III below.

Second, as set forth in its Complaint, Plaintiff alleges that the United States should be required to build drinking water infrastructure on the Hopi Reservation. Pl.’s Resp. at 24, 32. Indeed, Plaintiff’s Complaint relies upon the Executive Orders creating the Hopi Reservation and the Winters doctrine. See Compl. ¶¶ 23-33. As explained in the United States’ opening brief, neither the Executive Orders nor the Winters doctrine create money-mandating fiduciary duties. Def.’s Mot. at 4-13. Hopi’s response that the United States’ advocacy on behalf of Hopi in the ongoing water quantity Winters rights proceeding somehow creates a duty that requires the United States build water infrastructure on the Reservation, Pl.’s Resp. at 14-15, is unavailing.

argument in its opening motion to dismiss. The United States believes Plaintiff’s allegation with regard to the drilling of the wells falls outside the statute of limitations. Moreover, the United States notes that at the time wells were drilled the arsenic level in the water fell within the Environmental Protection Agency Safe Drinking Water Act’s regulation on arsenic. See Final Rule 40 Fed. Reg. 59,566, 59,570 (Dec. 24, 1975) (to be codified at 40 C.F.R. pt. 141); c.f., Compl. ¶ 16.

Winters rights result, in part, from the setting aside of land for Indian tribes by the United States. Regardless of the amount of water reserved at the time the Hopi Reservation was set aside, the Executive Order setting aside the Reservation does not contain any 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. Id. at 6-7. (discussing the creation of the 1882 Reservation by Executive Order and subsequent congressional enactments to settle the issue of what land comprises the Hopi Reservation). Likewise, the fact that Hopi's reserved water quantity rights originate, in part, from the United States holding the set aside 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) that could constitute a mandate from Congress for a damages remedy. See id. at 6-10.

The cases cited by Plaintiff do not change this result. First, Duncan v. United States, 229 Ct. Cl. 120 (1981), addresses a specific statutory requirement found in the Rancheria Act, P.L. No. 85-671, 72 Stat. 619 (1958) requiring the federal government construct water facilities. That statute does not apply to Hopi, which Hopi concedes, see Pl.'s Resp. at 16, n.2. Similarly, as discussed in the opening motion, Hopi's reliance on United States v. Gila Valley Irrigation District, 920 F. Supp. 1444, 1445 (D. Ariz. 1996), aff'd, 117 F.3d 425 (9th Cir. 1997), see Pl.'s Resp. at 14, strains the holding of that case, which addresses the relationship between junior and senior water appropriations in the context of water rights, and makes no broad pronouncements on the general relationship between water quality and quantity. See Def.'s Mot. at 10-11. In sum, Hopi's Complaint does not survive the motion to dismiss.

III. Plaintiff's Response Brief does not identify a source of law that creates an enforceable duty to drill wells or to construct water infrastructure on the Hopi Reservation.

Assuming that Plaintiff's Complaint provides "fair notice" of its claims, even though none of the statutes cited in Plaintiff's Response Brief are in the Complaint, Plaintiff's Complaint should nonetheless be dismissed. None of the cited statutes contain specific, enforceable, money mandating trust duties that waive this Court's jurisdiction. Plaintiff's brief relies on the Snyder Act (25 U.S.C. § 13), the Indian Health Care Improvement Act (25 U.S.C. § 1632(a)(5)), the Transfer Act (42 U.S.C. § 2004a(a)(1)), 25 U.S.C. § 162a(d)(8), and the Navajo-Hopi Rehabilitation Act of 1950 (25 U.S.C. §§ 631, 638). Pl.'s Resp. at 15, 22. As discussed below, the Supreme Court and Federal Circuit have already held that some of these statutes do not contain money-mandating fiduciary duties and the language of the others simply do not apply to Plaintiff's allegations here. Plaintiff's Complaint should be dismissed.

The Court of Federal Claims has already held that the Snyder Act, the Indian Health Care Improvement Act and the Transfer Act are not money mandating statutes for jurisdictional purposes. See Allred v. United States, 33 Fed. Cl. 349 (1995). Basing its decision on the Supreme Court's interpretation of these statutes in Lincoln v. Vigil, 508 U.S. 182, 193 (1993),² the court held in Allred that the Snyder Act, the Indian Health Care Improvement Act and the Transfer Act "are in essence discretionary lump-sum appropriations, 'the very point of [which] is to give an agency the capacity to adapt to changing circumstances and meet its statutory

² In Lincoln, the Court held that the decision by the Director of IHS to discontinue a health program altogether was "committed to agency discretion by law." 508 U.S. at 193 (citation omitted). Recognizing the existence of a general trust relationship in dealing with Indian tribal property, the Court stated: "Whatever the contours of that relationship, though, it could not limit the Services' discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide." Id. at 195. Thus, IHS discharges Congress's desire to ensure the existence of health services to qualified Indians as best it can, within its discretion, given the limited resources provided by Congress.

responsibilities in what it sees as the most effective or desirable way.” Allred, 33 Fed. Cl. at 355 (quoting Lincoln, 508 U.S. at 192); see also Quechan Tribe of the Fort Yuma Reservation v. United States, No. Civ. 10-02261-PHX-FSM, 2011 WL 1211574 (D. Ariz. Mar. 31, 2011).

The Supreme Court has also addressed the limited nature of the Snyder Act's mandate with regard to the BIA. The Snyder Act was enacted to provide Congressional authority for BIA activities in order to remedy the problem of appropriation requests by the House Committee on Indian Affairs being consistently stricken on the floor by point-of-order objections. See Morton v. Ruiz, 415 U.S. 199, 206 (1974). The Snyder Act imposes no “geographical limitation on the availability of general assistance benefits and does not prescribe eligibility requirements or the details of any program.” Id. at 207. Instead, it is broadly phrased leaving direction and supervision of the programs for the “benefit, care and assistance of the Indians” completely to the BIA. Id. It “contains no provision that ... mandates payment of damages, so that plaintiff could successfully allege breach of any obligation by the federal government.” Erikson v. United States, 12 Cl. Ct. 754, 759 (1987); see also Adams v. Hodel, 617 F. Supp. 359, 361-62 (D.D.C. 1985) (supporting limited view of Snyder Act's mandate).

Plaintiff further relies upon 25 U.S.C. § 162a(d)(8), Pl.’s Resp. at 15, 22, but that statute only applies in the context of trust funds. Section 162a involves the deposit and management of tribal funds in banks. See 25 U.S.C. § 162a. In 1994, as part of passing the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239, Congress amended Section 162a to include subsection d entitled “Trust responsibilities of Secretary of the Interior.” Subsection eight (8) lists “[a]ppropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.” Id. Importantly, the House Report’s section by section analysis of the amendments stated that “Section 101 [codified as 25

U.S.C. § 162a(d)] amends 25 U.S.C. 162a by adding a new subsection which provides a list of the Secretary's proper discharge of trust responsibilities regarding Indian trust funds." H.R. Rep. No. 103-778 (1994), reprinted in 1994 U.S.C.C.A.N. 3467 at 3473, 1994 WL 542740, at * 15. (emphasis added). Not only does the language of the statute disclaim its relevance to whether Interior has an enforceable duty to drill wells or establish water infrastructure on an Indian Reservation, but the legislative history defeats Plaintiff's overly broad reading of the subsection.

The Navajo-Hopi Rehabilitation Act also does not help Plaintiff. Pl.'s Resp. at 15-16, 22. The Rehabilitation Act authorized the Secretary in 1950 to undertake, "within the limits of the funds . . . appropriated pursuant to [the Act]," a "program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians [and] the more productive employment of their manpower." 25 U.S.C. § 631. That program included projects for education, road, soil and water conservation, irrigation, telecommunications, and business development, and the Act expressly specified the amount of federal funding "authorized to be appropriated" for each such element of the program. Id. Among other things, the Act authorized the Secretary to use \$2,500,000 in appropriated funds for "[a]gency, institutional and domestic water supply." Id. § 631(9). Congress directed that the "foregoing program" shall be conducted "in a manner which will provide for completion of the program, so far as practicable, within ten years from April 19, 1950." Id. § 632; see H.R. Rep. No. 85-2455, at 4, 7 (1958) (discussing program's status). After Congress added new funding for essential road-building in 1958, H.R. Rep. No. 85-2455, at 1, 4 (discussing amendment to 25 U.S.C. 631(7)), the associated road construction ended around 1964, and the Secretary completed the program authorized by the Act at that time. S. Rep. No. 93-11, at 1 (1973). Likewise, Section 638, the Rehabilitation Act's requirement that the Navajo Tribal Council and the affected Indian communities "be kept

informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by [the Act],” 25 U.S.C. § 638, also ceased to have any effect around 1964 before the alleged breaches of trust in this case. As such, it is difficult to see how this statute plays a role here. Moreover, Plaintiff’s Declaration of Puhuyesva, ECF No. 13-1, states that the wells were drilled after this date. See id. at ¶¶ 6-11.

Plaintiff further argues that the Bureau of Indian Education’s use of water at Keams Canyon and Indian Health Service’s use of the Tribe’s wells in Polacca for the hospital creates jurisdiction in this Court. Pl.’s Resp. at 18. (quoting United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003)). Contrary to Plaintiff’s reading, in Apache, the Supreme Court did not broadly state that any use by an executive agency within the boundaries of a Reservation takes the place of a statutory duty. Here, the Indian Health Service is a user of the water supply system, and has no control or ownership over the water system. The Hopi Villages and Tribe decide how the system will be managed and operated. Indian Health Service simply receives water bills that they pay like any other user of the system. Similarly, the United States does not hold the water supply system in trust for Hopi.

Instead, in Apache, the Supreme Court evaluated a unique, single-sentence statute specifying that the former Fort Apache Military Reservation be “held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes” 537 U.S. at 469 (quoting Act of Mar. 18, 1960 (1960 Act), Pub. L. No. 86-392, 74 Stat. 8). That statutory text “expressly and without qualification” employed the term “trust” as “a term of art” that is “commonly understood to entail certain fiduciary obligations” - and it did so in conjunction with express authorization for the government to occupy and exclusively use the premises for its *own*

(not the tribe's) purposes. Apache, 537 U.S. at 480 (Ginsburg, J., concurring). That express statutory “authority to make direct use of portions of the trust corpus” and the Court's apparent conclusion - as a matter of statutory construction - that the statute's use of the term “trust” embodied the principle that “a fiduciary actually administering trust property may not allow it to fall into ruin on his watch,” established, the Court held, a statutory obligation to preserve the trust corpus that the government exclusively used for its own purposes. See id. at 475; see also id. at 479-80 (Ginsburg, J., concurring) (“threshold” requirement of “a substantive source of law that establishes specific fiduciary or other duties” is satisfied by the text of the 1960 Act, which imposed “caretaker obligations” accompanying the government's “daily occupation” and “direct use of portions of the trust corpus”) (quoting Navajo, 537 U.S. at 506, 508). The government's duty in Apache thus derived directly from the *statute* itself, not from general principles of common law or “control” over the asset. Plaintiff has identified no such statute with regard to the Indian Health Service’s use of the Polacca wells or the Bureau of Indian Education’s use of water at Keams Canyon.

Importantly, Apache did not expressly alter the governing analysis set forth in Navajo or state that generalized notions of “control” give rise to actionable duties derived from the common law of trusts, and there is no basis for reading Apache to have done so *sub silencio*. Both Navajo and Apache were decided on the same day, and Justice Ginsburg, who authored Navajo, joined Apache - a 5-4 decision - based on her express understanding that Apache “is not inconsistent” with Navajo under the reading articulated above. Apache, 537 U.S. at 479-80 (concurring opinion). Similarly, Justice Breyer, who joined the opinion in Navajo, also joined Justice Ginsburg's concurrence in Apache explaining how Apache could be reconciled with Navajo. And Justice Souter, who authored Apache, indicated in his Navajo dissent that while a

“right to damages can be inferred from general trust principles” at the second stage of the pertinent analysis, that inquiry occurs “*once* a statutory or regulatory provision is found to create a specific fiduciary obligation” at step one. Navajo, 537 U.S. at 514 (Souter, J., dissenting) (emphasis added).

That understanding of the Indian Tucker Act is reinforced by Mitchell II, which formed the doctrinal foundation for both Navajo and Apache and was careful to ground the duties at issue in that case in specific statutory and regulatory prescriptions. Applying the two-step analysis subsequently reaffirmed by Navajo, 537 U.S. at 506, the Court in Mitchell II carefully partitioned its opinion into discrete sections separating the two inquiries and limited the use of common-law-trust principles to the Court's money-mandating analysis at step two. See Mitchell II, 463 U.S. at 219 (explaining organization of Part III of opinion); id. at 219-28 (Part III.A and III.B). Thus, the Court in Part III.A of its opinion (463 U.S. at 219-23) turned first to examine the “Acts of Congress and executive department regulations” on which the plaintiffs “based their money claims.” Id. at 219 (describing Part III.A). While those claims were described in the aggregate as “alleged breaches of trust in connection with [the government's] management of forest resources on allotted [Indian] lands,” id. at 207, each of the violations alleged by the plaintiffs tracked specific provisions in statutes and regulations governing federal Indian timber management. See id. at 210 (describing claims); id. at 209, 211, 219-23 & nn.23-28 (discussing governmental duties under statutes and regulations on which the damages claims were predicated). Consequently, the discussion of those duties in Mitchell II focused on the obligations imposed by the particular statutes and regulations at issue and nowhere invoked common-law trust principles to define the applicable duties. See id. at 219-223; see also Navajo, 537 U.S. at 505-06.

Mitchell II's discussion of trust principles was instead limited to Part III.B of the opinion (463 U.S. at 224-228), which addressed - at step two of the analysis - whether the relevant statutes and regulations could in turn “fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose.” Id. at 219 (describing Part III.B). Because a trustee normally is “accountable in damages for breaches of trust,” id. at 226, the Court concluded that statutes and regulations that give the government “full responsibility” and identified “fiduciary obligations” for the sole “benefit of the Indians” in order to “generate proceeds for the Indians” may “fairly be interpreted as mandating compensation” for a breach of those duties. Id. at 224-27. This limited use of trust principles (to infer by analogy a statutory and regulatory intent to mandate a remedy in damages) merely evaluates whether the particular statutes or regulations that themselves impose specific duties are, *in addition*, money-mandating provisions that are actionable under the Indian Tucker Act.

Finally, Plaintiff claims that the United States has failed to act with regard to its “commitment” to build the Hopi Arsenic Mitigation Project (“HAMP”). Pl.’s. Resp. at 24. As discussed below for purposes of resolution of the Motion to Dismiss, the United States accepts Hopi’s characterization of the facts, but notes that the document relied upon by Hopi to prove such a “commitment” speaks for itself. See Pl.’s Exhibits (ECF No. 13-1) at 28 (“[n]o commitment of IA [Indian Affairs] funds can be guaranteed at this time for contribution towards the HAMP.”). Regardless, this Court does not have jurisdiction to award money damages where Plaintiff’s disagreement is with how the agency has allocated its resources. See infra n.2. For an award of money damages from this Court, Plaintiff must point to a statutory duty to take action – a hurdle Plaintiff here has not overcome. Moreover, “policy issues as to the proper allocation of resources for Indian health care [or other Indian programs] . . . are best addressed through the

political process,” Quechan Tribe of the Fort Yuma Reservation v. United States, No. Civ. 10-02261-PHX-FSM, 2011 WL 1211574 (D. Ariz. Mar. 31, 2011), and not in courts.

IV. Discovery is unnecessary for resolution of the Motion to Dismiss.

Hopi requests that the Court order discovery before deciding the motion to dismiss because Hopi would like access to documents and witnesses “that more fully demonstrate the significant level of federal involvement in constructing the groundwater wells” Pl.’s Resp. at 34. Hopi’s request, much like its emphasis on control and involvement throughout its brief, puts the cart before the horse. The question pending before the Court is whether there are legal obligations found within sources of law that Plaintiff claims requires the United States to take certain actions, namely building a new drinking water system for the Hopi Reservation.

Resolving the motion to dismiss does not require any further factual investigation and for purposes of this motion, the United States will accept the facts as set forth by Hopi. If this case proceeds beyond the motion to dismiss, the United States will most certainly take issue with Hopi’s characterization of its actions regarding water quality and the Hopi Reservation. For example, the United States has in no way “stalled” any efforts to establish the Hopi Arsenic Mitigation Project as alleged in Pl.’s Resp. at 24, and in fact, has been assisting Hopi to find a source of funding for the Project. Clarification of these characterizations are not necessary for resolution of the Motion to Dismiss. Moreover, the United States disagrees that the “merits of its claim are inextricably interwoven with the facts necessary to establish jurisdiction.” Pl.’s Resp. at 35. The legal question presented in the Motion to Dismiss of whether Hopi’s Complaint sets forth a legal basis for money damages is a different question than whether a breach of that legal duty has occurred.

CONCLUSION

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

Dated: April 26, 2013

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources
Division

/s/ Maureen E. Rudolph
MAUREEN E. RUDOLPH
Senior Trial Attorney
Natural Resources Section
Environment & Natural Resources Division
United States Department of Justice
P. O. Box 7611
Washington, D.C. 20044
Telephone: (202) 305-0479
Fax: (202) 353-2021

Of counsel:
Dondrae Maiden

Department of the Interior

Michael Shachat
Michael Wolf
Indian Health Service