UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

ROSEBUD SIOUX TRIBE, a federally recognized Indian tribe, and its individual members, Plaintiff, vs. UNITED STATES OF AMERICA et al., Defendants.	CIV. No. 16-5027- JLV **DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendants, by and through Ronald A. Parsons, Jr., United States Attorney, and Assistant United States Attorney Cheryl Schrempp DuPris, respectfully submit this brief in support of their motion for summary judgment based upon (1) the absence of any enforceable legal duty; (2) the absence of standing based on lack of redressability; and (3) the absence of jurisdiction to resolve Plaintiff's claims.

STATUTORY BACKGROUND

The Indian Health Service (IHS) is an agency of the United States Department of Health and Human Services (HHS) that provides health care services to American Indians and Alaska Natives. Defendants' Statement of Undisputed Material Fact (SOF) 1, 3, 5. IHS's authority to provide such services derives primarily from two statutes. The Snyder Act of 1921, 25 U.S.C. § 13,

constitutes a broad, general authority to "expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians," for, among other things, the "relief of distress and conservation of health." 25 U.S.C. § 13.[1] The Indian Health Care Improvement Act (IHCIA), 25 U.S.C. §§ 1601 *et seq.*, authorizes numerous programs to address particular Indian health initiatives, such as alcohol and substance abuse treatment, diabetes treatment, and urban Indian health.[2]

Congress annually appropriates funds for all IHS programs, whether operated under the IHCIA, the Snyder Act, or the ISDEAA, through lump-sum appropriations. SOF 7-9. One lump-sum appropriation is for the delivery of all "Indian Health Services." *See, e.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2564 (2015). Another lump-sum appropriation, "Indian Health Facilities," generally funds construction and maintenance of primary care and sanitation facilities.[3] *See, e.g.*, 129 Stat. at 2566. These

[1] The Transfer Act, 42 U.S.C. § 2001 *et seq.*, transferred the Snyder Act's authority to provide Indian health services from the Department of the Interior to the Department of Health, Education, and Welfare, the predecessor of HHS.

[2] On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act, Public Law No. 111-148, which amended and permanently reauthorized the IHCIA. In addition to these authorities, the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. §§ 5301 *et seq.*, authorizes Indian tribes and tribal organizations to contract with IHS to take over and operate federal health care programs that IHS would otherwise operate pursuant to the Snyder Act and the IHCIA. 25 U.S.C. §§ 5321, 5385. The ISDEAA is not at issue in this case.

[3] Starting in FY 2016, Congress also authorized a separate appropriation for "Contract Support Costs." *See, e.g.*, 129 Stat. at 2566. That appropriation covers a type of funding authorized for ISDEAA contracts.

appropriations are finite, for sums certain. Generally, Congress does not designate funds for specific IHS facilities in the appropriations acts. *Id.* at 2564, 2566.

Pursuant to 42 U.S.C. § 1395qq and 42 U.S.C. § 1396j, respectively, Congress has authorized IHS facilities to receive reimbursement from Medicare and Medicaid so long as the facilities meet all of the generally applicable conditions and requirements for such payments. Medicare and Medicaid reimbursements provide additional funds for health care services.

FACTUAL BACKGROUND

Plaintiff, the Rosebud Sioux Tribe (Tribe or Plaintiff), is a federally-recognized tribe. SOF 1; Doc. 1, ¶ 2. The Tribe is a band of the Sioux Nation and, as such, is a signatory tribe to the Treaty of Fort Laramie. Doc. 1, ¶ 2; SOF 2.

IHS delivers health care services through 170 "service units," including 25 IHS-operated hospitals. SOF 4; *See* IHS Profile, *available at* https://www.ihs.gov/newsroom/factsheets/ihsprofile/ (last visited June 25, 2019). Service units are local administrative units serving defined geographic areas and are grouped within 12 IHS Areas, which, in turn, are overseen by IHS Headquarters in Rockville, Maryland. *Id.* Approximately 70% of IHS employees—including almost all of its key leaders—are American Indians or Alaska Natives. IHS Press Release, Nov. 6, 2018, *available at* https://www.ihs.gov/newsroom/pressreleases/2018pressreleases/indian-health-service-featured-on-military-makeover-operation-career-airing-on-

lifetime-tv/ (explaining that IHS also extends preference to veterans) (last visited June 25, 2019); IHS Key Leaders, https://www.ihs.gov/aboutihs/keyleaders/ (providing the biographies of IHS leadership) (last visited June 25, 2019); 25 U.S.C. § 5117 (requiring IHS to give preference in employment to Indian applicants).

The primary federal source of health care for the Tribe's members is the IHS-operated Rosebud Service Unit (RSU), which includes a hospital and is located in Rosebud, South Dakota. SOF 10; Doc. 1, ¶ 31. The RSU is located within the IHS Great Plains Area. SOF 10. IHS employs many medical providers and support personnel at the RSU. SOF 14.

On November 19, 2015, the Center for Medicare and Medicaid Services (CMS) completed re-certification surveys at the RSU. On November 23, 2015, based upon its surveys, CMS notified the RSU that it intended to terminate its Medicare Provider Agreement because RSU's Emergency Department (ED) was out of compliance with the Conditions of Participation (COPs). Doc. 1, ¶ 36; Doc. 19 (Declaration of CAPT. Michael Weahkee),[4] ¶ 6. CMS placed the RSU in Immediate Jeopardy (IJ) status. *Id.* The conditions identified by CMS and the placement of the RSU in IJ status led IHS to place the ED in "divert" status, thereby sending all emergency patients to local hospitals in Winner, South Dakota or Valentine, Nebraska. *Id.* During the diversion, the RSU continued its inpatient and outpatient services and established an Urgent Care Center to treat walk-in patients. *Id.* IHS renovated the ED, inventoried equipment, repaired or

[4] Michael Weahkee has since been promoted to Rear Admiral (RADM).

replaced equipment due for upgrade, revised processes to improve patient assessments, and upgraded technology systems to support effective documentation of electronic health records. Doc. 19, ¶ 17.

On April 30, 2016, CMS and IHS entered into a Systems Improvement Agreement (SIA) to facilitate the provision of quality health care services and to promote compliance with the COPs. Doc. 19, ¶ 13. Consistent with the terms of the SIA, IHS awarded a contract to AB Staffing Solutions, LLC, ("ABSS"), on May 17, 2016, for one year, with four option years, to provide staffing and management services for the operation of the ED. Doc. 19, ¶¶ 13, 15. On July 15, 2016, the ED re-opened and was staffed and managed by IHS's contractor, ABSS. Doc. 19, ¶ 16. In September 2017, the RSU completed the SIA to CMS's satisfaction, and CMS rescinded the IJ status. SOF 16. The RSU continues to provide a range of services, including emergency, outpatient clinic, inpatient, obstetric, dental, and pediatric services. SOF 4-5, 10-15. On September 27, 2017, IHS awarded contracts to Tribal EM and Central Care to provide staff and services at RSU. *See*, Defendants' Second Supplemental Answers to Interrogatory No. 17.

PROCEDURAL BACKGROUND

Plaintiff filed this four-count lawsuit against the United States and federal defendants on April 28, 2016, alleging claims for (1) violation of 25 U.S.C. § 1631(b)(1); (2) violation of the Administrative Procedures Act; (3) violation of a treaty, statutory, and common law trust duty; and (4) violation of Equal Protection and Due Process under the United States Constitution. *See* Doc. 1.

Defendants moved to dismiss all counts. Doc. 17.

On March 31, 2017, this Court granted Defendants' motion to dismiss Counts I, II, and IV, and denied the motion to dismiss Count III. SOF 17; Doc. 36. In so doing, this Court held that "the allegations of Count III of the Complaint are sufficient to survive a motion to dismiss" and that "Count III states a cognizable claim not subject to dismissal under either Rule 12(b)(1) or Rule 12(b)(6)." Doc. 36 at 22.

Following this Court's Memorandum Opinion and Order, Defendants answered the Complaint. Doc. 38. Since that time, the parties have engaged in lengthy discovery. On or about December 7, 2017, Defendants served Plaintiff with a set of interrogatories. SOF 18. Among other requests, Defendants asked Plaintiff to describe: (a) "each [alleged] specific statutory and trust responsibility(ies) related to health care;" (b) "the specific provision(s) of law . . . that you allege creates each responsibility(ies);" (c) "how the declaration of national Indian health policy in the [IHCIA] imposes a specific, judicially enforceable trust responsibility;" and (d) the facts and documents that "support your claims in paragraphs 60-66 of your Complaint." SOF 18, 20, 22, 24. Plaintiff's response objected to each of the interrogatories as a "premature contention interrogatory" and reserved the right to supplement this Answer. SOF 18, 20, 22, 24. Subject to that objection, Plaintiff directed Defendants to the statutory and trust responsibilities identified in the Complaint and in the Court's March 31, 2017 Order on Defendants' Motion to Dismiss. SOF 18, 20, 22, 24. Throughout this litigation, Plaintiff never supplemented its answers. SOF 19,

21, 23, 25.

Plaintiff disclosed the expert witness report of Donald Warne, M.D., M.P.H. (Warne report). The word "trust" does not appear in the Warne report. Doc. 68-1. Defendants moved to exclude the Warne report, in part because it offers no opinion that is relevant to the existence of any specific trust duty, as alleged in Count III of Plaintiff's Complaint. Doc. 66. The Court has not ruled on Defendants' motion.

Defendants now bring this motion for summary judgment on Count III of Plaintiff's Complaint.

STANDARD OF REVIEW

Summary judgment is appropriate when the movant establishes "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. "As the Eighth Circuit has explained, '[w]here the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate.'" *Cheyenne River Sioux Tribe v. Zinke*, No. 15-cv-3018 (D.S.D. Sept. 28, 2018), Docket 108 at 36-37 (Schreier, J.) (citing *United States v. Premises Known as 6040 Wentworth Ave. S., Minneapolis, Hennepin Cty., Minn.*, 123 F.3d 685, 687-88 (8th Cir. 1997) (citing *Crain v. Bd. of Police Comm'rs of Metro. Police Dept. of City of St. Louis*, 920 F.2d 1402, 1405-06 (8th Cir. 1990)). To obtain summary judgment here, Defendants need only point to the absence of evidence of an essential element of Plaintiff's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 331 (1986). As the Eighth Circuit has explained, where, as here, "[a]fter the parties have had

adequate time for discovery," Defendants are entitled to summary judgment if Plaintiff "fails to make a showing sufficient to establish the existence of an element essential to [its] case, and on which [Plaintiff] will bear the burden of proof at trial." *Bedford v. Doe*, 880 F.3d 993, 996 (8th Cir. 2018); *see also Buettner v. Arch Coal Sales Co.*, 216 F.3d 707, 718 (8th Cir. 2000) ("To avoid summary judgment, the non-movant must make a sufficient showing on every essential element of its claim on which it bears the burden of proof."). This initial burden on Defendants is "far from stringent" and "regularly discharged with ease." *St. Jude Med., Inc. v. Lifecare Int'l, Inc.*, 250 F.3d 587, 596 (8th Cir. 2001).

In this case, Plaintiff's remaining claim is that Defendants have breached a trust duty. Doc. 1, Count III, ¶¶ 60-66. To establish a trust duty, Plaintiff bears the burden of, among other things, identifying "a substantive source of law that establishes specific fiduciary or other duties," *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (*Navajo I*), and establishing that the United States has taken over tribal assets such as tribally-owned land or timber. *Yankton Sioux Tribe v. U.S. Dep't of Health & Human Servs.*, 533 F.3d 634, 644 (8th Cir. 2008) (citing *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (*Mitchell II*)). Absent Plaintiff's ability to establish either element, Plaintiff's breach of trust claim fails, entitling Defendants to summary judgment. *See Bedford*, 880 F.3d at 996.

ARGUMENT

I. Plaintiff has failed to meet its burdens of establishing that a specific trust duty exists and that Defendants have breached any duty to Plaintiff.

In its third and only surviving count, Plaintiff asserts that Defendants breached a trust duty to "provide health care services to the Tribe and its members" and to ensure health care services at the highest possible standards. Doc. 1, ¶¶ 16, 17, 21, 61-63, 65. For Count III, Plaintiff generally identifies the Snyder Act, the IHCIA, the Fort Laramie Treaty, and common law as separate authorities that create a right of action.[5] *Id.* ¶ 61. As set forth above, Congress appropriates funds for IHS through annual lump-sum appropriations. IHS allocates and spends its appropriated funds under the authority of the Snyder Act and the IHCIA. None of these authorities, nor the special relationship between the Federal government and Indian tribes generally, creates an actionable breach of trust claim that would support the declaratory or injunctive relief sought in Count III of Plaintiff's Complaint.

Without question, "[t]here is a 'general trust relationship between the United States and the Indian People.'" *Ashley v. U.S. Dep't of Interior*, 408 F.3d 997, 1002 (8th Cir. 2005) (quoting *Mitchell II*, 463 U.S. at 225). "But that relationship alone does not suffice to impose an actionable fiduciary duty on the United States." *Id.* In other words, while courts "do not question the 'general

[5] Plaintiff separately refers to the "Affordable Care Act," Doc. 1, ¶ 19, which Defendants understand to be a reference to the amendments and reauthorization of the IHCIA that were authorized by the Patient Protection and Affordable Care Act, Public Law No. 111-148, rather than a reference to that act as a separate authority.

trust relationship between the United States and Indian tribes,'" a bedrock principle, recently reaffirmed by the Supreme Court, is that "any specific obligations the Government may have under that relationship are 'governed by statute rather than the common law.'" *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 757 (2016) (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011)); *see also Cheyenne River Sioux Tribe*, No. 15-cv-3018, Docket 108 at 37-40 (holding that the statutes cited by plaintiffs failed to "establish fiduciary or other duties") (citing *Navajo I*, 537 U.S. at 506). To establish a trust duty, then, the burden at summary judgment is on Plaintiff to "identify a substantive source of law that establishes specific fiduciary or other duties, and that the Government has failed to faithfully perform those duties." *Navajo I*, 537 U.S. at 506.

Broad aspirational policy statements do not meet the threshold burden to establish a specific statutory trust obligation. Congress established IHS under broad authorities that grant the agency discretion to carry out health care programs to benefit American Indians and Alaska Natives throughout the United States, and Congress funds all such activities through annual, lump-sum appropriations to IHS. Even viewing the material facts in the light most favorable to the non-moving party, Plaintiff has not and cannot identify any specific enforceable trust duty owed or violated by Defendants. SOF 18-25. Under binding Supreme Court precedent, this Court should grant judgment against Plaintiff on Count III as a matter of law.

A. As a matter of law, no fiduciary duty exists.

The general trust relationship does not support a breach of trust claim against the federal government absent a statutory basis for specific trust responsibilities. *See Menominee Indian Tribe*, 136 S. Ct. at 757; *Jicarilla Apache Nation*, 564 U.S. at 165. To establish an enforceable trust duty, a statute must "establish a fiduciary relationship and define the contours of the Unites States' fiduciary responsibilities" with sufficient specificity and "clearly give the Federal Government full responsibility to manage Indian resources." *Mitchell II*, 463 U.S. at 224; *see also Cheyenne River Sioux Tribe,* No. 15-cv-3018, Docket 108 at 38 (citing *Ashley*, 408 F.3d at 1002). Such trust duties must apply to a "trust corpus" consisting of property—for example, "Indian timber, lands, [or] funds"—belonging to Indian tribes or their members. *Mitchell II*, 463 U.S. at 225. Plaintiff's contention that Defendants have a trust duty must fail because Plaintiff fails to identify any trust corpus and also cannot identify any source of law establishing specific duties owed by Defendants.

1. Plaintiff fails to identify a trust corpus.

As an initial matter, Plaintiff has failed to "identif[y] any assets taken over by the government such as tribally owned land, timber, or funds which would give rise to a special trust duty." *Yankton Sioux Tribe v. U.S. Dep't of Health & Human Servs.*, 533 F.3d 634, 644 (8th Cir. 2008). No such trust corpus is at issue here. The establishment of IHS by Congress is not the equivalent of taking over and managing Indian assets so as to create an enforceable trust. *See Allred v. United States*, 33 Fed. Cl. 349, 356-57 (Fed. Cl. 1995) (rejecting claim that

defendants violated trust responsibility to provide health services and holding that "because this court finds that the statutes in question only pertain to Indian health care generally and do not require that any tribal property be managed, plaintiffs have failed to establish the property element of a breach of trust claim"); *c.f. Mitchell II*, 463 U.S. at 222-25 (holding trust duty enforceable where "[a]ll of the necessary elements of a common-law trust [was] present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)"); *Yankton Sioux Tribe*, 533 F.3d at 644 (rejecting claim alleging violation of trust based on closure of health care facility emergency room).

To the contrary, the only resources at issue are Congressional lump-sum appropriations that the United States Supreme Court held are to be allocated at IHS's discretion. *Lincoln v. Vigil*, 508 U.S. 182 (1993) (citing *Reuben Quick Bear v. Leupp*, 210 U.S. 50, 80 (1908) for the distinction between such "gratuitous appropriations" and funds appropriated to fulfill treaty obligations). By failing to identify any trust corpus such as Indian-owned timber, lands, or funds, Plaintiff fails to establish any trust duty. *See Mitchell II*, 445 at 222-25.

2. Plaintiff failed to identify any source of law creating an enforceable trust duty and to show how Defendants violated such a duty.

Even if Plaintiff could identify a trust corpus, and it cannot, Plaintiff has failed to identify any source of law that creates actionable trust duties and to show how Defendants allegedly violated such duties. SOF 18-25. As the Supreme Court has made expressly clear, any legally-enforceable trust obligation

must be grounded in a specific statutory duty. *See Menominee Indian Tribe*, 136 S. Ct. at 757; *Jicarilla Apache Nation*, 564 U.S. at 177 (explaining that to establish a cause of action, the Tribe must identify "a specific, applicable, trust-creating statute or regulation that the Government violated") (internal quotation marks omitted); *Ashley*, 408 F.3d at 1002 ("The fact that a statute uses the word 'trust' does not mean that an actionable duty exists, for a 'bare trust' that does not impose upon the government the extensive and well-articulated duties described above falls short of creating such a duty.") (citing *Mitchell II*, 463 U.S. at 224; *United States v. Mitchell*, 445 U.S. 535, 541 (1980) (*Mitchell I*)); *Cheyenne River Sioux Tribe,* No. 15-cv-3018, Docket 108 at 38 (citing *Ashley*, 408 F.3d at 1002). Plaintiff's failure to do so is understandable because Congress has not enacted any statutes directing a specific action by IHS that can be shown to arise to the level of a trust duty or that has been breached by Defendants.

a. Neither the Snyder Act nor the IHCIA establish any fiduciary duty, nor has Plaintiff identified any specific breach arising under either statute.

Plaintiff contends that a fiduciary duty can be found in the Snyder Act's general authority to spend funds appropriated by Congress for Indian health services. *See* Doc. 1, ¶ 61; Response to Defs.' Interrogs. 1, 2; SOF 18, 20. Specifically, the text of the Act provides that:

> The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit care and assistance of the Indians throughout the United States for the following purposes:
>
> …

> For relief of distress and conservation of health.
>
> …

25 U.S.C. § 13. This broad language does not contain a specific, legally-enforceable duty to provide a specific level of health care. *Quechan Tribe of the Ft. Yuma Reservation v. United States*, No. 10-cv-02261-PHX–FJM, 2011 WL 1211574, at *2 (D. Ariz. Mar. 31, 2011), *aff'd*, 599 F. App'x 698 (9th Cir. 2015) (unpublished) ("The Snyder Act fails to impose an affirmative duty on defendants to provide a specific level of health care or to maintain facilities at a certain level. Plaintiff's breach of duty claims cannot rely on the Snyder Act.").

Plaintiff also identifies the IHCIA as establishing a trust duty. Doc. 1, ¶ 61; SOF 18, 20, 22, 24 (Response to Defs.' Interrogs., 1, 2, 3, 6). The analysis of the IHCIA is similar. The IHCIA provides, *inter alia,* that:

> Congress declares that it is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians—
>
> (1) To ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy.
>
> …

25 U.S.C. § 1602. As with the Snyder Act, however, the IHCIA "speak[s] of Indian health only in general terms," *Tsosie ex rel. Estate of Tsosie v. United States*, 441 F. Supp. 2d 1100, 1105 (D.N.M. 2004), and its statutory text does not create any specific or measurable duty arising to the level of an enforceable trust obligation.

An aspirational goal or policy statement does not equate to an enforceable guarantee of results. The congressional policy statements and findings in the

introductory sections of the IHCIA recognize the special federal-tribal relationship in the area of health care, but they do not entitle Plaintiff to any particular benefits under the IHCIA or elsewhere. *See Quechan Tribe,* 2011 WL 1211574, at *3 (holding that the IHCIA was primarily an appropriations statute and does "not impose a duty on defendants to provide a certain level of health care, preserve and maintain tribal property, or be a health care provider"). To the contrary, this type of policy statement expressed as a congressional finding "simply does not create substantive rights" and is authoritatively viewed as "too thin a reed" to support particular enforceable rights and obligations being read into them. *Pennhurst State Sch. and Hosp. v. Haldermann*, 451 U.S. 1, 11, 19 (1981).

Simply using the word "trust" in a statute, moreover, does not give rise to a breach of trust claim. *See Quechan Tribe*, 2011 WL 1211574, at *3 (rejecting contention that when Congress added the word "trust" to the IHCIA, it demonstrated an intent to impose specific fiduciary duties). The Supreme Court has clearly established that a statute or regulation that recites a general trust relationship between the United States and the Indian people is not enough to establish any particular trust duty. *See Jicarilla Apache Nation*, 564 U.S. at 165; *Navajo I*, 537 U.S. at 506; *Mitchell I*, 445 U.S. at 542-44; *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015).

Accordingly, Plaintiff's recitation of the Snyder Act and the IHCIA is legally insufficient to establish any specific duties owed by Defendants to Plaintiff and its individual members. As such, Plaintiff fails to show that any trust duty exists.

Despite Defendants' requests during discovery, Plaintiff also has not explained how Defendants allegedly violated any such duty. See, e.g., SOF 18, 20, 22, 24.

b. The 1868 Treaty of Fort Laramie does not establish any trust duty, nor has Plaintiff identified any specific breach arising under the Treaty.

Plaintiff also fails to support its contention that Defendants have breached a trust duty owed under the 1868 Treaty of Fort Laramie. *Id.* As a threshold matter, treaties between the United States and Indian tribes are a contract between two sovereign nations. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979). Disputes arising under treaties are subject to the jurisdiction of the Court of Federal Claims. 28 U.S.C. § 1505. Accordingly, treaty rights (and the mechanism for enforcing those rights) are distinct from a trust duty.

Furthermore, Plaintiff cannot establish any violation of the 1868 Treaty of Fort Laramie. Under its terms, the 1868 Treaty of Fort Laramie required the United States to provide a physician for Plaintiff and all other signatory tribes. 1868 Fort Laramie Treaty, art. XIII. In addition, the United States promised to construct "a residence for the physician." *Id.* art. IV. The United States also had the right to withdraw the physician after a period of ten years. *Id.* art. IX.

When interpreting provisions of a treaty between a tribe and the United States, the Indian canon of construction requires that the treaty "be construed liberally in favor of the Indians with ambiguous provisions interpreted for their benefit." *Oneida Cnty., N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 247 (1985) (internal citations omitted). Courts interpret treaties to "give effect to

the terms as the Indians themselves would have understood them" at the time the treaty was made. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). In this case, the treaty language is clear: the United States agreed to provide a physician for the benefit of all signatory tribes for a period of ten years, after which the United States may stop providing the physician. Courts are bound by the text of a treaty. *See Oregon Dep't of Fish & Wildlife v. Klamath Tribe*, 473 U.S. 753, 774 (1985).

It is undisputed that IHS spends millions of dollars annually and employs many physicians at multiple IHS facilities on the Rosebud Indian Reservation, on other South Dakota Indian reservations, and in Rapid City, South Dakota. SOF 10-15. There can be no credible claim that IHS is not adhering to or honoring the terms of the 1868 Fort Laramie Treaty, as Defendants indisputably provide more than one physician for the members of the tribes who were parties to the treaty. *See, e.g.* SOF 10-15. Despite Defendants' requests during discovery, Plaintiff has not explained how Defendants allegedly violated the treaty. SOF 18, 20, 22, 24.

Plaintiff has not, and cannot, identify any treaty language that imposes any other duty that Defendants have violated. *Id.* By authorizing the United States to withdraw the physician, the treaty clearly did not establish any particular level of health care for Plaintiff or its members. Viewing the material facts in the light most favorable to Plaintiff, summary judgment should be granted in favor of Defendants on any claim based upon the 1868 Fort Laramie Treaty. *See, e.g., Cheyenne River Sioux Tribe*, No. 15-cv-3018, Docket 108 at 40-

44 (refusing to expand the requirements of the 1868 Treaty of Fort Laramie beyond the plain language); *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1083 (D.S.D. 2009) (Kornmann, J.) (dismissing claim brought by Indian tribe based on treaty).

c. Common law cannot serve as a basis for finding a trust responsibility.

The Supreme Court has firmly established the bedrock principle that "any specific obligations the Government may have under [the general trust] relationship are 'governed by statute *rather than the common law.*'" *Menominee Indian Tribe of Wis.*, 136 S. Ct. at 757 (2016) (quoting *Jicarilla Apache Nation*, 564 U.S. at 165) (emphasis added). "Congress may style its relations with the Indians a '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." *Jicarilla Apache Nation*, 564 U.S. at 173-74. Accordingly, Plaintiff's reliance on common law must fail.

B. Plaintiff's claim is barred by *Lincoln v. Vigil*.[6]

The principles enforced by the Supreme Court in *Lincoln* further require that summary judgment be granted in favor of Defendants on Plaintiff's remaining claim. First, the principles in *Lincoln* affirm that no trust corpus is at issue here, as discussed *supra*. Second, *Lincoln* rejected the suggestion that IHS's authorizing statutes establish any specific trust duty.

[6] *Lincoln v. Vigil*, 508 U.S. 182 (1993).

Lincoln involved a challenge to IHS's decision to discontinue a local program for handicapped Indian children. *Lincoln*, 508 U.S. at 189. Instead, IHS proposed to create a nationwide program for handicapped Indian children. *Id.* Children eligible to receive services at the original local program sued, alleging that IHS "violated the federal trust responsibility to Indians, the Snyder Act, the IHCIA, the APA, and the Fifth Amendment's Due Process Clause." *Id.*

The Supreme Court rejected the *Lincoln* plaintiffs' claims and made clear that IHS's discontinuation of services was an expression of its discretion to determine how best to expend the annual lump-sum appropriations that Congress appropriates under the Snyder Act and IHCIA. *See id.* at 185. As the Supreme Court explained, "an agency's allocation of funds from a lump-sum appropriation requires 'a complicated balancing of a number of factors which are peculiarly within its expertise': whether its 'resources are best spent' on one program or another; whether it 'is likely to succeed' in fulfilling its statutory mandate; whether a particular program 'best fits the agency's overall policies'; and, 'indeed, whether the agency has enough resources' to fund a program 'at all.'" *Id.* at 193 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). The Supreme Court thus held that IHS's decision to discontinue the local program therefore was "unreviewable under § 701(a)(2)" of the Administrative Procedures Act. *Id.* Significantly, in reaching this conclusion, the Supreme Court observed that "both the Snyder Act and the [IHCIA]," the same statutes invoked by Plaintiff here, "speak about Indian health only in general terms." *Id.*

Importantly, the Supreme Court expressly rejected the contention that "the special trust relationship existing between Indian people and the Federal Government" might somehow alter the analysis. *Id.* at 194. Rejecting a limitation imposed by that relationship that had been discerned by the court of appeals, the Supreme Court held that "[w]hatever the contours of that relationship, though, it could not limit the [IHS's] discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide." *Id.* at 195 (citing *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986); *see also Cheyenne River Sioux Tribe*, No. 15-cv-3018, Docket 108 at 35, 37-40 (recognizing the Bureau of Indian Education's discretion to reorder its priorities through a restructuring that aimed to improve Indian education nationwide, despite the general trust relationship).

Where, as here, Indian health services are funded by an annual lump-sum appropriation from Congress, the distribution of those limited resources is a zero-sum game entrusted to the Agency. After all, an appropriation is "lump sum" in nature precisely because of the absence of instructions and corresponding discretion conferred regarding how to spend it. *See Allred*, 33 Fed. Cl. at 355 (citing *Lincoln*, 508 U.S. at 192-93); *see also Hammitte v. Leavitt*, No. 06-11655, 2007 WL 3013267, *9 (E.D. Mich. Oct. 11, 2007) ("Congress has chosen to implement its views regarding Indian health care by enacting the Snyder Act and the IHCIA, in which it conferred on the IHS broad discretion in how to best provide services to Native Americans. Congress declined to create vested rights in any particular Indian health program or service, nor did it specify

how the IHS was to fund any program or service.") The lack of any specific direction from Congress to the Agency defeats any claim that a trust responsibility exists, as a trust duty exists only where Congress has included specific direction. *Jicarilla Apache Nation*, 564 U.S. at 174 ("[T]he analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.") (citing *Navajo I*, 537 U.S. at 506).

C. Supreme Court precedent, including *Lincoln*, invalidates *White v. Califano*.

Plaintiff refers to *White v. Califano*, 437 F. Supp. 543 (D.S.D. 1977), *aff'd* 581 F.2d 697 (8th Cir. 1978), for its position that IHS has a trust duty. Doc. 1, ¶ 19. Plaintiff's reliance on *White* is misplaced because the case is distinct and because the decision is not consistent with *Lincoln* and other well-established Supreme Court precedent.

White involved a case of civil commitment to a state mental hospital and raised two questions: (a) whether the State of South Dakota had jurisdiction to civilly commit an Indian residing on an Indian reservation; and (b) what responsibilities the Federal government had to provide care when the State could not do so. The district court first concluded that the State did not have jurisdiction to commit an Indian residing on the reservation. 437 F. Supp. at 550. The present case is distinct because no state jurisdictional question is at issue. When considering the second question, the district court spent considerable time on the lack of alternative resources and then determined that IHS must be responsible under the language of the IHCIA. *Id.* at 551-58.

The *White* district court's 1977 decision on this issue clearly has been superseded and invalidated. First, the *White* court never identified any trust corpus, which is one of two requirements for finding that a trust responsibility exists. *See, e.g.*, *Jicarilla Apache Nation*, 564 U.S. at 192–94 (discussing how Congress has 'define[d] the contours of the United States' fiduciary responsibilities' *with regard to its management of Indian tribal property and other trust assets*" (emphasis added)). The *White* court acknowledged that the only resources at issue were IHS's discretionary appropriations. 437 F. Supp. at 557. In failing to even explain how the trust corpus requirement was met, *White* failed to meet the Supreme Court's standard for establishing a trust responsibility. *See, e.g.*, *Mitchell II*, 463 at 224 (explaining that a trust responsibility exists only where the government exercises sufficient control over Indian land or resources). Moreover, the Supreme Court has since held that IHS's discretionary appropriations are not trust resources, distinguishing them from "money appropriated to fulfill treaty obligations." *Lincoln,* 508 U.S. at 195 (citing *Reuben Quick Bear v. Leupp*, 210 U.S. 50, 80 (1908)).

Second, the Supreme Court held that IHS's appropriations, the Snyder Act, and the IHCIA speak of Indian health only in general terms and do not impose trust obligations. *Lincoln*, 508 U.S. at 194-95. This directly invalidates the *White* court's reliance on the IHCIA, including the statute's "declaration of policy," as "adequate specificity [t]hat the trust relationship require[d]" IHS to provide health care. *White,* 437 F. Supp. at 555. *White* cannot support Plaintiff's claims because it is inconsistent with *Lincoln*'s holding on IHS's authorities

specifically and also contradicts the Supreme Court's precedent requiring specific rights-creating statutory language and rejecting reliance on broad policy statements. *Jicarilla Apache Nation*, 564 U.S. at 174 ("'[T]he analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.'" (quoting *Navajo I*, 537 U.S. at 506 (2003))); *Pennhurst State School*, 451 U.S. at 19 (considering general policy statements and congressional findings "too thin a reed" to support particular rights and obligations).[7]

Moreover, *White* is in direct conflict with other expressions of Congressional intent vis-à-vis IHS resources. The *White* court in essence found IHS to be the payer of first resort, but Congress clearly has established the opposite—that IHS is the payer of last resort. SOF 6; 25 U.S.C. § 1623. As a result, any services eligible for reimbursement from the State or other sources are subject to such reimbursement prior to use of IHS funds. Consistent with the payer of last resort rule and the broad nature of IHS's authorities, Congress has not set forth any specific legal obligations for IHS.

D. Similar cases confirm that Defendants are entitled to judgment on Count III of Plaintiff's Complaint.

This case has similarities to a case brought against the United States by the Hopi Tribe. There, the Tribe pointed to several statutory provisions, including 25 U.S.C. § 1632(a)(5), an IHCIA provision about general policy

[7] Plaintiff also cites to *Blue Legs v. United States*, 867 F.2d 1094 (8th Cir. 1989) in its complaint. Doc. 1, ¶ 20. As with *White*, *Blue Legs* is inconsistent with *Lincoln* and other Supreme Court precedent establishing the standard for finding a trust responsibility.

regarding safe water supply and waste disposal systems for Indian communities and homes, alleging that United States committed a breach of trust by failing to ensure that the water supply on the Tribe's reservation contained safe levels of arsenic. *See Hopi Tribe v. United States*, 782 F.3d 662, 665 (Fed. Cir. 2015). The Federal Circuit held that because "the sources of law relied on by the Hopi Tribe do not establish a specific fiduciary obligation on the United States to ensure water quality on the Hopi Reservation," the government has not been shown to have violated a "specific, applicable, trust-creating statute or regulation" that could give rise to a breach of trust claim, and affirmed the dismissal of the action. *Id.* at 671 ("We understand that water quality on parts of the Hopi Reservation is unacceptable, due in part to insufficient funds for new water infrastructure. But the Supreme Court's decisions are controlling in this case."). The Court should reach the same result in this case. *See also United States v. Navajo Nation*, 556 U.S. 287, 295-302 (2009) (*Navajo II*) (rejecting contention that "comprehensive control" or a "network" of statutes, treaties, and regulations could provide the basis for breach of trust claims absent "a specific, applicable, trust-creating statute or regulation that the Government violated" and directing that "[t]his case is at an end").

In 2008, the Eighth Circuit addressed whether there was a violation of the federal trust responsibility in connection with the closure of the emergency room at the Wagner, South Dakota, IHS health care facility, in order to convert it to an urgent care facility. *Yankton Sioux Tribe*, 533 F.3d at 634. There, the court affirmed the dismissal of the claim on the basis that no trust corpus was

identified and no statutory obligation was alleged that could be characterized as creating a trust or fiduciary duty. *Id.* at 644.

Two other cases, consistent with precedent, specifically have held that IHS does not have a trust duty to provide a particular level of health care. In *Quechan Tribe of the Ft. Yuma Indian Reservation v. United States*, 599 F. App'x 698, 699 (9th Cir. 2015) (unpublished), the Tribe sought a declaration that the United States breached its duty to operate at a level exceeding a minimum standard of care, alleging that the facilities at Fort Yuma (the oldest in the IHS system) are in disrepair and unsafe, that Fort Yuma lacks basic medical equipment, and that Fort Yuma affords unsafe and unhealthy medical care. The Ninth Circuit affirmed the dismissal of the case, holding that: (1) the federal-tribal trust relationship does not, in itself, create a specific, judicially-enforceable duty; (2) the "trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law;" and (3) "in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law." *Quechan*, 599 F. App'x at 699 (citing *Jicarilla*, 564 U.S. at 165). The court concluded that neither the Snyder Act nor the IHCIA "contains sufficient trust-creating language on which to base a judicially enforceable duty." *Id.* As the Ninth Circuit aptly summarized: "[W]e emphasize that we appreciate the Tribe's commitment to ensuring adequate healthcare for its members, and we acknowledge the challenges faced by the Tribe in ensuring such care. However, the solution lies in Congress and the executive branch, not the courts." *Id.* at 699-700; *see also Hammitte*, 2007

WL 3013267, at *10 ("In the end, plaintiffs' complaint raises policy issues, not legal issues, as to the proper allocation of resources. Their concerns are best addressed through the legislative, not the judicial, process.").

Similarly, in *Gila River Indian Cmty v. Burwell*, No. 14-cv-00943-PHX-DGC, 2015 WL 997857 (D. Ariz., March 6, 2015), the district court dismissed the Tribe's breach of trust claim, stating that "the Court cannot conclude that the statutes and regulations relied on by the [Gila River Indian] Community show that the United States has accepted trust responsibilities for the healthcare related duties the Community seeks to enforce." *Id.* at *5. The court focused on the corpus requirement and distinguished the IHS appropriation from a trust corpus, stating that "a congressional appropriation of government funds is qualitatively different from the tribal-owned real property managed by the government on behalf of Indian tribes." *Id.* at *6; *see also Mitchell I*, 445 U.S. at 542; *Lincoln*, 508 U.S. at 195 (citing *Reuben Quick Bear v. Leupp*, 210 U.S. 50, 80 (1908), for distinction "between money appropriated to fulfill treaty obligations, to which the trust relationship attaches, and gratuitous appropriations" such as IHS's appropriation). As the district court correctly recognized, "[i]f a tribal member has been damaged as a result of medical malpractice, that member may sue the United States under the Federal Tort Claims Act which expressly waives the government's sovereign immunity for such actions." *Gila River Indian Cmty*, 2015 WL 997857, at *4. "But plaintiffs' *parens patriae* lawsuit asking for us to find a specific standard of care established in the Snyder Act and the IHCIA fails to state a valid cause of action

for breach of statutory or fiduciary duties." *Id.* Even viewing all material facts in favor of Plaintiff, the same result holds true in this case.

II. Plaintiff lacks standing to bring the claim asserted in Count III of Plaintiff's Complaint.

Summary judgment also should be granted on Count III because, under controlling principles concerning standing, the claim is not capable of being redressed by the courts. Article III of the United States Constitution limits federal jurisdiction to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. Standing is one of the essential prerequisites to jurisdiction under Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, (1992). As the Supreme Court explained, the "irreducible constitutional minimum of standing contains three elements." *Id.* at 560. First, an "injury in fact." *Id.* Second, a causal connection between conduct and alleged injury. *Id.* Third, redressability—that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561; *see also Ashley*, 408 F.3d at 1000.

Summary judgment should be granted to Defendants because Plaintiff cannot meet the redressability element of standing. The Eighth Circuit has rigorously enforced the redressability requirement of standing. In *Ashley*, members of the Crow Creek Sioux Tribe sought an order setting aside the Tribe's approval of a bond and requiring the Department of Interior to oversee the Tribe's spending in conformity with the Development Trust Fund Act of 1996. *See* 408 F.3d at 999. The court of appeals held that plaintiff-appellants lacked standing because they could not show the statute obligated or empowered the federal

government to control the Tribe's expenditures, and could not show an enforceable trust duty. *See id.* at 1001, 1003. As a result, the court held that it could issue "no order in this case that [wa]s 'likely' to redress the plaintiffs' claims." *Id.* at 1003 (citing *Lujan*, 504 U.S. at 562).

The same holds true in this case. The relief that Plaintiff seeks—i.e. declarative and injunctive relief to take sufficient measures to ensure health services to members of the Tribe are raised to the highest possible level— could require that IHS dedicate additional resources to RSU, which is not within the Court's power to grant. The amount of funding appropriated to IHS is a matter controlled by Congress and how IHS should allocate its lump sum appropriations is committed to that agency's discretion by law. As a matter of law, IHS's allocation of funds to the RSU is committed to agency discretion, and this Court cannot review, let alone change, that allocation. *See Lincoln*, 508 U.S. at 193. Accordingly, this Court "can issue no order in this case that is 'likely' to redress plaintiffs' claims." *Ashley*, 408 F.3d at 1003 (quoting *Lujan*, 504 U.S. at 562); *see also Sisseton-Wahpeton Oyate*, 659 F. Supp. 2d at 1078 (holding that Tribe did not have standing because "it is purely speculative that a favorable ruling by this court would redress the injuries of which Plaintiffs complain").

As a result, there is no standing in this case and judgment should be granted to Defendants on that basis.

III. The Court lacks jurisdiction.

Finally, Defendants reassert the jurisdictional arguments made in support of their motion to dismiss, Doc. 18, and suggest that summary judgment should

be granted on Count III of Plaintiff's Complaint on those grounds. Claims made against the United States requiring the payment of money, of course, must be brought in the Court of Federal Claims. So, too, must claims to enforce treaty rights. Although the Plaintiff here pled its claim for breach of trust as one ostensibly seeking declaratory and injunctive relief, the only result of a declaration or injunction that IHS has breached an alleged responsibility to provide adequate resources to provide a specific level of health care would be the allocation of funds to remedy that alleged failure. First, this Court would not be empowered to order such a remedy directly. *See Lincoln*, 508 U.S. at 193. Second, "[t]he district court is prohibited from evading the preclusive effect of the Tucker Act or infringing upon the exclusive province of the Court of Claims by issuing injunctions or declaring judgments which are designed to serve as res judicata in the Court of Claims to affect a monetary recovery in a subsequent suit." *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 590-91 (9th Cir. 1983). Thus, because Count III of Plaintiff's Complaint is in reality one aimed at forcing the expenditure of funds, this Court lacks jurisdiction over that claim.

CONCLUSION

Plaintiff and Defendants share the same aspirational policy goal: ensuring the highest possible level of health care for Indians. Plaintiff, however, has failed to meet its burden of establishing a specific trust duty that the United States owes to Plaintiff, and has failed to establish a breach of any such duty. This Court can neither declare the breach of specific trust obligations that do not exist nor compel IHS to allocate greater funding, because allocation of lump-sum

appropriations by Congress is committed to agency discretion. Even viewing the material facts in the light most favorable to Plaintiff, Defendants are entitled to judgment on Count III of Plaintiff's Complaint as a matter of law.

Dated this 28th day of June, 2019.

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WORD COUNT CERTIFICATIION

The undersigned attorney hereby certifies that in accordance with local rules, the foregoing brief, which exceeds the court's page limit of 25 pages, does not exceed the word count limit of 12,000 words. According to MS Word software, the word count is 7713.

/s/ Cheryl Schrempp DuPris