No. 20-2062

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ROSEBUD SIOUX TRIBE,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Constitution:

Statutes:

Treaty:

INTRODUCTION AND SUMMARY OF ARGUMENT

Like the district court, plaintiff-appellee Rosebud Sioux Tribe (plaintiff, or the Tribe) would rewrite the federal government's 1868 treaty commitment—to provide to all of the signatory tribes a single "physician" and physician's residence—thereby creating a new obligation, allegedly rooted in Indian trust law, to furnish "competent physician-led health care" to the members of the Rosebud Sioux Tribe. This interpretation of the Fort Laramie Treaty of 1868 (the Treaty) and Indian trust law is untenable under decades of Supreme Court precedent. Nor do the general statements of federal policy and goals regarding Indian health care cited by the Tribe suffice to create such an obligation under Indian trust law.

The government provides health care services to all American Indians and Alaska Natives, including members of the Rosebud Sioux Tribe, pursuant to congressional enactments such as the Snyder Act, 25 U.S.C. § 13, and the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. §§ 1601 *et seq.* The services provided under these statutory schemes fulfill the government's obligations under the Treaty and more. And while the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) & 2671-80, imposes enforceable requirements that the medical care provided at the Rosebud Indian Health Service (IHS) Hospital be non-negligent, those obligations cannot be enforced under the guise of trust law.

The district court was mistaken to hold that the United States has a duty under the Treaty and Indian trust law to furnish "competent physician-led health care" to

members of the Rosebud Sioux Tribe and other signatories to the Treaty. The Treaty imposes no such obligation by its terms, and no trust obligation arises because there is neither a trust corpus nor "a substantive source of law that establishes specific fiduciary or other duties." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (*Navajo Nation I*); *accord United States v. Navajo Nation*, 556 U.S. 287, 296, 302 (2009) (*Navajo Nation II*).

In any event, the declaratory judgment issued by the district court constitutes an advisory opinion that is not likely to redress the Tribe's alleged injury. Instead, it will only serve to complicate the agency's already complex task of balancing the health care needs of all American Indians and Alaska Natives. The Tribe does not identify any concrete action that the government must take or refrain from taking, and instead avers that it wishes to set out an interpretation of the Treaty that will serve as a guide in future controversies. That is a classic advisory opinion.

ARGUMENT

I. IHS DOES NOT HAVE A DUTY UNDER THE FORT LARAMIE TREATY OF 1868 OR INDIAN TRUST LAW TO PROVIDE "COMPETENT PHYSICIAN-LED HEALTH CARE" TO THE ROSEBUD SIOUX TRIBE'S MEMBERS.

As discussed in our opening brief, neither the Fort Laramie Treaty of 1868 by its terms nor principles of Indian trust law impose a general, open-ended duty to provide "competent physician-led health care" to members of the Rosebud Sioux

Tribe. The Treaty itself contains no language that could plausibly be construed to impose the duty posited by the Tribe, and Indian trust law has no application here.

A. The Fort Laramie Treaty of 1868 Imposes No Obligation to Provide "Competent Physician-Led Health Care"

Plaintiff's defense of the district court's holding that the Treaty imposes a general, sweeping obligation to provide "competent physician-led health care" is incompatible with the Treaty's text, which contains no such obligation. The Treaty created a specific obligation to "furnish annually" a physician and to construct "a residence for the physician" (*see* Treaty, arts. IV, XIII, JA 326, 328-29)—an obligation that the government has fulfilled since the inception of the Treaty, and that it continues to more than fulfill through the operations of the IHS, with its network of hospitals (including the Rosebud Hospital), clinics, and doctors. This is the obligation that the government assumed in 1868—not a vague, open-ended "duty to provide health care to the Rosebud Tribe," as plaintiff now contends (Pl. Br. 24), to say nothing of an even vaguer, more onerous duty "to provide health care to permit the health status of the Tribe and its individual members to be raised to the highest possible level" (Compl. ¶ 21, JA 7), for which plaintiff unsuccessfully contended in the district court. *See* Op. 24-26, JA 934-36.

The Tribe's suggestion that "[t]he logical extension of the Government's position is that it could eliminate health care services to the Rosebud Tribe without violating any duty," Pl. Br. 28, highlights its unwillingness to appreciate the more

limited duty that the Treaty explicitly imposes—to provide a physician and construct a residence. Similarly, the government's position is not, as the Tribe and the district court assert, that "the Government could satisfy its duty by employing and furnishing a physician and housing him on the reservation without the physician providing any sort of services." *Id.* (quoting Op. 21 n.11, JA 931). The government would not have "furnish[ed]" a physician if the physician provided no health-care services, and the government has advanced no such nonsensical interpretation of the Treaty.

The Tribe cannot escape the Treaty's language and clear meaning by invoking the canons of construction that treaty language is interpreted "'not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians,'" and that "[a]mbiguities in the treaty language are resolved in favor of the Indians." Pl. Br. 21 (citations omitted). There is no ambiguity in the language of the Treaty. It calls for provision of a single physician, a physician's residence, and continuing appropriations for the physician. The government is not relying on legal niceties or technicalities—such as a technical definition of land that is "allotted," as distinguished from land that is merely "marked out," *see Jones v. Meehan*, 175 U.S. 1, 11 (1899)—but rather the only plausible ordinary meaning of the Treaty's terms. Although ambiguous terms may be construed in the Tribe's favor, no canon of construction permits the Treaty to be construed to impose numerous additional obligations that are nowhere mentioned in the Treaty's text. *See, e.g., Oregon Fish & Wildlife v. Klamath Tribe*, 473 U.S. 753, 766-74 (1985).

Nor is there any reason to think that the Indians who negotiated the treaty would have understood the language differently, i.e., to provide an undefined and unlimited right to "health care services to the Rosebud Tribe." *See* Pl. Br. 21-22. Plaintiff has offered no evidence to the contrary, much less to suggest that the United States was agreeing, in a treaty that was adopted in 1868, to provide a health care system in keeping with modern understandings; obviously, neither the government nor the tribes were thinking in such terms. Moreover, it is telling that the Treaty did not even require the government to provide a hospital (a concept that certainly existed in 1868). It is thus inconceivable that either the tribal signatories or the government would have had an understanding of the Treaty language as requiring the provision of broad "health care services," let alone that the government would have agreed to it. *See Jones v. United States*, 846 F.3d at 1356 (stating that "we may not interpret [an Indian t]reaty in a way that the United States would not reasonably have agreed to adopt at the time of the signing. In other words, the extent of our interpretive deference to the perspective of the Native leaders cannot extend past the meeting of the minds of the parties." (citations omitted)).

Contrary to plaintiff's assertion, the government does not characterize the Treaty as an "aspirational statement of general policy." *See* Pl. Br. 22-23. Rather, the Treaty was the source of a specific obligation that the government has faithfully fulfilled. What the government correctly describes as an "aspirational statement of general policy" are the provisions of the IHCIA set forth at 25 U.S.C. §§ 1601-02, as

amended, which the Tribe also erroneously invokes, along with the Snyder Act, 25 U.S.C. § 13, as additional bases for an Indian trust law duty. As discussed below, neither the Treaty itself nor these statutes give rise to such a trust-law duty.

B. The Government Has No Trust-Law Duty to Provide "Competent Physician-Led Health Care"

In our opening brief (U.S. Br.), we demonstrated that under the jurisprudence of the Supreme Court and this Court, the government has no duty under Indian trust law to provide "competent physician-led health care" to members of the Rosebud Sioux Tribe, because there is (1) no trust corpus, and (2) no specific rights-creating statutory, regulatory, or treaty prescription establishing such a duty.

1. There Is No Trust Corpus.

As this Court has recognized, although "[t]here is a 'general trust relationship between the United States and the Indian People,'" it is well established that "that relationship alone does not suffice to impose an actionable fiduciary duty on the United States." *Ashley v. U.S. Dep't of the Interior*, 408 F.3d 997, 1002 (8th Cir. 2005) (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (*Mitchell II*)). And the existence of a treaty in and of itself does not necessarily mean that there is a trust relationship; instead, as this Court has recognized, a trust relationship must be premised on the existence of a trust corpus. *Yankton Sioux Tribe v. U.S. Dep't of Health & Hum. Servs.*, 533 F.3d 634, 644 (8th Cir. 2008). A trust without a corpus consisting of Indian resources managed by the federal government is nothing more than a

"general," "bare," or "limited," trust, not a common law trust imposing any fiduciary duties on the United States. *See Mitchell II*, 463 U.S. at 224-25; *see also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475-76 (2003); *Navajo Nation I*, 537 U.S. at 503, 505; *United States v. Mitchell*, 445 U.S. 535, 541-42 (1980) (*Mitchell I*); *Ashley*, 408 F.3d at 1002; *Inter-Tribal Council of Arizona, Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995) ("There is no common law trust in this case because the school property is not properly the subject of a trust corpus."). Nor can a trust corpus be supplied by a comprehensive network of statutes and regulations, as the Tribe suggests, *see* Pl. Br. 32, in the absence of tangible Indian assets. *See, e.g., Navajo Nation II*, 556 U.S. at 296.

Plaintiff does not suggest that there is a trust corpus in this case, but instead disputes the need to satisfy the trust corpus requirement. In this regard, it is revealing that the Tribe does not even address this Court's ruling in *Yankton Sioux Tribe*, a case involving health care services for another tribe that also signed the Treaty at issue here. In *Yankton Sioux Tribe*, the Court rejected a claim alleging that the closure of an emergency room constituted a violation of trust principles, stating that "[t]he Tribe has not identified any assets taken over by the government such as tribally owned land, timber, or funds which would give rise to a special trust duty." 533 F.3d at 644. That decision squarely contradicts plaintiff's argument.

Instead of responding to *Yankton Sioux Tribe* and the wealth of Supreme Court authority cited in the government's opening brief to establish the trust corpus

requirement, the Tribe relies on inapposite cases that stand for the unremarkable proposition that a treaty between the United States and an Indian tribe can impose enforceable obligations even in the absence of a trust corpus. *See McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020); *Washington State Dep't of Licensing v. Cougar's Den, Inc.*, 139 S. Ct. 1000 (2019); *United States v. Washington*, 853 F.3d 946, 972-75 (9th Cir. 2017). As discussed above, the United States does not dispute that it has a treaty obligation. *See supra* sec. I.A. But treaties do not give rise to additional obligations beyond the treaty language, even if such obligations are asserted under Indian trust law. *See Mitchell II*, 463 U.S. at 225.

The Tribe fares no better in relying on *Washington v. Daley*, 173 F.3d 1158, 1167-68 (9th Cir. 1999), which relied in part on the undisputed trust relationship to conclude that the United States could adequately represent a tribe for purposes of Federal Rule of Civil Procedure 19. Nor does the Tribe advance its argument by relying on *Jones v. United States*, 846 F.3d 1343, 1355, 1364 (Fed. Cir. 2017), which declined to apply trust principles because it held that the alleged trust obligation would be cumulative of the obligations set out in the plain text of the treaty provision at issue in that case.

Plaintiff falls back on *Quick Bear v. Leupp*, 210 U.S. 50, 80 (1908), which we have already analyzed and distinguished at some length in our opening brief. *See* U.S. Br. 14-15. The Tribe mistakenly suggests that "when money is appropriated pursuant to treaty duties, trust responsibility attaches," and that the Supreme Court "has not

conditioned this trust attachment on the finding of a trust corpus." Pl. Br. 33. But *Quick Bear* was premised on the idea that particular appropriated funds, which were specifically designated as fulfilling treaty obligations, should be treated as funds held in trust because they were "moneys belonging really to the Indians." 210 U.S. at 80-81. The Supreme Court distinguished those funds from public funds that are gratuitously appropriated to benefit Indians. *Id.* at 79-80. Here, there are no "moneys really belonging to the Indians" that could constitute a trust corpus, as the only funds at issue are gratuitous appropriations of public funds. *Lincoln v. Vigil*, 508 U.S. 182, 192, 194-95 (1993). The Tribe has identified no source of money other than general appropriations, which are not a trust corpus—even plaintiff does not suggest that the entire IHS budget should be treated as a trust corpus. Rather, this case involves the same kind of "gratuitous appropriations" of public funds that the Court held did not constitute money "that really belongs to the Indians." *See id.*; *Vigil*, 508 U.S. at 192, 194-95.

2. There Is No "Specific, Applicable, Trust-Creating" Source of Law.

Plaintiff fares no better with respect to the second prong of Indian trust law analysis, the need to show "a substantive source of law that establishes specific fiduciary or other duties." *Navajo Nation I*, 537 U.S. 488, 506 (2003); *accord Navajo Nation II*, 556 U.S. 287, 296, 302 (2009). A trust obligation only arises when a specific rights-creating statutory, regulatory, or treaty prescription establishes such an

obligation. *See, e.g., Jicarilla Apache Nation*, 564 U.S. at 177 (requiring "a specific, applicable, trust-creating statute or regulation" for a trust obligation to arise) (quotation marks omitted). As we demonstrated in the government's opening brief, that independent requirement also goes unfulfilled in this case.

In its answering brief, plaintiff mischaracterizes both the Treaty and the government's position. The Tribe asserts that "[t]he United States is accountable for disregarding its longstanding treaty obligation to provide adequate health care services to the Rosebud Tribe." Pl. Br. 20. It claims that the government "argu[es] that the Treaty does not create a specific obligation," and that it "suggest[s] that no duty results from the Treaty[.]" *Id.* at 22; *see also id.* at 24 (asserting that government contends "there was not any duty at all"), 25 (characterizing "the Government's argument that it has no duty to provide any type of health care to the Rosebud Tribe"). As discussed above, the government's position is not that the Treaty imposes no obligation, but rather that the obligation is to provide a physician—not "to provide competent physician-led health care to the Tribe's members"—and that the government has satisfied its obligations under the Treaty. *See supra* sec. I.A.

In any event, pointing to the Treaty does not excuse plaintiff from identifying provisions contained therein that impose specific obligations. Even the district court seemed to concede that "broad, aspirational" policy statements do not meet the threshold burden to establish a specific statutory trust obligation. S*ee* Op. 24-26, JA 934-36. These provisions do not establish any such duty, as the Supreme Court

recognized in *Vigil*, *see* 508 U.S. at 194-95. And plaintiff cannot breathe life into this argument by its passing reference to *White v. Califano*, 581 F.2d 697 (8th Cir. 1978) (*see* Pl. Br. 23-24), which, for reasons discussed at length in the government's opening brief (*see* U.S. Br. 17-21), cannot come close to bearing the weight plaintiff places on it. At bottom, plaintiff's reliance on trust-law principles cannot succeed unless plaintiff's improper and atextual reading of the Treaty itself is accepted. *See Jones*, 846 F.3d at 1364 (holding that trust claim would be cumulative of claim that the United States had violated a specific provision of a treaty).

The Tribe's reliance upon the Indian Trust Asset Management Reform Act of 2016, 25 U.S.C. § 5601, is equally unavailing. That statute states that "through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indians," 25 U.S.C. § 5601(3), and that the United States' fiduciary responsibilities "also are founded in part on specific commitments made through written treaties," *id.* § 5601(4). The dispute here is not whether the United States has undertaken certain trust responsibilities. Rather, the question is whether the United States has undertaken a specific responsibility under a specific treaty, such as the one alleged under the Treaty in this case. For the reasons discussed above, it has not, and the general findings set forth in 25 U.S.C. § 5601 do not prove otherwise.

Finally it bears emphasis that the Snyder Act, 25 U.S.C. § 13, and the IHCIA, 25 U.S.C. §§ 1601 *et seq.*, create a general *statutory* basis—not a specific fiduciary

obligation—for the government to provide health care services to all American Indians and Alaska Natives, including the Rosebud Sioux Tribe. *See Vigil*, 508 U.S. at 194-95. Furthermore, under the FTCA, 28 U.S.C. §§ 1346(b) & 2671-80, the United States has a duty to provide non-negligent medical care at the Rosebud IHS Hospital, and at any other IHS clinic or facility serving members of the Rosebud Tribe; as a participant in Medicare, the Hospital also must comply with the standards imposed by the Centers for Medicare and Medicaid Services (CMS) (*see* Pl. Br. 30). But none of these sources establishes any duties cognizable under Indian trust law.

II. The District Court's Declaratory Judgment Amounts to an Advisory Opinion That Merely Restates Existing Legal Standards and Is Unlikely to Redress Plaintiff's Alleged Injury.

Plaintiff also fails to appreciate the jurisdictional inadequacy of the district court's declaratory judgment. The Tribe sought, and the district court issued, an advisory opinion concerning the abstract issue of the quality of care the United States is obligated to provide to members of the Rosebud Sioux Tribe. The court resolved no specific dispute regarding the quality of care, and identified no specific action that the government was compelled to take or refrain from taking. Instead, the court awarded a declaratory judgment at a level of abstraction that is not likely to redress the Tribe's alleged injury, but that is virtually certain to generate extensive future litigation to determine its meaning.

The Tribe does not even try to identify any concrete action that will be affected by the declaratory judgment, instead stating that the court "can assume that

government officials will abide by the district court's interpretation of the Treaty." Pl. Br. 15. The Tribe does not specify what the government would need to do in order to comply. To the extent that the Tribe suggests that the government would need to comply with a specific standard of competent medical care, it asserts that "the federal government itself applied those standards to the Rosebud Hospital." Pl. Br. 17. Efforts to reinforce a standard that the federal government already applies (*see supra* p.12) do not give rise to an Article III case or controversy. And the Tribe has not cross-appealed the district court's determination that the Tribe has not proven that the government was actually in breach of any obligation to impose a higher standard. *See* Op. 24-26, JA 934-36.

The declaratory judgment here thus does not compel the government to alter any concrete conduct, but rather gives rise to the threat of future litigation if the Tribe is later dissatisfied with the quality of health care provided. The district court properly declined to issue concrete mandates that would micromanage the government's provision of health care to the Tribe. It is well settled that under the Administrative Procedure Act, 5 U.S.C. § 706(2), a plaintiff "cannot seek *wholesale* improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891 (1990). And the Supreme Court has likewise affirmed the Secretary's discretion to allocate funds in his administration of Indian health care programs. *See Vigil*, 508 U.S. at 192, 194-95. But the district court's inability to

provide meaningful concrete relief does not authorize it to issue the general and abstract declaratory judgment at issue here. Nor, of course, can the government be held to have waived any objection to the declaratory judgment—even if the objection were not jurisdictional—given that the government could not have known at the time of briefing the form of the judgment the district court would ultimately issue.

Relatedly, the indirect effort to motivate the government to provide better health care does not satisfy the "redressability" prong of the jurisdictional Article III standing test, which requires that "'it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Ashley*, 408 F.3d at 1000, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotations omitted in citing case). Indeed, even the district court stated only that the judgment "holds *some promise* of being substantially likely to redress an injury," and "*may* affect the parties' behavior toward one another." Op. 29, JA 939 (emphasis added). This is not good enough. And the very case upon which the Tribe relies (Pl. Br. 14-15), *Franklin v. Massachusetts*, 505 U.S. 788 (1992), proves the point, because the Supreme Court held that the relief issued was "substantially likely" to afford the plaintiff relief. *See id.* at 803.

In sum, the district court's declaratory judgment in no way clarifies the government's existing duties in a particular context, and with the specificity required by the Article III redressability requirement. It is an advisory opinion deciding a purely academic question rather than adjudicating an actual case or controversy.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the government's opening brief, the judgment of the district court should be reversed.

Respectfully submitted,

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OCTOBER 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,798 words, excluding exempt material, according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2020, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system, and that I served counsel for Appellee by the same means.

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