IN THE UNITED STATES COURT OF FEDERAL CLAIMS

THOMAS G. LANDRETH, Plaintiff, v. THE UNITED STATES, Defendant.	No. 18-476L (Judge Campbell-Smith)

DEFENDANT'S REPLY IN SUPPORT OF THE MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Pursuant to Rules 7.2, 12(b)(1), and 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully files this reply in support of its motion to dismiss the amended complaint filed by plaintiff, Thomas G. Landreth, for lack of subject-matter jurisdiction or, alternatively, for failure to state a claim upon which relief can be granted.

ARGUMENT[1]

We explained in our motion the various jurisdictional and other problems pervading the amended complaint. *See* Def. Mot. at 6-14 (jurisdictional arguments); *id.* at 14-17 (non-jurisdictional arguments). Chiefly, although the amended complaint names the United States as the defendant, and suggests some indirect theories of Government liability, the gravamen of the pleading concerns alleged wrongdoing by the Quinault Indian Nation and seeks redress on that

[1] "Am. Compl." refers to Mr. Landreth's operative pleading. ECF No. 12. "Def. Mot." refers to our motion to dismiss the amended complaint. ECF No. 15. "Pl. Opp." refers to the brief that Mr. Landreth has filed opposing our motion to dismiss. ECF No. 21.

basis alone. The response to our motion, in turn—among other recent filings by Mr. Landreth, *see, e.g.*, ECF Nos. 19, 24, & 25—confirms much of the same.[2]

First, like the amended complaint, the response to our motion invokes various provisions of the United States Constitution and, at times, couches them as "[a]rticles of [an] express contract." *See, e.g.*, Pl. Opp. at 1 (citing the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Fifth and Fourteenth Amendments); *see also id.* at 10-11, ¶¶ 26, 29-30 (similar); *id.* at 13, ¶ 1 (quoting the First Amendment); *id.* at 17, ¶¶ 13, 15 (similar); *id.* at 31, ¶¶ 79-80 (similar). The response further invokes the Indian Civil Rights Act, 25 U.S.C. § 1302, *see, e.g.*, Pl. Opp. at 13, ¶ 2; *id.* at 31, ¶ 80, and alleges violations of Mr. Landreth's "civil rights." *See, e.g.*, *id.* at 7, ¶¶ 16, 18-20; *id.* at 15, ¶¶ 8-10; *id.* at 17, ¶ 15; *id.* at 18, ¶ 19; *id.* at 19, ¶ 21; *id.* at 20, ¶ 27; *id.* at 21, ¶ 32.

However, as we explained in our motion, the Court lacks jurisdiction over such constitutional and civil rights claims, including under the Indian Civil Rights Act. *See* Def. Mot. at 12-13.[3] Moreover, the Constitution is not itself a "contract." *Cf. Church v. Kelsey*, 121 U.S.

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[2] And to the extent that the response to our motion asserts new theories or claims not alleged in the amended complaint, we note that "[i]t is generally improper for a party to raise new claims not included in [his] complaint in an opposition to a motion to dismiss." *Driessen v. United States*, 116 Fed. Cl. 33, 44 n.10 (2014); *see, e.g.*, *Morgan v. United States*, No. 16-1510C, 2017 WL 2829396, at *7 (Fed. Cl. June 30, 2017); *see also Pollio v. MF Global, Ltd.*, 608 F. Supp. 2d 564, 568 n.1 (S.D.N.Y. 2009) ("[P]arties cannot amend their pleadings through issues raised solely in their briefs, and such facts [first raised in the brief] are thus irrelevant for purposes of determining whether plaintiff's Complaint should be dismissed for failure to state a claim[.]" (internal quotation marks and citation omitted)).

[3] *See also Smith v. United States*, 709 F.3d 1114, 1116 (Fed. Cir. 2013) (holding that the Tucker Act does not extend to due process and equal protection claims brought under the Fifth and Fourteenth Amendments); *United States v. Connolly*, 716 F.2d 882, 887 (Fed. Cir. 1983) (holding that the First Amendment "cannot be . . . interpreted to command the payment of money"); *Ballard v. United States*, 680 F. App'x 1007, 1008-09 (Fed. Cir. 2017) (per curiam) (affirming that the Court of Federal Claims "lacks jurisdiction to address claims based on the Commerce Clause"); *May v. United States*, 534 F. App'x 930, 933 (Fed. Cir. 2013) (per curiam)

282, 283-84 (1887) (holding that "[a] state constitution is not a contract" but instead "the fundamental law adopted by the people for their government").

Second, like the amended complaint, the response to our motion invokes the Indian Tucker Act, 28 U.S.C. § 1505. *See, e.g.*, Pl. Opp. at 4, ¶ 3. But for the reasons stated in our motion, Mr. Landreth has not alleged sufficient facts or asserted the right claims to proceed in this Court under that jurisdictional statute. *See* Def. Mot. at 6-7, 10.

Third, like the amended complaint, the response to our motion invokes the Washington state constitution and various provisions of Washington state law. *See, e.g.*, Pl. Opp. at 7, ¶ 16; *id.* at 15, ¶¶ 8-9; *id.* at 19, ¶ 24; *id.* at 21, ¶ 31; *id.* at 25-26, ¶¶ 49-50; *id.* at 26, ¶ 52; *id.* at 30-31, ¶¶ 73-77; *id.* at 32, ¶ 83. As we explained in our motion, however, those non-Federal sources of law are beyond the scope of the Tucker Act. *See* Def. Mot. at 13.

Fourth, like the amended complaint, the response to our motion suggests that the Treaty of Olympia, 12 Stat. 971 (1856), is itself a "contract" within the scope of the Tucker Act. *See, e.g.*, Pl. Opp. at 2; *id.* at 20-21, ¶¶ 28 & 30; *id.* at 30, ¶¶ 69-71; *id.* at 31, ¶ 82. We explained in our motion, however, why that is not so and why Mr. Landreth cannot assert claims in this Court pursuant to that treaty. *See* Def. Mot. at 8-11. Moreover, the response to our motion appears to acknowledge that Mr. Landreth is not a party to that allegedly "binding contract." Pl. Opp. at 20-21, ¶ 30.

Fifth, the response to our motion now contends that the Treaty of Olympia created a "Trust Relationship," Pl. Opp. at 2, which the Quinault Indian Nation allegedly "breach[ed]" by claiming ownership of Lake Quinault in 2013. *Id.* at 3; *see also, e.g.*, *id.* at 8; *id.* at 9, ¶ 24; *id.*

("The Privileges and Immunities Clause of Article IV of the Constitution . . . do[es] not mandate the payment of money[.]").

at 17, ¶¶ 12, 15; *id.* at 19, ¶ 21; *id.* at 20-21, ¶ 30; *id.* at 24, ¶ 42; *id.* at 30, ¶¶ 68-69. The response further suggests the United States is "responsible" to third parties for the Quinault Indian Nation's "breach of trust that goes along with the contract." Pl. Opp. at 8; *see also, e.g.*, *id.* at 17, ¶ 12; *id.* at 21, ¶ 30 ("duty to protect all citizens from wrongs").

To the extent that the response to our motion now alleges the existence of a fiduciary duty owed by the Quinault Indian Nation to Mr. Landreth under the Treaty of Olympia, *but cf. Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (describing the elements of a trust claim), and, further, a breach of that duty by the Quinault Indian Nation, it again wrongly asserts claims against entities other than the United States. *See* Def. Mot. at 11 (citing cases).

To the extent that the response suggests that the United States is vicariously liable to Mr. Landreth for the Quinault Indian Nation's alleged breach of a fiduciary duty, we note that "[t]he common law doctrine of respondeat superior alone is not a money-mandating 'contract, regulation, statute or constitutional provision' under 28 U.S.C. § 1491." *Stebbins v. United States*, 105 Fed. Cl. 81, 85 (2012) (citing cases). Moreover, "Indian tribes are sovereigns," *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 780 (1991), and that separate sovereignty is fundamentally incompatible with theories of vicarious liability. *See Fiebelkorn v. United States*, 76 Fed. Cl. 438, 440-41 (2007); *Marshall N. Dana Const., Inc. v. United States*, 229 Ct. Cl. 862, 864 (1982); *see also D. R. Smalley & Sons, Inc. v. United States*, 372 F.2d 505, 508 (Ct. Cl. 1967).

To the extent that the response also contends that the General Allotment Act of 1887, 24 Stat. 388 (1887), supports the existence of a trust/fiduciary duty owed to Mr. Landreth, *see, e.g.*, Pl. Opp. at 3, we note that that law imposed a fiduciary duty on the United States "for the sole use and benefit of the *Indian*[*s*] to whom . . . allotments . . . have been made[.]" 24 Stat.

at 389 (emphasis added); *see also United States v. Mitchell*, 445 U.S. 535, 542 (1980) (holding that "the Act created only a limited trust relationship between the United States and the [Indian] allottee"); *see also Quinault Allottee Ass'n v. United States*, 485 F.2d 1391, 1394, 1396-97 (Ct. Cl. 1973) (describing the purpose of the Act).

Sixth, the response now contends that Mr. Landreth has satisfied the requirements of Article 8 of the Treaty of Olympia, inasmuch as he allegedly attempted to "prove" the injury to his property to the Quinault Indian Nation's "agent." Pl. Opp. at 21, ¶ 32; *see also, e.g.*, *id.* at 24, ¶ 41. However, to the extent that "the Agent did not respond" to Mr. Landreth, *id.* at 21, ¶ 32, or allegedly "ignore[d]" his "emails and information proving depredation," *id.* at 24, ¶ 41, Mr. Landreth still has not sufficiently alleged that he has "satisfactorily *proven*" his claim "before the agent" such that he might now seek redress from the Federal Government following the Quinault Indian Nation's "*default* thereof." 12 Stat. at 972 (emphases added). In any event, as we explained in our motion, *see* Def. Mot. at 11, Article 8 of the Treaty of Olympia is not money-mandating because it vests the Government with unfettered discretion to provide "compensation" for the Quinault Indian Nation's depredations. *See* 12 Stat. at 972 ("compensation *may* be made" (emphasis added)).

Seventh, like the amended complaint, the response to our motion generally references this Court's jurisdiction over Federal taking claims, *see, e.g.*, Pl. Opp. at 1, 11-12, but appears to assert only that the Quinault Indian Nation effected a taking of Mr. Landreth's property by claiming ownership over Lake Quinault in 2013. *See, e.g.*, Pl. Opp. at 12; *id.* at 18, ¶ 20 (asserting that "the Quinault Indian Nation" has "definitely" committed "a taking under color of

the law").[4] As we noted in our motion, a Fifth Amendment taking requires action by the Federal Government, and the Quinault Indian Nation is not the Federal Government. *See* Def. Mot. at 15.

The response to our motion also contends that the Quinault Indian Nation acted illegally in claiming ownership of Lake Quinault. *See, e.g.*, Pl. Opp. at 7, ¶¶ 15, 18; *id.* at 12, ¶ 25; *id.* at 18, ¶ 19; *id.* at 27, ¶ 55; *id.* at 29, ¶ 63. But as we previously noted, illegal conduct cannot give rise to a taking claim. *See* Def. Mot. at 15-16.

The response to our motion further appears to claim that the "public purpose" needed to establish a taking was "[t]he creation of the Quinault Indian Reservation" over 150 years ago, Pl. Opp. at 20, ¶ 26, although the response also asserts that "[a]llowing the Quinault Indian Nation ownership of Lake Quinault will be creating a monopoly . . . detrimental to the whole public." Pl. Opp. at 29, ¶ 63. But as we explained in our motion, a taking does not occur unless it is "for *public* use." Def. Mot. at 16 (quoting U.S. Const. amend. V and emphasis added); *see also Kelo v. City of New London*, 545 U.S. 469, 478 (2005) (reaffirming that a taking cannot involve "conferring a private benefit on a particular private party").

Finally, to the extent that this suit seeks some sort of declaration that the United States owns the land beneath and/or controls Lake Quinault, *see, e.g.*, Pl. Opp. at 26, ¶ 51—but seeks monetary relief either from non-Federal entities or unrelated to a taking by the United States—it effectively asserts a standalone claim to quiet title governed by the Quiet Title Act, 28 U.S.C. § 2409a, which this Court "is without jurisdiction to entertain[.]" *Dwen v. United States*, 62 Fed.

[4] The response nonetheless suggests that the Federal Government has exercised its power of eminent domain in "Olympic National Park," albeit in connection with other land and after the payment of compensation. Pl. Opp. at 19, ¶ 22. We do not understand Mr. Landreth to assert a taking claim over this alleged Federal action.

Cl. 76, 80 (2004); *see also* 28 U.S.C. § 1346(f) ("The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.").[5]

CONCLUSION

For these reasons and the reasons stated in our motion, we respectfully request that the Court dismiss the amended complaint for lack of subject-matter jurisdiction or, alternatively, for failure to state a claim upon which relief can be granted.

[5] We nonetheless note that, like the amended complaint, the response to our motion variously alleges that (i) the United States retains ownership of Lake Quinault, *see, e.g.*, Pl. Opp. at 8-9; *id.* at 18, ¶ 16; *id.* at 26, ¶ 51; *id.* at 29, ¶ 61; and/or (ii) the state of Washington controls the lake's waters. *See, e.g.*, *id.* at 19, ¶¶ 24-25; *id.* at 21, ¶ 31 ("concurrent jurisdiction between the State of Washington and the United States Forest [S]ervice"); *id.* at 22, ¶ 33; *id.* at 25, ¶ 46 ("Lake Quinault . . . was repurchased by the government"); *id.* at 25, ¶ 49 ("owned by the public according to Washington State [laws]"); *id.* at 26, ¶ 52 ("Washington State Law applies"); *id.* at 32, ¶ 83. We further note that the United States has consented to be "join[ed] . . . as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of . . . water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." 43 U.S.C. § 666(a).

Respectfully submitted,

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February 25, 2019

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 25th day of February, 2019, I caused a copy of the foregoing "DEFENDANT'S REPLY IN SUPPORT OF THE MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT" to be filed with the Court.

☐ This filing was served electronically on all registered parties by operation of the Court's electronic filing system.

■ I also caused a copy of this filing to be served via

☐ hand delivery

■ mail

☐ third-party commercial carrier for delivery within 3 days

☐ electronic means, with the written consent of the party being served

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