UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

ROSEBUD SIOUX TRIBE, a federally recognized Indian tribe, and its individual members, Plaintiff, vs. UNITED STATES OF AMERICA et al., Defendants.	CIV. No. 16-3038-RAL **DEFENDANTS' COMBINED REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT**

Defendants, by and through Ronald A. Parsons, Jr., United States Attorney, and Cheryl Schrempp DuPris, Assistant United States Attorney, respectfully submit this reply in support of their motion for summary judgment and in opposition to Plaintiff's cross-motion for summary judgment.

Plaintiff's cross-motion for summary judgment is a melding of immaterial facts and misleading recitations of law. Plaintiff dedicates over twenty pages to assailing Defendants for alleged systemic failures; yet not once, in either its memorandum or its statement of facts, does Plaintiff cite to any text in any law that establishes any specific trust or treaty duty owed by the Defendants. *See* Pl.'s Combined Mem. In Supp. of Mot. for Summ. J. & In Opp'n to Defs.' Mot. for Summ. J. ("Pl.'s Mem."), Doc. 89; Pl.'s Statement of Undisputed Material Facts ("Pl.'s SOF"), Doc. 90. In failing to do so, Plaintiff attempts to bypass the first hurdle in claiming a breach—identifying a specific duty owed by

Defendants. Plaintiff contends that Defendants have a nebulous duty "to raise the health status of its members to the highest possible level," Doc. 89 at 2, but after years of discovery has not identified any source of law that establishes and defines any specific trust or treaty duty that would provide the basis for a cognizable claim.

It goes without saying that everyone involved in this case aspires to elevate the health status of all American Indians and Alaska Natives. This is just as true for the Indian Health Service ("IHS" or "Agency"), whose leadership and staff is comprised primarily of American Indians and Alaska Natives, as it is for Plaintiff. Defs.' Br. in Supp. of Mot. for Summ. J. ("Defs.' Br."), Doc. 81, at 3–4 (providing information on IHS leadership and staff). As Plaintiff correctly points out, however, the question before this Court is not how to solve the myriad challenges of providing health care in Indian country. *See* Pl.'s Mem. at 38. Rather, the only questions before the Court are whether Defendants owe a specific trust or treaty duty to Plaintiff and, if so, whether Defendants have breached that duty. The answer to both questions is no.

I. Plaintiff has failed to show that Defendants owe a specific duty to Plaintiff and, therefore, also cannot show any breach.

To establish a breach of trust, Plaintiff must "identify a substantive source of law that establishes *specific* fiduciary or other duties, and [show] that the Government has failed to faithfully perform those duties." *United States v. Navajo Nation* ("*Navajo I*"), 537 U.S. 488, 506 (2003) (emphasis added); *see also Menominee Indian Tribe of Wis. v. United States* ("*Menominee*"), 136 S. Ct. 750,

757 (2016) ("[A]ny *specific* obligations the Government may have under [the trust] relationship are 'governed by statute rather than the common law.'") (emphasis added) (quoting *United States v. Jicarilla Apache Nation* ("*Jicarilla*"), 564 U.S. 162, 165 (2011)). Plaintiff fails this standard when it claims that Defendants owe an amorphous trust duty "to raise the health status of its members to the highest possible level." *See, e.g.*, Pl.'s Mem. at 2. Plaintiff grossly misconstrues Supreme Court precedent, misstating the standard for establishing a trust duty and contradicting the Supreme Court's explicit holding that congressional appropriations for IHS are gratuitous appropriations of public funds, not trust or treaty funds. *See, e.g.*, *id.* at 32. Despite Plaintiff's assertions, neither the statutes referenced, the Fort Laramie Treaty ("Treaty"), 15 Stat. 635 (1868), nor common law—either individually or as a "network" of authorities—form any basis for the claimed duty. Similarly, Plaintiff's recitation of IHS's alleged misdeeds cannot establish a breach of trust or treaty duty, particularly when Plaintiff has not, indeed cannot, establish or define any such duty.

A. The general trust relationship does not create a trust or fiduciary duty, nor does Plaintiff identify any statute establishing such a duty.

"There is a 'general trust relationship between the United States and the Indian People.' But that relationship alone does not suffice to impose an actionable fiduciary duty on the United States." *Ashley v. U.S. Dep't of Interior*, 408 F.3d 997, 1002 (8th Cir. 2005) (quoting *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 225 (1983)) (internal citations omitted); *see also Menominee*,

136 S. Ct. at 757 ("[A]ny specific obligations the Government may have under [the trust] relationship are 'governed by statute rather than the common law.'") (quoting *Jicarilla*, 564 at 165). Thus, the general trust "relationship" is distinct from an enforceable trust "duty" (a/k/a "responsibility" or "obligation").

To establish an enforceable trust duty, Plaintiff must identify a statute that "clearly give[s] the Federal Government full responsibility to manage Indian resources" and "define[s] the contours of the Unites States' [sic] fiduciary responsibilities" with sufficient specificity. *Mitchell II*, 463 U.S. at 224; *see also* Mem. Op. & Order at 38, *Cheyenne River Sioux Tribe v. Zinke* (*"Cheyenne River"*), No. 15-cv-3018 (D.S.D. Sept. 28, 2018), Doc. 108 ("In order for a trust duty to exist, 'there must be something akin to 'elaborate provisions . . . [that] give the Federal government full responsibility to manage Indian resources . . . .' ' ") (quoting *Ashley*, 408 F.3d at 1002). Plaintiff suggests that this Court has already ruled on this threshold issue, Pl.'s Mem. at 29, but this Court's "denial of the motion to dismiss was not a decision on the merits of that motion, but was a means of postponing decision on the merits." *Murr Plumbing Inc. v. Scherer Bros. Fin. Servs. Co.*, 48 F.3d 1066, 1070 (8th Cir. 1995). We are no longer at the motion-to-dismiss stage; at summary judgment, Plaintiff "may not merely point to unsupported self-serving allegations, but must substantiate its allegations with sufficient probative evidence that would permit a finding in its favor." *Reed v. City of St. Charles*, Mo., 561 F.3d 788, 790–91 (8th Cir. 2009); *see also Burton v. Richmond*, 370 F.3d 723, 728 (8th Cir. 2004) ("Our earlier decision in this case dealt only with the allegations

made by plaintiffs in their complaint . . . but such facts are not supported by the record developed by discovery and before the District Court at the summary-judgment stage of the proceedings. Thus, the District Court was free to reassess whether plaintiffs had adequately shown the existence of a special custodial relationship creating a duty to protect.") (citing *McKenzie v. BellSouth Telecomms., Inc.*, 219 F.3d 508, 513 (6th Cir. 2000) (finding that an appellate court's earlier "holding on a motion to dismiss does not establish the law of the case for purposes of summary judgment, when the complaint has been supplemented by discovery")). Moreover, this "[C]ourt has the inherent power to reconsider and modify an interlocutory order any time prior to the entry of judgment." *Murr Plumbing*, 48 F.3d at 1070 (citing to *Lovett v. Gen. Motors Corp.*, 975 F.2d 518, 522 (8th Cir. 1992) ("When a district court is convinced that it incorrectly decided a legal question in an interlocutory ruling, the district court may correct the decision to avoid later reversal.")). Plaintiff's conclusory allegations in its complaint are not sufficient to prevail on summary judgment and, despite years of discovery, Plaintiff has failed to identify a trust corpus or any specific duty that Defendants must perform. Plaintiff must show both before it can establish a breach; Plaintiff has not and cannot clear this basic hurdle.

1. Plaintiff fails to identify a trust corpus, as it must to establish a trust duty.

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. ("*Yankton Sioux*"), 533 F.3d 634, 644 (8th Cir. 2008); *see also Mitchell II*, 463 U.S. at 224 (holding that the statutes at issue in that case established a fiduciary duty because they gave "the Federal Government full responsibility to manage Indian resources and land"); *Ashley*, 408 F.3d at 1002 ("For a duty to exist, there must be something akin to 'elaborate provisions . . . [that] give the Federal government full responsibility to manage Indian resources . . . .'"). Plaintiff cannot do so because IHS does not administer any tribal resources.

Plaintiff makes two implausible arguments in an overt attempt to avoid this requirement. First, Plaintiff erroneously asserts that Supreme Court precedent does not require a trust corpus to find that a trust duty exists. Pl.'s Mem. at 33. In doing so, Plaintiff brazenly misapplies decades of Supreme Court precedent in which the Court has repeatedly rejected claims of a trust duty where the government has not assumed control of Indian resources. *See, e.g.*, *Jicarilla*, 564 U.S. at 194–95 (discussing the *Mitchell II* requirement that all elements of a trust, including a trust corpus, must be present); *United States v. Navajo Nation* ("*Navajo II*"), 556 U.S. 287, 301–02 (2009) (finding that control over Indian resources is required but insufficient by itself, absent "a specific, applicable, trust-creating statute," to establish a trust duty); *Navajo I*, 537 U.S. 507–08 (finding that the statute at issue did not involve managerial control over coal leasing and distinguishing *Mitchell II*, where the government had comprehensive managerial control over Indian resources); *United States v. Mitchell* ("*Mitchell I*"), 445 U.S. 535, 541 (1980) (finding that the statute at issue

"does not impose any duty on the Government to manage timber resources"); *see also* Defs.' Br. at 11–12 (discussing the trust corpus requirement).

Second, Plaintiff curiously cites to *Lincoln v. Vigil*, 508 U.S. 182 (1993), for the proposition that, if a trust corpus is required, Congress's appropriations of public funds for IHS can serve as a trust corpus. Pl.'s Mem. at 33. Plaintiff grossly distorts the holding in *Lincoln*, as well as *Reuben Quick Bear v. Leupp*, 210 U.S. 50, 79–81 (1908), both of which distinguish general appropriations of public money from trust resources and treaty funds.

The 1905 appropriation at issue in *Quick Bear* authorized two types of appropriations for the Indian schools at issue in that case. First, Congress explicitly appropriated funds "for fulfilling treaty stipulations with various Indian tribes," including $10,400 for the teachers, physician, and other provisions of the Treaty also at issue in this case. Appropriations, Indian Dep't, Pub. L. No. 58-212, 33 Stat. 1048, 1055 (1905) ("1905 Appropriation"); *Quick Bear*, 210 U.S. at 80–81. As the Court explained, a "treaty fund" is distinct from a trust fund in that it comes from public money instead of originating from tribal property, but the result is the same—both types of funds ultimately belong to the Indian tribe. *Quick Bear*, 210 U.S. at 80–81. As the Court also explained, however, in this regard treaty and trust funds both are distinct from the second type of appropriation at issue in that case, which involved "gratuitous appropriations of public moneys under the heading 'Support of Schools.'" *Quick Bear*, 210 U.S. at 80; *see also* 1905 Appropriation, 33 Stat. at 1073. Such money does not belong to Indian tribes, and they have

no claim to such funds as a matter of right. *Quick Bear*, 210 U.S. at 79–81.

Like the appropriations for "Support of Schools" at issue in *Quick Bear*, Congress's appropriations for IHS also are gratuitous appropriations of public money that do not belong to Plaintiff and on which Plaintiff can make no claim as a matter of right. Unlike the treaty funds at issue in *Quick Bear*, Congress's appropriations for IHS do not refer to any treaty or to any particular health care program and, instead, are lump-sum appropriations that do not confer any particular rights. *Lincoln*, 508 U.S. at 192 (reaffirming the bedrock principle "that where 'Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions.'" (quoting *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975))); *see also* Dep't of the Interior & Related Agencies Appropriations Act, 1985, Pub. L. No. 98-473, 98 Stat. 1838, 1863–64 (1984) (appropriating the 1985 IHS funds addressed in *Lincoln*, for the purpose of carrying out the Snyder Act, the Indian Self-Determination and Education Assistance Act ("ISDEAA"), the Indian Health Care Improvement Act ("IHCIA"), and the Public Health Service Act ("PHSA")); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2564 (2015) (appropriating funds to IHS for 2016, also for the purpose of carrying out the Snyder Act, the ISDEAA, the IHCIA, and the PHSA). Thus, Congress gives IHS broad discretion in how to allocate these lump-sum appropriations. *Lincoln*, 508 U.S. at 192; *see also* 129 Stat. 2564; Defs.' Br. at 2–3 (discussing Congress's appropriations for IHS). Consistent with that

discretion, IHS allocates funding to health programs for all American Indians and Alaska Natives, including more than $34 million that IHS allocated to health care for Plaintiff's members as of FY 2017.[1] Defs.' SOF, ¶ 11 (identifying amounts allocated for programs IHS provides to Plaintiff's members for fiscal years ("FY" or "FYs") 2010–2017); Pl.'s Resp. to Defs.' SOF ¶ 11 (undisputed as to substance). Accordingly, Congress's appropriations for IHS are gratuitously-appropriated public funds that do not belong to Plaintiff (or any other tribe) and, therefore, are not a trust corpus.

Every court to consider this issue since *Lincoln* has reached the same conclusion. *See, e.g.*, *Quechan Tribe of the Ft. Yuma Indian Reservation v.*

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[1] Plaintiff concedes it is not challenging Congress's appropriations for IHS or IHS's allocations of its lump-sum appropriations. Pl.'s Mem. at 38. Yet, Plaintiff suggests that funding for Plaintiff's health program is material evidence of unmet health care needs. Pl.'s Mem. at 6–7 (identifying the gap between congressional appropriations and the amount needed for health care generally and selectively referring to one budget line of the funds IHS allocates for Plaintiff's programs that reduced from 2010 to 2017); *see also* Pl.'s SOF ¶ 6–9, 26(d). On the other hand, Plaintiff challenges Defendants' facts regarding appropriations and funding as immaterial. *See, e.g.*, Pl.'s Resp. to Defs.' Statement of Undisputed Facts ("Pl.'s Resp. to Defs.' SOF"), Doc. 92, ¶ 11 (disputing materiality, but not substance).

While Plaintiff's position on materiality is confusing at best, its own statements about IHS's allocations for the health care programs provided to Plaintiff's members also are misleading. First, Plaintiff fails to recognize that Congress reduced appropriations for IHS, including when it imposed government-wide sequestration in 2013, thereby reducing the amount IHS could allocate to Plaintiff and all other tribes. *See* Former Deputy Director of Management Operations, IHS, Elizabeth Fowler Dep. Tr. at 104, lines 11–20, 105, lines 15–18. Second, IHS's total allocations from all budget lines for Plaintiff's programs increased by 12%, from $31.2 million to $34.7 million, from 2010 to 2017. Defs.' Statement of Undisputed Material Facts ("Defs.' SOF"), Doc. 82, ¶ 11; Pl.'s Resp. to Defs.' SOF ¶ 11 (undisputed).

United States ("*Quechan Tribe II*"), 599 F. App'x 698, 699 (9th Cir. 2015) (holding that the court could not require IHS to provide additional funds to a particular service unit "because there is no specific, unequivocal statutory command requiring IHS to do so" and "because IHS's allocation of the lump-sum appropriation for Indian health care is committed to its discretion"); *Yankton Sioux*, 533 F.3d at 644 ("The Tribe has not identified any assets taken over by [IHS] such as tribally owned land, timber, or funds which would give rise to a special trust duty."); *Samish Indian Nation v. United States*, 419 F.3d 1355, 1366 (Fed. Cir. 2005) ("[T]he Supreme Court has already determined the Snyder Act does not provide a damage remedy because it does not require the expenditure of general appropriations, on specific programs, for particular classes of Native Americans.") (citing to *Lincoln*, 508 U.S. at 194); *Gila River Indian Cmty. v. Burwell* ("*Gila River*"), No. 14-cv-00943, 2015 U.S. Dist. LEXIS 27595, 2015 WL 997857 (D. Ariz. Mar. 6, 2015) (finding no trust corpus existed because, consistent with *Lincoln* and *Quick Bear*, "the general appropriations for IHS are public moneys belonging to the government, not funds set aside in trust"); *Hammitte v. Leavitt*, No. 06-cv-11655, 2007 U.S. Dist. LEXIS 76051, 2007 WL 3013267, at *9 (E.D. Mich. Oct. 11, 2007) ("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."); *Allred v. United States*, 33 Fed. Cl. 349, 355, 357 (Fed. Cl. 1995) (citing to *Lincoln* to conclude that neither the IHCIA nor the Snyder Act "mandate that the IHS spend its general appropriations in any particular

manner" and that no trust corpus existed).

Plaintiff responds by distorting all of the cases, including *Lincoln* and *Quick Bear*, and suggesting an unsubstantiated distinction between *Allred* and the congressional appropriations at issue in this case. Pl.'s Mem. at 35. No such distinction exists. As explained in Defendants' opening brief, historically IHS has received the same lump-sum, annual appropriations from Congress, for the same purpose of carrying out the Snyder Act, the ISDEAA, the IHCIA, and the PHSA each year. Defs.' Br. at 2–3; *also compare* 98 Stat. at 1863–64 (1984) (appropriating the 1985 IHS funds addressed in *Lincoln*), *with* Dep't of Interior & Related Agencies Appropriations Act, 1991, Pub. L. No. 101-512, 104 Stat. 1915, 1950 (1990) (appropriating the 1991 IHS funds that would have been at issue on May 29, 1991, the date of the Agency action at issue in *Allred*, 33 Fed. Cl. at 351), *and* 129 Stat. at 2564 (appropriating 2016 IHS funds).

Finally, Plaintiff cites to *White v. Califano*, 437 F. Supp. 543 (D.S.D. 1977), yet fails to reconcile that 1977 decision with subsequent Supreme Court precedent on the trust responsibility, generally, and the IHS-specific findings in *Lincoln*. *See, e.g.*, Pl.'s Mem. at 36. As discussed herein and in Defendants' opening brief, to the extent *White* directly contradicts the last 40 years of Supreme Court precedent, the decision is no longer valid. Defs.' Br. at 21–23.

Because Plaintiff's only attempt to identify a trust corpus is a reference to Congress's gratuitous appropriations of public money for IHS, Plaintiff has failed to identify a trust corpus and, therefore, cannot identify any trust duty.

2. Plaintiff fails to identify any source of law creating a specific trust duty and, therefore, cannot show any violation of a duty.

Even if Plaintiff could identify a trust corpus, and it cannot, its claim would still fail because the analysis of a trust claim "must begin with '*specific* rights-creating or duty-imposing statutory or regulatory prescriptions.'" *Navajo II*, 556 U.S. at 301 (emphasis added) (citing *Navajo I*, 537 U.S. at 506). This is consistent with Congress's exclusive responsibility for articulating and giving content to the unique relationship between the United States and Indian Tribes. U.S. Const. art. I, § 8, Cl. 3 (Indian Commerce Clause). When, as here, a 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*, 564 U.S. at 177 (quoting *Navajo II*, 556 U.S. at 302); *see also 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).

While Plaintiff refers to the Snyder Act, the IHCIA, the Affordable Care Act,[2] common law, and the Treaty for its allegations, Plaintiff fails to identify

[2] By reference in the Patient Protection and Affordable Care Act, or "Affordable Care Act" or "ACA," Congress enacted the Indian Health Care Improvement Reauthorization and Extension Act ("IHCIREA"). Pub. L. No. 111-148, § 10221, 124 Stat. 119, 935 (2010) (as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010)). The IHCIREA amended and reauthorized the IHCIA (as codified in 25 U.S.C. §§ 1601–85). 124 Stat. 935. Accordingly, references herein to the

any text in any of those authorities that requires any specific duty of Defendants. Pl.'s Mem. at 30–33. Plaintiff's failure is understandable because Congress has not enacted any law requiring any specific duties of IHS.

a. Neither the Snyder Act, the IHCIA, nor Common Law establish any specific trust duty—either individually or as a "network" of authorities.

When Congress enacted the Snyder Act and the IHCIA, it gave IHS broad discretion and flexibility to determine how best to provide health services to all American Indians and Alaska Natives. Defs.' Br. at 13–16 (discussing how the Snyder Act and the IHCIA speak of Indian health only in general terms and do not establish any specific trust duty). Congress may have relied on the general trust relationship as a rationale to enact the IHCIA, 25 U.S.C. § 1602; but that alone does not furnish a basis for a court to impose extra-statutory duties on IHS. *Pennhurst State Sch. & Hosp. v. Haldermann*, 451 U.S. 1, 11, 19 (1981) (finding that policy statements "simply do[ ] not create substantive rights"); *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); *see also Quechan Tribe of Ft. Yuma Indian Res. v. United States* ("*Quechan Tribe I*"), No. 10-cv-02261, 2011 U.S. Dist. LEXIS 36778, 2011 WL 1211574, at *3 (D. Ariz.

IHCIA include the amendments and reauthorization enacted by reference in the ACA.

Mar. 31, 2011) (finding that the addition of the word "trust" to § 1602 did not reflect any congressional intent to impose specific fiduciary duties on IHS and stating that "broad policy language . . . does not create a private right of action or impose any specific duties on defendants . . . and [w]ithout specific statutory entitlement, there is no claim"), *aff'd*, *Quechan Tribe II*; *see also* Defs.' Br. at 18 (discussing how common law cannot serve as a basis for establishing a trust duty). Because Congress declined to create vested rights in any particular programs or services provided under the auspices of the Snyder Act or the IHCIA—or to specify particular standards that IHS must follow—Congress has not imposed any trust duty on IHS. Defs.' Br. at 13–21.

Plaintiff cannot conjure a specific trust duty by cobbling together multiple statutes that speak of Indian health only in general terms, as it attempts to do in its "network" argument. Pl.'s Mem. at 30–33. Plaintiff's reliance on *Mitchell II* is misplaced. *Mitchell II* involved the management of forest resources on allotted lands of the Quinault Indian Reservation. 463 U.S. at 219. The government's role in that case was "pervasive," with the government selling timber resources, consenting to sales by allottees, and ensuring the proper disposition of all proceeds. *Id.* at 219–20. Thus, that case clearly involved a trust corpus in the form of Indian timber, land, and funds. 463 U.S. at 224, 225. In addition, the relevant statutes in that case provided concise guidance to the government on administering the corpus. *See, e.g.*, *id.* at 221 (explaining how the Indian Reorganization Act of 1934, 48 Stat. 984, "imposed even stricter duties" on the government by requiring "sustained-yield"

management methods to better conserve Indian lands and assets). The assumption of "such elaborate control over forests and property belonging to Indians" therefore established specific fiduciary duties. *Id.* at 225. The reasoning of *Mitchell II* is inapposite here, where no Indian property is involved and the statutes at issue speak of Indian health only in general terms.

Rather, this case is more akin to *Navajo II*, in which the Supreme Court rejected reliance on a "network" of laws as the basis for creating a trust duty, due to the absence of "a specific, applicable, trust-creating statute or regulation that the Government violated." 556 U.S. at 295–302. *Navajo II* involved an ongoing dispute over a coal lease. *Id.* at 292. The Court previously rejected the tribe's reliance on the Indian Mineral Leasing Act of 1938 ("IMLA") as providing a basis for its trust claim, finding that the statute did not contain "specific prescriptions for coal leases." *Navajo I*, 537 U.S. at 494 (contrasting the IMLA's general provisions on coal leases to its more specific requirements for oil and gas leases). The Court affirmed its longstanding rule, applied in *Mitchell II* and other cases, that "a Tribe must identify a substantive source of law that establishes *specific* fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Id.* at 506 (emphasis added). The Court affirmed again that the general trust relationship alone is insufficient to impose fiduciary duties. *Id.* It found that the IMLA failed to set out any specific duties. *Id.* at 506–07. To the contrary, the IMLA promoted self-governance, giving the government a limited role that is in clear contrast to the role of a fiduciary. *Id.* at 507–09.

On remand, the court of appeals accepted the tribe's new argument that a "network" of other statutes, in combination with the IMLA, provided a basis for its trust claims. *Navajo II*, 556 U.S. at 295–96. The Supreme Court overturned that decision, admonishing "that our reasoning in *Navajo I*—in particular, our emphasis on the need for courts to '*train on specific rights-creating or duty-imposing statutory or regulatory prescriptions*,'—left no room for that result based on the sources of law that the Court of Appeals relied upon." *Id.* at 295 (emphasis added) (internal citations omitted) (quoting *Navajo I*, 537 U.S. at 506). Because none of the individual statutes at issue impose a specific duty, the statutes combined also cannot form a network that imposes such a duty. *Id.* at 295–302.

Here, Plaintiff tries to avoid the plain requirements set out by the Supreme Court by suggesting that this Court can infer some undefined obligation, even absent a specific, trust-creating statute. *See* Pl.'s Mem. at 31. The Supreme Court explicitly rejected such a claim in *Navajo II*, explaining that identifying "a substantive source of law that establishes *specific fiduciary or other duties*" is the *threshold* issue. 556 U.S. at 290–91 (emphasis added); *see also Cheyenne River*, No. 15-cv-3018, Doc. 108 at 40 (citing *Navajo II*). As discussed, Plaintiff cannot meet that threshold here, where the only resource at issue is Congress's gratuitous appropriation of public funds—not trust or

treaty funds—and the statutes speak of Indian health in general terms only.[3] Plaintiff's reference to a "network" of statutes does nothing to change that result, as the court made clear in *Navajo II*.

Plaintiff's reliance on *Jicarilla* as support for its "network" argument also is misplaced. In *Jicarilla*, the Supreme Court held exactly the opposite of what Plaintiff claims—"[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities in statute," and even control over Indian assets will not matter if a tribe "cannot identify a specific, applicable, trust-creating statute." 564 U.S. at 177. An alleged "network" of statutes cannot impose some amorphous duty that otherwise does not exist in any specific statute.

Nor can Plaintiff rely on *White v. Califano, supra,* or *Blue Legs v. U.S. Bureau of Indian Affaris,* 867 F.2d 1094 (8th Cir. 1989). As an initial matter, each case provided specific relief, unlike the broad declaration Plaintiff seeks here. *White*, 437 F. Supp. at 555–56 (finding that the plaintiff's "medical need was extreme" and that IHS must provide for her care because the state did not have jurisdiction to do so); *Blue Legs*, 867 F.2d at 1098–99 (holding that federal

[3] Moreover, similar to *Navajo I*, Plaintiff has the option of operating the health care programs itself by entering into a self-determination agreement with IHS under the ISDEAA. 25 U.S.C. § 5321; *Navajo I*, 537 U.S. at 507–09 (finding that the United States cannot be found to exert the level of control required of a fiduciary when statutes authorize self-governance). Plaintiff has exercised that option for a portion of its programs. *See* Defs.' SOF ¶ 14 (identifying the funding transferred to Plaintiff under its self-determination agreement in FYs 2010–2017); Pl.'s Response to Defs.' SOF ¶ 14 (undisputed).

agencies, including IHS, must comply with the waste disposal requirements of the Resource Conservation and Recovery Act ("RCRA")). *Blue Legs* is further distinguished by that court's determination that the agencies violated the RCRA, which is not at issue here. *Id.* Moreover, the court in *Blue Legs* considered the trust relationship only as further support for the specific obligations that existed under the RCRA. *Id.* at 1100–01. Therefore, *Blue Legs* is distinct from this case, in which Plaintiff cannot identify any specific duty set out in statute. Finally, both the holdings in *White* and *Blue Legs* are no longer valid to the extent they are inconsistent with subsequent Supreme Court precedent. *See* Defs.' Br. at 21–23 (discussing *White* in depth and noting that *Blue Legs* is invalid for the same reasons).

Plaintiff's contention that *White* "did not ignore the Court's enumerated requirements for finding that a trust responsibility exists" and instead "implicitly acknowledges that the IHS annual appropriations are sufficient to establish a trust corpus," Pl.'s Mem. at 36, is confusing at best. It defies logic to suggest that *White* could have considered the "enumerated requirements" in *Mitchell II*, *Navajo I*, *Navajo II*, or *Jicarilla*, which were all decided years after *White*. As discussed above, it similarly makes no sense for Plaintiff to rely on the 1977 *White* decision in light of the 1993 decision in *Lincoln*. Indeed, the Eighth Circuit more recently rejected allegations of a trust duty owed by IHS, finding that no such duty existed because the tribe had neither "identified any assets taken over by the government such as tribally owned land, timber, or funds" nor "alleged violation of any statutory or treaty obligation" that could

give rise to a trust duty. *Yankton Sioux*, 533 F.3d at 644.

Other courts have reached the same result. *See, e.g.*, *Quechan Tribe II*, 599 F. App'x at 699 ("Neither the Snyder Act nor the [IHCIA] contains sufficient trust-creating language on which to base a judicially enforceable duty. Both statutes 'speak about Indian health only in general terms,' [*Lincoln*, 508 U.S. at 194], and neither requires the United States to provide a specific standard of medical care."); *Hopi Tribe v. United States*, 782 F.3d 662, 669–71 (Fed. Cir. 2015) (finding that the Snyder Act and the IHCIA cannot be construed as imposing a trust duty and that such a duty exists only when Congress "'expressly accepts those responsibilities by statute'") (quoting *Jicarilla*, 564 U.S. at 177); *Samish Indian Nation*, 419 F.3d at 1366 ("[T]he Supreme Court has already determined the Snyder Act . . . does not require the expenditure of general appropriations, on specific programs, for particular classes of Native Americans.") (citing to *Lincoln*, 508 U.S. at 194); *Gila River*, 2015 WL 997857, at *5 ("The Court cannot conclude that the statutes and regulations relied on by the Community show that the United States has accepted trust responsibilities for the healthcare related duties the Community seeks to enforce."); *Hammitte*, 2007 WL 3013267, at *9 ("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."); *Tsosie ex rel. Estate of Tsosie v. United States*, 441 F. Supp. 2d 1100, 1104–05 (D.N.M. 2004) (relying on *Mitchell II*, *Navajo I*, *Lincoln*, and *Allred* to determine that the statutes at issue, including

the Snyder Act and the IHCIA, "speak of Indian health only in general terms" and to find that plaintiffs "simply have not presented this Court with a treaty, statute, executive order, or regulation charging the United States with a specific duty to act"); *Allred*, 33 Fed. Cl. at 355 (citing to *Lincoln* for the conclusion that neither the IHCIA nor the Snyder Act "mandate that the IHS spend its general appropriations in any particular manner").

Finally, the Indian canon of construction asserted by Plaintiff, Pl.'s Mem. at 27–28, applies only in the face of an *ambiguity* and does not serve as an independent basis for asserting a trust duty. *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985), and concluding that the canon "cannot make the difference for which the Tribes argue"). The Indian canon cannot be used to overcome Congress's drafting of the statutes at issue, *id.*, which in this case do not impose any specific duties and instead are unambiguously general and devoid of standards imposed on IHS by Congress. *See also* Defs.' Br. at 13–16. Accordingly, there is no basis for applying the Indian canon to find a specific duty in any of these statutes.

For the reasons discussed herein and in Defendants' opening brief, Plaintiff's reliance on the Snyder Act, the IHCIA, the Affordable Care Act, and common law as a "network" of authorities is legally insufficient to establish any specific duty owed by Defendants to Plaintiff and its individual members. As such, Plaintiff fails to show that any trust duty exists and, without any duty, also cannot show any breach.

b. Plaintiff cannot establish that Defendants have breached any duty, particularly because Plaintiff has failed first to establish a duty.

Where, as here, Plaintiff has failed the threshold requirement of establishing a trust duty, Plaintiff cannot establish a breach. Yet Plaintiff devotes significant effort to alleging that IHS's actions constitute a breach. Pl.'s Mem. at 3–24. The worst of these allegations, even if true, cannot create a trust duty. Even if Plaintiff could establish that a duty exists, and it cannot, its allegations do not establish that a breach has occurred.

First, many of Plaintiff's allegations are too broad and too general to establish a specific breach. For example, Plaintiff refers to health disparities of American Indians and Alaska Natives, generally, rather than to health disparities specific to Plaintiff and its members. *See, e.g.*, Pl.'s SOF, ¶¶ 1, 3–7, 14(a), (c)–(f), 21, 23–25, 26(a); Pl.'s Mem. at 4–6. Also, Plaintiff refers to IHS's difficulty with recruiting and maintaining staff, without recognizing that this is a widespread issue for all rural health care providers. *Compare* Pl.'s Mem. at 7–13 (discussing concerns about staff recruitment and retention), *and* Pl.'s SOF ¶¶ 1, 10, 14, 17, 26(b), *with* Eli Saslow, Wash. Post., *'Out here, it's just me': In the medical desert of rural America, one doctor for 11,000 square miles* ("*It's just me*") (Sept. 28, 2019), https://www.washingtonpost.com/national/out-here-its-just-me/2019/09/28/fa1df9b6-deef-11e9-be96-6adb81821e90_story.html ("The federal government now designates nearly 80 percent of rural America as 'medically underserved.' It is home to 20 percent of the U.S. population but fewer than 10 percent of its doctors . . . . In Texas

alone, 159 of the state's 254 counties have no general surgeons, 121 counties have no medical specialists, and 35 counties have no doctors at all."); Kirk Siegler, Nat'l Public Radio, *The Struggle To Hire And Keep Doctors In Rural Areas Means Patients Go Without Care* ("*Struggle*") (May 21, 2019), https://www.npr.org/sections/health-shots/2019/05/21/725118232/the-struggle-to-hire-and-keep-doctors-in-rural-areas-means-patients-go-without-c (discussing the challenges of rural health care, including lack of access to physicians); Eli Saslow, Wash. Post, *Who's Going To Take Care Of These People: As Emergencies Rise Across Rural America, A Hospital Fights For Its Life* (May 11, 2019), https://www.washingtonpost.com/news/national/wp/2019/05/11/feature/whos-going-to-take-care-of-these-people/ (discussing the many challenges faced by rural hospitals, including the shortage of 40,000 physicians in rural America); John Iglehart, *The Challenging Quest to Improve Rural Health Care*, New England Jl. Of Med. 473, 475–76 (Feb. 1, 2018) (attachment #2 to DuPris Declaration) (discussing workforce issues as one of several challenges in rural health care); *and* Robin Warshaw, Assoc. of Amer. Med. Colleges, *Health Disparities Affect Millions in Rural U.S. Communities* ("*Health Disparities*") (Oct. 31, 2017), https://news.aamc.org/patient-care/article/health-disparities-affect-millions-rural-us-commun/ (discussing rural health disparities, including longer wait times in emergency rooms and physician shortages). Facts about American Indians and Alaska Natives generally and problems that are not unique to IHS but are widespread amongst all rural health care providers cannot serve as material evidence of any specific

duty owed to Plaintiff and its members, or a specific breach thereof.[4]

Second, conclusory statements that the temporary lack of certain services, such as surgical and obstetrics, are evidence of a duty or a breach also fail. *See, e.g.*, Pl.'s Mem. at 8, 17; Pl.'s SOF ¶¶ 14, 26(b). Again, all parties to this case agree that a full array of services is ideal for all American Indians and Alaska Natives. That ideal does not, however, establish a legal requirement for the United States to provide such services—such a requirement must be set out in statute and, as discussed herein, Plaintiff has not shown any statutory requirement.

Plaintiff also fails to recognize that this issue is common among rural health care providers—who all face intensive challenges—and is not unique to IHS. *See, e.g.*, Siegler, *Struggle* (noting that a community hospital serving a population of 15,000 has only two family practice providers who also serve as obstetricians and sharing the story of a women who drives four hours to get to an obstetrician); Iglehart, New England Jl. of Med. at 476 ("the scarcity of medical specialists is acute in many sparsely populated places, particularly general surgeons, hospitalists, internists, obstetricians, gynecologists, oncologists, and psychiatrists"); Warshaw, *Health Disparities* (citing a study that found "as of 2014, 54% of rural counties did not have a hospital with obstetrics services"). Moreover, *Lincoln* has affirmed IHS's discretion in making

[4] To the extent Plaintiff's expert, Dr. Donald Warne, relies on such immaterial facts, his report is similarly immaterial. *See, e.g.*, Pl.'s SOF ¶¶ 26(a), (b).

decisions about which programs and services to provide. 508 U.S. 182. If Plaintiff objects to the programs and services that IHS has prioritized at the Rosebud Service Unit ("RSU"), Plaintiff may contract under the ISDEAA to operate the health care programs itself, based on the priorities Plaintiff identifies for its members. 25 U.S.C. § 5321. Otherwise, without any legal restraint on IHS's discretion to determine which programs and services to provide, no duty can exist, and no breach can occur.[5]

Third, Plaintiff's reliance on congressional hearings and investigations, Pl.'s Mem. at 13–14, also fails to establish either a specific duty or breach thereof. To the contrary, by demonstrating that Congress is aware of some concerns, Plaintiff has only emphasized Congress's decision not to impose any specific requirements on IHS to address those concerns, *e.g.*, by earmarking a specific amount for Plaintiff's health care programs in the annual appropriations for IHS. Rather than establishing a duty or a breach, Plaintiff's recitation of such facts further demonstrates that its "concerns are best addressed through the political process." *Quechan Tribe I*, 2011 WL 1211574, at *7.

Fourth, by conceding that it is not challenging appropriations for IHS or

[5] Dr. Warne incorrectly assumes that IHS is required to provide certain care, e.g., surgical and obstetric services, and concludes that IHS's failure to provide such services at all times means that IHS has failed to meet the amorphous standard of "provid[ing] the highest quantity and quality of health care services" to Plaintiff and its members. Pl.'s SOF ¶ 26(b), 27. Dr. Warne's legal conclusions are wholly unsupported by the law, as discussed herein.

IHS's allocations of its lump-sum appropriations, *see, e.g.*, Pl.'s Mem. at 38, Plaintiff calls into question the materiality of several of its own facts. *See id.* at 6–7 (identifying the gap between congressional appropriations and the amount needed for health care, generally); *see also* Pl.'s SOF ¶ 6–9, 26(d);[6] *see also Nat'l Ass'n of Reg'l Councils v. Costle*, 564 F.2d 583, 590 n.16 (D.C. Cir. 1977) ("[T]he matter of whether or not an appropriation will be made rests wholly upon the determination of Congress, and with that determination this court has nothing to do.") (quoting *Hetfield v. United States*, 78 Ct. Cl. 419, 422 (1933)). It is not clear how this is material if Plaintiff is not challenging Congress's appropriations for IHS or IHS's allocations of its lump-sum appropriations. The materiality of these facts is even more questionable considering Plaintiff has disputed the materiality of Defendants' facts regarding the funding IHS allocates to health care programs for Plaintiff's members. *See, e.g.*, Pl.'s Resp. to Defs.' SOF ¶¶ 7, 11 (undisputed as to substance but disputed as to materiality). Moreover, this Court has already dismissed Count IV of Plaintiff's Complaint which was based on the disparity of funding health care for Native Americans in comparison to other federal health care needs of other patient populations.

Finally, to the extent Plaintiff is alleging malpractice, Pl.'s Mem. at 14,

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[6] Dr. Warne relies on the erroneous conclusion that IHS's allocations of funds to the RSU are declining, Pl.'s SOF ¶ 26(d), when IHS's total allocations for Plaintiff's programs increased by 12%, from $31.2 million to $34.7 million, from 2010 to 2017. Defs.' SOF ¶ 11; Pl.'s Resp. to Defs.' SOF ¶ 11 (undisputed).

Pl.'s SOF ¶¶ 28, 31–33, such concerns do not provide the basis for breach of trust claims and, instead, are properly addressed as tort claims. *Quechan Tribe I*, 2011 WL 1211574, at *4. "If 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*, 2015 WL 997857, at *4.[7] "But plaintiffs' [sic] *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.*

Thus, even if true, Plaintiff's factual allegations do not provide a basis for this Court to declare that the United States has breached some duty that is not set out in statute.

B. The Treaty does not establish any trust duty, nor has Plaintiff identified any specific breach arising under the Treaty.

Plaintiff has not shown how the Treaty establishes a trust duty. *See* Defs.' Br. at 16–18; *see also supra* sec. I.A (discussing Supreme Court

[7] Thus, to the extent Plaintiff relies on statements by individuals who imply malpractice has occurred, *see, e.g.*, Pl.'s Mem. at 14, Pl.'s SOF ¶¶ 28, 31–33, such facts are immaterial to Count III. Moreover, allegations of malpractice require a plaintiff to identify—not assume, as Plaintiff does here—the existence of a duty and the standard by which a defendant's actions will be judged. *See, e.g.*, *Sorace v. United States*, 788 F.3d 758, 763 (8th Cir. 2015) ("[T]he analogue for [a Federal Tort Claims Act] claim under South Dakota state law is a negligence claim, which requires proof of duty . . . ."); *Chapa v. United States*, 497 F.3d 883, 887 (8th Cir. 2007) (explaining that a plaintiff alleging medical malpractice must establish the medical standard of care); *White v. United States*, 148 F.3d 787, 793 (7th Cir. 1998) (finding that establishing the existence of a duty is one of four elements in a negligence action).

precedent requiring a trust corpus and specific duties imposed by Congress to establish a trust duty). As discussed herein, Plaintiff also cannot show the existence of any treaty or trust funds. *Supra* sec. I.A.1. However, assuming *in arguendo* that the Treaty imposes some duty (whether a trust or a treaty duty) on the United States, IHS's services exceed any requirements of the Treaty. Under its plain terms, the Treaty required the United States to provide "the physician" for Plaintiff and all other signatory tribes. Treaty, art. XIII. In addition, the United States promised to construct "a residence for the physician." *Id.* art. IV. Plaintiff does not dispute that the United States met these terms. *See* Defs.' SOF ¶ 15; Pl.'s Resp. to Defs.' SOF ¶ 15 (agreeing that IHS provides many physicians and other health care professionals, though questioning the consistency in the number).[8]

Indeed, IHS's services far exceed the Treaty requirement to provide a physician to all signatory tribes. IHS spends millions of dollars of its lump-sum appropriation each year, employing many physicians for Plaintiff and its members alone (not counting physicians provided to other signatory tribes). Defs.' SOF ¶ 11 (identifying amounts IHS allocated for the services it provided

[8] Plaintiff has never so much as suggested that the United States breached its agreement to build a residence for the physician. IHS continues to provide quarters for health care providers. Doc. 91-8 at 1 (identifying the amount allocated by IHS to Rosebud each year for "quarters," which is housing available for health care providers); Dep't of Health & Human Servs., Indian Health Service: Justification of Estimates for Appropriations Committees, Fiscal Year 2020, at CJ-184–CJ-185, https://www.ihs.gov/budgetformulation/includes/themes/responsive2017/display_objects/documents/FY2020CongressionalJustification (explaining the "quarters" budget line and how it is funded).

to Plaintiff's members for FYs 2010–2017); Pl.'s Resp. to Defs.' SOF ¶ 11 (undisputed); Defs.' SOF ¶ 15 (explaining that IHS employs many physicians and other health care professionals at RSU); Pl.'s Response to Defs.' SOF ¶ 15 (agreeing that IHS provides many physicians and health care professionals, though questioning the consistency in the number). As such, IHS's services far exceed providing a physician to all signatory tribes of the Treaty, and Plaintiff cannot establish any violation of the Treaty.

Without relying on any text of the Treaty, Plaintiff asserts that the Treaty requires the United States "to provide health care to the Tribe to the extent necessary 'to ensure the highest possible health status for Indians.'" Pl.'s Mem. at 27–28. Plaintiff further asserts that *ambiguous* treaty provisions must be interpreted for its benefit under the Indian canon. Pl.'s Mem. at 27 (relying on *Oneida County, N.Y. v. Oneida Indian Nation of N.Y. State* ("*Oneida*"), 470 U.S. 226, 247 (1985), and *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985)). That may be, but the "starting point for any analysis" of Indian treaties "is the treaty language itself." *Oneida*, 470 U.S. at 206. Plaintiff fails to allege, let alone establish, any ambiguities in the Treaty's language. Indeed, Plaintiff does not even recite any treaty text or explain how any of the text requires the alleged duty. Nor can Plaintiff point to any such language, as the Treaty is straightforward and clear: The United States agreed to provide "the physician . . . as herein contemplated" for the benefit of all signatory tribes while also reserving "the privilege of withdrawing the physician" after ten years. Treaty, art. XIII, IX. This agreement cannot be expanded beyond its plain

language to require the nebulous duty claimed by Plaintiff. *See, e.g., Cheyenne River*, No. 15-cv-3018, Doc. 108 at 40–44 (refusing to expand the requirements of the Treaty beyond the plain language); *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1083 (D.S.D. 2009) (dismissing the treaty-based claim brought by the tribe). To the contrary, by reserving the right to withdraw the physician, the United States clearly was not agreeing in the Treaty to an expanded duty. Since Plaintiff does not dispute that IHS provided more than one physician for Plaintiff alone, Defendants have complied with the Treaty and no breach has occurred.

II. Plaintiff lacks standing to bring the claim asserted in Count III.

This Court should decline Plaintiff's request for declaratory relief and hold that the requested relief is impermissibly speculative as to how it could redress any harm claimed by Plaintiff. *See* Defs.' Br. at 27–28. "In a case of actual controversy within its jurisdiction," the Declaratory Judgment Act ("Act") allows this Court to "declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). The Act "confer[s] on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136 (2007). In passing the Act, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *see also* State of *Mo. ex rel. Missouri Highway & Transp. Comm'n v. Cuffley*, 112 F.3d 1332, 1334 (8th Cir. 1997) ("[T]he [Act] is a procedural statute, not a jurisdictional

statute."). Because Plaintiff cannot meet the redressability element of standing, this Court lacks jurisdiction over Count III.

Plaintiff seeks declaratory relief for a nebulous trust duty and an unspecified breach of such duty based on the plurality opinion in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). In *Franklin*, the plaintiffs challenged congressional reapportionment of seats in the House of Representatives. *Id.* at 796. Writing for a plurality, Justice O'Connor opined that a judgment against the Secretary of Commerce requiring issuance of a modified census report would likely redress certain apportionment-related injuries, even though it ultimately was the President's duty to transmit apportionment results to Congress. *See id.* at 800, 803. As the Court explained in a later census case, redress was "likely" under such circumstances because a court could compel the Secretary to substitute a new census report for the old one, and consequent apportionment-related steps would be "purely mechanical." *Utah v. Evans*, 536 U.S. 452, 463-64 (2002).

In contrast with *Franklin and Evans*, no such "purely mechanical" result is likely to occur as a result of this Court's declaration of an undefined trust duty or a breach thereof by Defendants. *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 959 (8th Cir. 2015) ("The relief sought in this case . . . is not so directly related to an alleged injury as the revised census report and the 'purely mechanical' apportionment-related steps that would follow in *Evans*."). Rather, it remains entirely speculative, what, if anything, would change in the relationship between the parties if this Court were to issue

such a declaration. *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) ("The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an [impermissible] advisory opinion—is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff."); *Mississippi River Revival, Inc. v. City of Minneapolis*, 145 F. Supp. 2d 1062, 1065 (D. Minn. 2001) (finding that plaintiffs lacked standing because the requested declaration that past conduct violated rights "would not compel any additional action on the part of the [defendants] and therefore would do nothing to redress [p]laintiffs' [sic] injuries."), *aff'd*, 319 F.3d 1013 (8th Cir. 2003).

As discussed herein, this Court could not declare Congress's appropriations for IHS insufficient, nor declare IHS's allocation of funds to the RSU insufficient. *See* Pl.'s Mem. at 38 (conceding the same). Moreover, allowing Plaintiff to challenge congressional appropriations for IHS or IHS's allocation of those funds would mean that all private citizens essentially have a freestanding right to obtain some hypothetical level of funding for their favorite agency and to direct those funds to their favorite agency field office. This concept finds no support in the law. *See NAACP v. Bureau of the Census*, No. 8:18-cv-891, -- F. Supp. 3d --, 2019 U.S. Dist. LEXIS 128368, 2019 WL 3500934, at *5 (D. Md. Aug. 1, 2019); *Farbstein v. Hanks*, No. 05-cv-14, 2006 U.S. Dist. LEXIS 98338, 2006 WL 6628293, at *4 (E.D.N.Y. June 30, 2006) ("The Plaintiff does not cite any case law nor is this Court aware of any Constitutional right to [agency] funding or Congressional assistance in gaining

[agency] funding."), *aff'd*, 331 F. App'x 890 (2d Cir. 2009). Additionally, although Plaintiff contends that it could obtain relief in relation to treaty funds, *see* Pl.'s Mem. at 28, as discussed herein, no such funds are at issue here. *Compare Lincoln*, 508 U.S. at 182, *and* 129 Stat. at 2564, *with Quick Bear*, 210 U.S. at 80 (1908) *and* 33 Stat. 1048–56. Plaintiff fails to allege any other action that would be required of Defendants as a "purely mechanical" response to the requested declaration.

Thus, Plaintiff's request remains impermissibly speculative about what any such declaration might accomplish. *See United Food & Commercial Workers Int'l Union, Local 751 v. Brown Grp., Inc.*, 50 F.3d 1426, 1430 (8th Cir. 1995) ("We do not think that the boilerplate remedies language quoted above, broad and non-specific as it is, comports with the constitutional requirement of redressability"), *rev'd on other grounds*, 517 U.S. 544 (1996). Accordingly, Plaintiff lacks standing to maintain this action.

III. This Court lacks jurisdiction over Count III.

Plaintiff's failure to suggest any relief that would be accomplished by the requested declaration leaves us with one option, despite Plaintiff's statement to the contrary—that IHS would have to reallocate funds in an attempt to be responsive to any declaration from this Court. This Court therefore lacks jurisdiction because Congress has not empowered it to order such a remedy directly. *See Lincoln*, 508 U.S. at 193. Moreover, this Court must not allow Plaintiff to "evad[e] the preclusive effect of the Tucker Act or infring[e] 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 aimed—either directly or indirectly—at the expenditure of funds, this Court lacks jurisdiction over the claim.

CONCLUSION

Plaintiff and Defendants share the same aspirational goal: achieving the highest possible level of health care for all American Indians and Alaska Natives, including Plaintiff and its members. However, such aspirations do not create a specific trust duty that the United States owes to Plaintiff. For the reasons enumerated above, Plaintiff has failed to show either specific, rights-creating duties prescribed by Congress or a trust corpus being administered by IHS. This Court cannot declare the existence or breach of specific trust obligations that do not exist. Accordingly, Defendants are entitled as a matter of law to judgment on Count III of Plaintiff's Complaint.

Dated this 9th day of October, 2019.

Respectfully Submitted,

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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 9215.

/s/ Cheryl Schrempp DuPris