IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHEROKEE NATION, Plaintiff, v. DEPARTMENT OF THE INTERIOR, *et al.*, Federal Defendants.	)	No: 1:19-cv-02154-TNM/DAR

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR 12(c) MOTION TO DISMISS PLAINTIFF'S COMMON LAW CLAIMS

Federal Defendants' argument is a simple one: to the extent Plaintiffs seek to bring claims arising from common law—and *not* from a statute—those claims should be dismissed. The law is absolutely clear that claims not grounded in statute but rather "grounded in common law," ECF No. 48 at 3, have no legal basis.

Plaintiff does not dispute that "a duty to account" requires a "statute or regulation creating a trust relationship between [the Tribe] and the government." ECF No. 60 at 4 (quoting *Fletcher v. United States*, 730 F.3d 1206, 1208-09 (10th Cir. 2013)). Nor could Plaintiff dispute this, as the law is clear that "[t]he Government assumes Indian trust responsibilities *only* to the extent it expressly accepts those responsibilities by statute." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) (emphasis added). In other words, "any specific obligations the Government may have" towards Tribes are "'governed by statute rather than the common law.'" *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 757 (2016) (quoting *Jicarilla*, 564 U.S. at 177).

The only dispute between the Parties on this matter appears to be whether the Plaintiff in fact seeks to advance a cause of action arising from common law rather than statute. Plaintiff's own statements identify common law as the basis of at least some of their claims, which is why Federal Defendants filed the instant motion. For instance, the Plaintiff openly argued before Judge McFadden it is "entitled to enforce their rights under the 1994 statute *and common law*." Feb. 18, 2020 Hrg. Tr. at 4 (emphasis added). In the Parties' Joint Statement, Plaintiff also characterized its claims as based on "common law," ECF No. 46 at 2, and in the Parties' Supplemental Joint Statement, Plaintiff again very directly asserted that "Counts I and II are . . . grounded in common law . . .". ECF No. 48 at 3. Federal Defendants in the same Statement pointed out that there can be no grounds to advance common law claims and therefore included a date in this litigation's schedule for filing this Motion. *Id.* at 14. Federal Defendants have also pointed out in their opening brief that this Motion was filed to narrow the issues before the Court as Federal Defendants remain focused on proceeding on a clear and efficient litigation track. This Motion could have been avoided as based on their opposition, Plaintiff seems to agree that any duties owed to the Plaintiff arise only from statute—not from common law. However, to the extent Plaintiff does seek to base or "ground" a claim in common law rather than statute, such a claim should be dismissed.

Plaintiff confuses the issue by arguing that "[t]he United States is seeking absolution of any common law trust obligations to the Nation, regardless of the fact that its obligation is grounded in statute . . ." ECF No. 60 at 3. Federal Defendants are not seeking absolution or release from an applicable common law trust obligation and their Motion does not seek that

relief. Instead, they are arguing that common law cannot be the source of any obligation—rather, Federal Defendants' obligations are only those it has expressly taken on by statute.

As Federal Defendants argued in their opening brief, the general trust relationship between the United States and Indian Tribes does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations. *Shoshone–Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) ("[A]n Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty."); *N. Slope Borough v. Andrus*, 642 F.2d 589, 612 (D.C. Cir. 1980) ("Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only."); *Vigil v. Andrus*, 667 F.2d 931, 934 (10th Cir. 1982) ("[T]he federal government generally is not obligated to provide particular services or benefits in the absence of a specific provision in a treaty, agreement, executive order, or statute."); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) ("[U]nless there is a specific duty that has been placed on the government with respect to Indians, [the government's general trust obligation] is discharged by [the government's] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."); *Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1039–40 (Fed. Cir. 2012) ("Indian [t]ribes, moreover, cannot simply rely on common law duties imposed on a trustee; instead, tribes must point to specific statutes [or] regulations that 'establish the fiduciary relationship and define the contours of the [Government's] fiduciary responsibilities.'").

Though the law is clear that Federal Defendants owe no general "common law obligations" to Tribes, that does not mean the common law is wholly irrelevant. If a Tribe identifies a specific statutory obligation, then the common law may inform a court's "interpretation of [the] statute[.]" *Jicarilla*, 564 U.S. 162 at 177. Indeed, that common law principles may come into play when interpreting a statute is not unique to the area of Indian trusts and accounting; it is a basic cannon of statutory interpretation. *See, e.g., Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 108 (1991) (Congress "is understood to legislate against a background of common-law . . . principles"); *Field v. Mans*, 516 U.S. 59, 69, (1995) (analyzing portion of bankruptcy code using common law meaning of term); *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 448 (9th Cir. 2011) (looking to common law for meaning of the term "owner" in statute). For instance, in *Navajo II*, the Supreme Court observed that if a Tribe had identified a specific duty statutory duty, and that duty "bears the hallmarks of a 'conventional fiduciary relationship' . . . *then* trust principles . . . could play a role . . ." *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009). But the Supreme Court cautioned that the reliance on "trust principles" was not a first step in establishing liability and criticized the Federal Circuit for making it the "starting point." *Id.*

Thus to the extent Plaintiff is advancing a theory by which obligations arise not from a statute but rather from common law—as Plaintiff appears to be based on its prior representations to this Court—that theory should be rejected. For instance, in *El Paso Natural Gas v. United States*, the plaintiff's Tenth Claim alleged "the Government breached various duties owed to it under federal common law . . ." 750 F.3d 863, 891–92 (D.C. Cir. 2014). The Circuit Court held, with regard to this claim, that the plaintiff "failed to state a claim for relief because the Tribe has

not identified a substantive source of law establishing specific fiduciary duties . . ." *Id.* at 892. The Circuit Court reasoned that a cause of action only lies "where a plaintiff can identify specific trust duties in a *statute, regulation, or treaty*." *Id.* (emphasis added); *see also Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 143-46 (D.D.C. 2017); *Navajo Nation v. United States Dep't of the Interior*, No. CV-03-00507-PCT-GMS, 2019 WL 3997370, at *4 (D. Ariz. Aug. 23, 2019) (rejecting plaintiffs' argument that its claim "need not be based on any statutory enumeration of duties because it is bringing a common law claim").

This argument is not a restatement of Federal Defendants' earlier motion to dismiss, ECF No. 34-1. *Cf.* ECF No. 60 at 9. Indeed, the phrase "common law" does not appear in that motion; Federal Defendants are not repeating an argument made there. Nor are Federal Defendants advancing an argument that they have "consistently lost in other tribal trust litigation across the country," as Plaintiff contends. ECF No. 60 at 9. The truth is exactly the opposite. The "consistently lost" argument, in Plaintiff's view is: "that the United States' actionable trust obligations to Indian beneficiaries are only those expressly provided by statute." *Id.* But despite Plaintiff's assertion, the above argument is accepted law, articulated by the Supreme Court in nearly identical language: "[t]he Government assumes Indian trust responsibilities *only* to the extent it expressly accepts those responsibilities by statute." *Jicarilla*, 564 U.S. at 177 (emphasis added).

The binding Supreme Court case law accords with *Western Shoshone Identifiable Group v. United States*, 143 Fed. Cl. 545 (2019), upon which Plaintiff relies. Even if *Western Shoshone* were binding on this Court—which it is not—the case says nothing inconsistent with the Supreme Court's articulation of statute as the "only" basis by which Federal Defendants assume

trust responsibilities. To the contrary, in *Western Shoshone* there was agreement between the parties that the statute that governed the United States' obligations to the Tribe was 25 U.S.C. § 162a. *Id.* at 593. The Plaintiff in *Western Shoshone* did not advance a common law claim not tethered to a statute.

Plaintiff also contends that this 12(c) motion is intended to avoid discovery. ECF No. 60 at 7. Here too, the facts are exactly the opposite. It is Plaintiff who is admittedly attempting to rely on its common law claims to obtain expansive discovery over a 200 year period. Indeed, during the February 18th hearing, Plaintiff cited common law as a basis for discovery. ECF No. 48-2, Feb. 18, 2020 Hrg. Tr. at 4. Moreover, Plaintiff also directly told this Court that "Plaintiff's position is that discovery is required in order for the Court to determine the necessary scope of the accounting required by common law and statute." ECF No. 46 at 6; *see also* ECF No. 48 at (attempting to support Plaintiff's request for discovery because Counts I and II are "grounded in common law and statute"). Given the fully briefed motion for a protective order which is incorporated by reference (ECF Nos. 55 and 62) and for the sake of brevity, Federal Defendants will not address this point further herein.

In sum, Plaintiff has told this Court on three occasions that it is seeking to advance claims based on common law. ECF No. 48-2, Feb. 18, 2020 Hrg. Tr. at 4, ECF No. 46 at 2, and ECF No. 48 at 3. It is beyond dispute, however, that only statutory law can create binding obligations on Federal Defendants. Therefore, to the extent Plaintiff seeks to advance claims based on common law, those claims should be dismissed. Clarifying the scope of Plaintiff's legal theory is helpful at this stage in order to focus the Parties and Court's attention on the discrete statutes that Plaintiff alleges create a duty for Federal Defendants—and the precise

contours of that statutory duty. Accordingly, to the extent Plaintiff's claims arise from common law rather than statute, they should be dismissed.

Dated: June 19, 2020

Respectfully submitted,

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