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

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I. INTRODUCTION

The Cherokee Nation ("Plaintiff") seeks an "accounting of its assets held in trust by the United States and its agencies under common law, statutes, and the Administrative Procedure Act[.]" Parties' Joint Statement, ECF 46 at 2; *see* ECF No. 1, Complaint ("Compl."), ¶¶ 131-67. Plaintiff explicitly identifies common law as the basis for both its first and second claims, characterizing these claims as based on, *inter alia*, "common law and applicable trust requirements." Parties' Joint Statement, ECF 46 at 2. Likewise, Plaintiff disclaims reliance on the Administrative Procedure Act for these claims, stating "Counts I and II are not based on the Administrative Procedure Act but rather are grounded in common law and statute . . . ." Parties' Supplemental Joint Statement, ECF No. 48 at 3.

Plaintiff's "common law" claims, however, have no legal basis. Binding case law from the Supreme Court and this Circuit make clear "trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011); *see also Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) ("While it is true that the United States acts in a fiduciary capacity in its dealings with Indian tribal property, it is also true that the government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations.").

Thus, to the extent Plaintiff's claims rest on an asserted common law trust obligation, those claims fail as a matter of law and must be dismissed. Foreclosing this legal theory at this juncture will assist in narrowing the scope of the case and clarifying the permissible legal basis of Plaintiff's claims. Accordingly, Federal Defendants respectfully request that their motion to dismiss be granted under Rules 12(c) of the Federal Rules of Civil Procedure.

II. BACKGROUND

Plaintiff is a federally recognized tribe and one of the Five Civilized Tribes that has trust or restricted lands in northeastern Oklahoma. Compl. ¶¶ 6-8. Plaintiff cites some twenty-four treaties that it executed with the United States, during the period from November 28, 1785, to April 27, 1868. *Id*. at ¶¶ 18-38, 40, 42, 47. Plaintiff alleges[1] that these treaties provided for, among other things, the cession of certain lands, the investment of certain funds, and the payment of investment interest, relating to Plaintiff. *Id*. at ¶¶ 19, 45. Additionally, Plaintiff cites numerous Acts of Congress and Presidential proclamations regarding the management of Plaintiff's trust funds, including the Indian Claims Commission Act of 1946 ("ICCA"), 60 Stat. 1049, and the American Indian Trust Fund Management Reform Act of 1994 ("Trust Fund Management Reform Act"), 108 Stat. 4239. *Id*. at ¶¶ 49-87. Plaintiff relies not only on statute and treaties but also on common law, Parties' Joint Statement, ECF 46 at 2 (characterizing claims as based on, *inter alia*, "common law"); Parties' Supplemental Joint Statement, ECF No. 48 at 3 ("Counts I and II are . . . grounded in common law . . .").

Plaintiff requests this Court direct Federal Defendants to prepare an accounting and mandate the restoration of any of Plaintiff's trust funds "for which [Federal Defendants] cannot account," and implement a series of broad programmatic changes to how Federal Defendants generally manage trust assets.

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1 For purposes of this Rule 12 motion, Plaintiff's factual allegations are assumed to be true, unless there is evidence to the contrary. *See, e.g., North v. Smarsh, Inc.,* 265 F. Supp. 3d 71, 76 (D.D.C. 2017), *aff'd,* No. 17-7120, 2017 WL 6553385 (D.C. Cir. Dec. 6, 2017); *Bazarian Int'l Fin. Assocs., L.L.C. v. Desarrollos Aerohotelco, C.A*., 168 F. Supp. 3d 1, 8 (D.D.C. 2016); *Sabre Int'l Sec. v. Torres Advanced Enter. Sols., LLC,* 60 F. Supp. 3d 21, 27 (D.D.C. 2014).

III. LEGAL STANDARD

Rule 12(c) provides that, "[a]fter the pleadings are closed—but early enough not to delay trial, a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). The standard of review under Rule 12(c), is "'virtually identical' to that applied to a motion to dismiss under Rule 12(b)(6)." *Baumann v. District of Columbia*, 744 F. Supp. 2d 216, 221 (D.D.C. 2010) (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987), *abrogated on other grounds by Hartman v. Moore*, 547 U.S. 250 (2006)). "[T]o support a Rule 12(c) motion, 'the moving party [must] demonstrate[ ] that no material fact is in dispute and that it is entitled to judgment as a matter of law.'" *Murphy v. Dep't of Air Force*, 326 F.R.D. 47, 49 (D.D.C. 2018) (quoting *Schuler v. PricewaterhouseCoopers, LLP*, 514 F.3d 1365, 1370 (D.C. Cir. 2008)); *see also Dist. No. 1, Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n, AFL-CIO v. Liberty Mar. Corp.*, 933 F.3d 751, 760–61 (D.C. Cir. 2019).

In evaluating a motion under Rule 12(c), "the court must construe the complaint in a light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations." *Baumann*, 744 F. Supp. 2d at 222 (citing *In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 854 F. Supp. 914, 915 (D.D.C. 1994)); *see also Tapp v. Wash. Metro. Area Transit Auth.*, 306 F. Supp. 3d 383, 392 (D.D.C. 2016). The Court may rely on "'the facts alleged in the complaint, documents attached to the complaint as exhibits or incorporated by reference, and matters about which the court may take judicial notice.'" *Tapp*, 306 F. Supp. 3d at 392 (quoting *Allen v. U.S. Dep't of Educ.*, 755 F. Supp. 2d 122, 125 (D.D.C. 2010)).

IV. ARGUMENT

A. Federal duties to Indians do not derive from common law.

Though Plaintiff bases their claims for breach of trust in part on "common law," there is no common law of Indian trusts. As the Supreme Court explained in *United States v. Jicarilla Apache Nation*, "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." 564 U.S. 162, 177 (2011). Thus, while a "general trust relationship" exists between the United States and federally-recognized Indian tribes, *id.* at 176 (quoting *United States v. Mitchell* ("*Mitchell II*")), 463 U.S. 206, 225 (1983), the "trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law." *Id.* at 165. *Accord Menominee Indian Tribe of Wisc. v. United States*, 136 S. Ct. 750, 757 (2016) ("We do not question the 'general trust relationship between the United States and the Indian tribes,' but any specific obligations the Government may have under that relationship are 'governed by statutes rather than the common law.'") (quoting *Jicarilla*, 56 U.S. at 162, 165).

This rule "follows from the unique position of the Government as sovereign." *Jicarilla*, 564 U.S. at 174. The United States "is not a private trustee," even when it expressly assumes "trust" duties by statute. *Id.* at 173-74. The United States "consents to be liable to private parties 'and may yield this consent upon such terms and under such restrictions as it may think just.'" *Id.* at 174 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 283 (1856)). Where statutes or regulations establish a trust relationship, common- law trust principles might play a role in informing the nature of fiduciary obligations. *Id.* at 177-78. But because federal trust obligations to Indians are "defined and governed by statutes rather than the common law," any cause of action for breach of trust "must train on specific rights-creating or

duty-imposing statutory or regulatory prescriptions." *Id.* at 174 (quoting *United States v. Navajo Nation* ("*Navajo I*"), 537 U.S. 488, 506 (2003)); *accord United States v. Navajo Nation* ("*Navajo II*"), 556 U.S. 287, 296 (2009).

This rule is longstanding. Four decades ago, the Supreme Court considered a breach-of-trust claim alleging that federal officials had mismanaged timber allotments expressly owned by the United States in trust for individual Indians under the General Allotment Act. *See United States v. Mitchell* ("*Mitchell I*"), 445 U.S. 535, 541 (1980). The Supreme Court held that the Act created a "bare trust" only; it precluded land alienation but did not impose actionable fiduciary duties with respect to the management of timber resources on the allotments. *Id.* at 542-43. Three years later, the Court considered a different set of statutes that gave federal officials comprehensive control over harvesting the timber resources on the allotments. *Mitchell II*, 463 U.S. at 222-26. Because the timber-management statutes and implementing regulations, "established "comprehensive" federal responsibilities to manage the harvesting and sale of Indian timber, the Court determined that they were intended to impose conventional trust duties enforceable by an action for damages for breach of trust. *Id.* at 222, 226.

Following *Mitchell I* and its progeny, courts have recognized that "an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty." *Shoshone-Bannock Tribes*, 56 F.3d at 1482; *see also Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (The "bare" trust relationship resulting from federal trust ownership of tribal property "does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations.").

In *North Slope Borough v. Andrus*, the Circuit Court held that a "trust responsibility can only arise from a statute, treaty, or executive order; in this respect we are governed by [*Mitchell I*] holding that the United States bore no fiduciary responsibility to Native Americans under a statute which contained no specific provision in the terms of the statute." 642 F.2d 589, 611 (D.C. Cir. 1980) (internal quotation marks and footnote omitted); *accord Shoshone–Bannock Tribes,* 56 F.3d at 1482 ("[T]he government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations." (citing the *Mitchell* cases)).

1. *Cobell* affirms this principle

In its effort to establish common-law trust duties and seek discovery on the basis of such duties, Plaintiff asserts it is "well-established precedent holding that Indian trust accounting claims fall "both within and without the [APA]." Parties' Supplemental Joint Statement, ECF No. 46 at 7 (citing *Cobell v. Babbitt* ("*Cobell V"*), 91 F. Supp. 2d 1, 24 (D.D.C. 1999). *Cobell* does not, however, establish there is a common law trust duty separate from any statute including the APA. Quite the opposite.

Cobell involved a class action by individual Indians to compel accountings to remedy the alleged mismanagement of "individual Indian money" accounts held by Interior under federal statutes. *See generally Cobell v. Norton*, 240 F.3d 1081, 1088-89 (D.C. Cir. 2001). The D.C. Circuit held that the plaintiffs had a claim under the APA to challenge an official failure to act in the face of an "unequivocal statutory duty." *Id.* at 1095 (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987)). In so holding, the D.C. Circuit determined that the duties owed "rooted" in statutes that required Interior officials to collect, manage, and distribute revenues from Indian trust lands, though they were defined in equitable terms. *Id.* at 1095,

1099; *see also id.* at 1087-1089. And the D.C. Circuit specifically observed that there were no purely common-law claims before the court. *Id.* at 1089. In interpreting *Cobell*, the D.C. Circuit later confirmed it did not deviate from the clear precedent establishing that only statutory law rather than common law can support a breach of trust claim. *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 896 (D.C. Cir. 2014).

In the present case, by contrast, the Plaintiff seeks to plead a claim for common-law breach of trust—in addition to an APA claim. As in *Cobell*, here, it is not enough for the Tribe to allege that United States has a general trust duty. To state a cause of action the Tribe must identify a specific treaty or statutory provision requiring such action. *Shoshone–Bannock Tribes,* 56 F.3d at 1482; *El Paso Nat. Gas Co.*, 750 F.3d at 895–96.

2. To the extent Plaintiff's claims are based on "common law" they should be dismissed

Courts in this Circuit and throughout the country have dismissed claims that plaintiffs seek to raise under a "common law" trust theory. A recent case that provides a comprehensive overview of the issue is *El Paso Natural Gas Co.*, 750 F.3d at 895–96. In *El Paso*, the Tribe brought several claims including one that alleged the "Government breached various duties owed to it under federal common law." *Id.* at 891–92. The Court reviewed the relevant case law including *Mitchell I* and *Mitchell II*, which the Court reasoned "make clear that neither the general trust relationship between the federal government and Indian Tribes nor the mere invocation of trust language in a statute . . . is sufficient to create a cause of action for breach of trust." *Id.* at 893. The Court then reviewed *Navajo I* and *White Mountain*, and reasoned that collectively the Supreme Court's jurisprudence makes clear that a cause of action for breach of

trust cannot rest on common law but rather "'*a substantive source of law* that establishes' that specific fiduciary duty." *Id.* at 895 (quoting *Navajo I,* 537 U.S. at 506) (emphasis in original).

The *El Paso* Court therefore looked only to the statutes the plaintiffs cited, and ultimately found "none of the cited sources of law . . . create a conventional fiduciary relationship that is enforceable as a breach of trust either under the APA or as a separate cause of action implied from the nature of the trust relationship as provided by the *Mitchell* doctrine." *Id.* at 899. Affirming the District Court's dismissal of the Tribe's breach of trust claims, the D.C. Circuit held a substantive source of law was required to bring such a claim:

> We hold…that the Tribe has failed to state a claim for relief because the Tribe has not identified a substantive source of law establishing *specific fiduciary duties*, a failure which is fatal to its trust claim regardless of whether we read the claim as brought under the APA or under a cause of action implied by the nature of the fiduciary relationship itself.

Id. at 892 (emphasis in original). Moreover, the panel in *El Paso* specifically cautioned that *Cobell VI* does not support the imposition of fiduciary duties extracted from common law, rather than "specific provisions" in substantive law. *El Paso*, 750 F.3d at 895-96.

This approach was recently followed in this Court in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 143-46 (D.D.C. 2017). There, the Plaintiff asserted that "[t]he federal government has a duty, arising from the Treaties and the federal trust responsibility . . ." *Id.* at 44. The court rejected this approach: "The problem for [Plaintiff], however, is that "[t]he trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law." *Id.* (quoting *Jicarilla Apache Nation*, 564 U.S. at 165). *See also Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. CV 16-1534 (JEB), 2020 WL 1441923, at *18 (D.D.C. Mar. 25, 2020) (same).

Other courts routinely reach the same result. *See, e.g.*, *Fletcher v. United States*, 730 F.3d 1206, 1208 (10th Cir. 2013); *Flute v. United States*, 67 F. Supp. 3d 1178, 1188 (D. Colo.

2014), *aff'd*, 808 F.3d 1234 (10th Cir. 2015); *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006); *Crow Allottees Ass'n v. U.S. Bureau of Indian Affairs*, 705 F. App'x 489, 491 (9th Cir. 2017); *Hopi Tribe v. United States*, 113 Fed. Cl. 43, 44–45 (2013), aff'd, 782 F.3d 662 (Fed. Cir. 2015); *Ramona Two Shields v. United States*, 820 F.3d 1324, 1332 (Fed. Cir. 2016); *El Paso Nat. Gas Co. LLC v. United States*, No. CV-14-08165-PCT-DGC, 2017 WL 3492993, at *7 (D. Ariz. Aug. 15, 2017) ("The trust relationship between the United States and the tribes "is defined and governed by statutes rather than common law."); *Navajo Nation v. United States Dep't of the Interior*, No. CV-03-00507-PCT-GMS, 2019 WL 3997370, at *2 (D. Ariz. Aug. 23, 2019); *Agdaagux Tribe of King Cove v. Jewell*, No. 3:14-CV-0110-HRH, 2014 WL 12513891, at *8 (D. Alaska Dec. 19, 2014); *Alabama-Coushatta Tribe of Texas v. United States*, No. 2:12-CV-83-JRG-RSP, 2013 WL 1279051, at *4 (E.D. Tex. Mar. 8, 2013), *report and recommendation adopted*, No. 2:12-CV-83-JRG-RSP, 2013 WL 1279033 (E.D. Tex. Mar. 27, 2013), *aff'd*, 757 F.3d 484 (5th Cir. 2014) ("The notion that the existence of a general fiduciary duty, such as that arising from the historic relationship between the Government and the Indian tribes, creates a cause of action for this Tribe on these claims finds little support in the current jurisprudence."); *Pawnee Nation of Oklahoma v. Zinke*, No. 16-CV-697-JHP-TLW, 2017 WL 4079400, at *7 (N.D. Okla. Sept. 14, 2017) ("Accordingly, even if all of the facts plead in the Amended Complaint are accepted as true, Plaintiffs' alleged breaches of trust equate to a violation of a general trust relationship, which does not set forth a valid cause of action."); *Rosebud Sioux Tribe v. United States*, No. 3:16-CV-03038-RAL, 2017 WL 1214418, at *7 (D.S.D. Mar. 31, 2017); *Rosebud Sioux Tribe v. United States*, No. 3:16-CV-03038-RAL, 2020 WL 1516184, at *5 (D.S.D. Mar. 30, 2020).

In sum, Courts in this Circuit and throughout the country have dismissed claims, like those advanced by the Plaintiff here, based on a "common law" breach of trust theory. This Court should do the same.

V. CONCLUSION

Plaintiff's claims that rest on a "common law" trust obligation fail as a matter of law and should be dismissed. Direct precedent from the Supreme Court, D.C. Circuit Court, D.C. District Courts, as well as other courts around the country, unequivocally hold that a Tribe cannot bring a common law claim for breach of trust. Foreclosing this legal theory at this juncture will assist in narrowing the scope of the case and clarifying the legal basis of Plaintiff's claims. Accordingly, Federal Defendants respectfully request that their motion to dismiss be granted under Rules 12(c) of the Federal Rules of Civil Procedure.

Respectfully submitted this 20th day of May 2020.

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