# 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
Case No. 3:16-cv-03038-RAL

## BRIEF OF APPELLEE ROSEBUD SIOUX TRIBE


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## Summary and Request for Oral Argument

The Rosebud Sioux Tribe ("Rosebud Tribe") is satisfied with the Government's summary of the case. The Rosebud Tribe respectfully agrees that oral argument is warranted and concurs that 15 minutes per side is appropriate.

## Corporate Disclosure Statement

The Rosebud Tribe is a federally recognized Indian Tribe, a governmental body without an ownership structure.

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## Statement of Issues

1. **Does the United States have an obligation to provide "competent physician-led health care" to the Rosebud Tribe and its members?**

The district court rejected the Government's argument that the United States has no duty to provide health care to the Rosebud Tribe. The district court further interpreted the 1868 Treaty of Fort Laramie to require the United States to provide competent physician-led health care to the Rosebud Tribe.

### Apposite Authorities:

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*Washington State Dep't of Licensing v. Cougar Den, Inc.*
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**Apposite Authorities:**

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**Apposite Authorities:**

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505 U.S. 788 (1992)

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## Statement of the Case

### A. The 1868 Treaty of Fort Laramie and subsequent statutory enactments.

The treaty and statutory background of this case are not in dispute.

In 1868, the United States entered into a treaty with the Rosebud Tribe and other tribes in the Sioux Nation. 1868 Treaty of Fort Laramie (the "Treaty") (JA 325-333). Among other promises in the Treaty, the United States agreed to "furnish annually to the Indians the physician . . . as herein contemplated, and that such appropriations shall be made . . . as will be sufficient to employ such persons." (JA 328-29.)

The Snyder Act of 1921 expressly provides Congress with the authority to appropriate funds specifically for Indian health care and obligates the federal government to act "for the benefit, care, and assistance of Indians throughout the United States . . . for the relief of distress and conservation of health to Indians." 25 U.S.C. § 13.

The Indian Health Care Improvement Act of 1976 ("IHCIA") requires the federal government to provide "the highest possible health status for Indians" and "the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level." 25 U.S.C. § 1621(a)(1); 25 U.S.C. § 1601(3). Congress first passed the IHCIA in 1976, finding that the "most basic human right must be the right to enjoy decent health," and that "any effort to fulfill Federal responsibilities to the Indian people must begin with the provision of health services." H.R. Rep. No. 94-1026(I), at 13 (1976).

Most recently, the Affordable Care Act ("ACA") stated that "it is the policy of this nation, in fulfillment of its special trust responsibilities and legal obligations to Indians – [] to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy." 25 U.S.C. § 1602 (2009).

## B. Level of care at Rosebud Hospital.

The undisputed evidence before the district court conclusively established that the health care the United States provides at the Rosebud Hospital is appallingly inadequate. Conditions at the Rosebud Hospital have been described as "simply horrifying and unacceptable" and "summed up in one word—malpractice." (JA 496; JA 772.)

In November of 2015, the Centers for Medicare & Medicaid Services ("CMS") found that deficiencies in the emergency room services at Rosebud Hospital constituted an "immediate and serious threat to the health and safety" of "any individual who comes to [the Rosebud] hospital to receive emergency services." (JA 491; JA 614.) The decision to close the Rosebud Hospital emergency room came after a patient "delivered a pre-term baby unattended on the [Emergency Department] floor," two patients with chest pain were not properly treated, and a pediatric patient with a head injury from a car accident did not receive proper care. (JA 578.)

As a result of these findings, the emergency room at the Rosebud Hospital was closed, forcing emergency patients to travel

to hospitals in Winner, South Dakota, or Valentine, Nebraska, both approximately 50 miles away. (JA 617.) In June of 2016, the Indian Health Service ("IHS") diverted obstetrical and surgical patients to other facilities. (JA 627.) And in August of 2018—while this lawsuit was pending—CMS issued another "immediate jeopardy" notice to the Rosebud Hospital, finding that the deficiencies "substantially limit the hospital's capacity to render adequate care and constitute an immediate and serious threat to the health and safety of patients." (JA 628.)

Dr. Donald Warne, a noted expert on tribal public health, provided an unrebutted expert report that conclusively documented the failing quality of care at the Rosebud Hospital. (JA 381-401.) These patterns of failure at the Rosebud Hospital have been well-documented by the federal government itself. (JA 578; JA 495-96 (citing to the Dorgan Report, JA 751-70); JA 772.)

## Summary of Argument

Promises have meaning. And when they are made in a treaty, they are enforceable in court. Over 150 years ago, the United States promised to provide health care to the Rosebud Tribe in exchange for acquiring vast swaths of land. The Rosebud Tribe asks this Court to affirm the decision of the district court holding the United States to its promise.

The Government's arguments—both in the district court and on appeal—incorrectly assume that treaty promises made by the United States are unenforceable unless a trust corpus exists. As long-standing case law establishes, a trust corpus is not required for a plaintiff like the Rosebud Tribe to obtain a declaration of rights. The district court properly rejected this argument.

The district court also properly interpreted the scope of the duty the United States owes to the Rosebud Tribe. The canon of construction favoring tribes and the statutory affirmations by Congress support the district court's conclusion, and the Government has not offered a viable alternative interpretation.

Although not presented to the district court, the Government now argues that the district court erred by offering an advisory opinion that is so vague as to be meaningless. The district court's opinion is not an advisory opinion because it is grounded in a concrete, longstanding, ongoing, and tragic dispute over the quality of health care on the Rosebud Reservation, as documented in the district court's opinion. Moreover, the district court's articulation of the United States' obligation to the tribe is not vague or abstract. The federal government routinely establishes baseline standards for competent medical care and requires compliance with those standards—such as when it shut down the Rosebud Hospital as a result of the incidents precipitating this lawsuit.

## Standard of Review

An appellate court reviews de novo a district court's decision to grant or deny summary judgment. *Green v. City of St. Louis*, 507 F.3d 662, 666 (8th Cir. 2007).

The district court's findings regarding the treaty negotiators' intentions are reviewed for clear error. *E.g.*, *United States v. Idaho*, 210 F.3d 1067, 1072 (9th Cir. 2000). This Court "then review[s] de novo whether the district court reached the proper conclusion as to the meaning of the [treaties] given those findings." *Id*.

"As a rule, factual determinations relating to standing must be upheld on appeal unless they are clearly erroneous." *Nor-W. Cable Commc'ns P'ship v. City of St. Paul*, 924 F.2d 741, 746 (8th Cir. 1991). But the ultimate conclusion as to "the existence of standing is a determination of law reviewed de novo." *Park v. Forest Serv. of U.S.*, 205 F.3d 1034, 1036 (8th Cir. 2000).

## Argument

### I. The district court's opinion and judgment properly determined the legal rights of the Rosebud Tribe and the United States.

The United States and the Rosebud Tribe are parties to the Treaty. But they disagree about what the Treaty requires of the United States. The district court properly exercised its authority to declare the rights and obligations of the parties to the Treaty.

The Declaratory Judgment Act allows courts to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). Although courts may not issue advisory opinions based on purely hypothetical facts, declaratory relief is available if "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pac. Coal & Oil Co., et al.*, 312 U.S. 270, 273 (1941). Indeed, a declaratory judgment action can be maintained even if no injury has yet occurred. *See Cnty. of*

*Mille Lacs v. Benjamin*, 361 F.3d 460, 464 (8th Cir. 2004) ("The essential distinction between a declaratory judgment action and an action seeking other relief is that in the former no actual wrong need have been committed or loss have occurred in order to sustain the action.").

Here, the Rosebud Tribe and the United States have a real and substantial disagreement about the scope of the duty the Treaty imposes on the United States. The Government argued that the district court should interpret the Treaty as only requiring the United States to provide a single physician and a house. (*E.g.*, June 28, 2019 Gov't Summ. Judg. Br., Dkt. 81, pp. 16-17.) The Rosebud Tribe, on the other hand, argued that the Treaty, as clarified by subsequent statutes, imposed on the United States a duty to provide care sufficient to raise the health status of the Rosebud Tribe to the highest possible level. (*E.g.*, Aug. 26, 2019 Pl. Summ. Judg. Br., Dkt. 89, pp. 27-28 ("Taken together, the Treaty and statutes make clear that the Government has acknowledged that it has an enforceable legal duty to provide health care to the Rosebud Tribe to the extent

necessary 'to ensure the highest possible health status for Indians.'").)

As established by the undisputed facts, this disagreement is of very real immediacy; Rosebud Tribal members are subjected to a health care system that the chair of the Senate committee with responsibility for, and oversight of, the affairs between the federal government and the Rosebud Tribe (who is also a medical doctor) has described as "malpractice." (JA 772.) Shortly before the Rosebud Tribe filed this lawsuit, CMS declared that the poor quality of care at the Rosebud Hospital constituted an "immediate and serious threat to the health and safety" of "any individual who comes to your hospital to receive emergency services." (JA 614.) As set forth in the Rosebud Tribe's Statement of the Case, the poor quality of care on the Rosebud Reservation is anything but hypothetical—in fact, CMS issued another "immediate jeopardy" notice while this lawsuit was pending. (JA 628.)

Before the district court, the Government argued that the Rosebud Tribe did not have standing to seek a declaration of rights and obligations under the Treaty because the district court did not

have the authority to compel appropriations from Congress, leaving the Rosebud Tribe's injuries unredressable. (*E.g.*, June 28, 2019 Gov't Summ. Judg. Br., Dkt. 81, pp. 27-28.) The district court properly rejected that argument.

A plaintiff "satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (plurality opinion). Ripeness is a question of degree "not discernible by any precise test." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297 (1979).

In this matter, although the Rosebud Tribe cannot obtain a judicial ruling compelling the appropriation of additional funding for its health care, it is entitled to a judicial ruling rejecting the Government's improper interpretation of the Treaty and declaring the rights and obligations of the Rosebud Tribe and the United States under the Treaty. Moreover, the issues in this case are ripe for judicial decision; the Government never pointed to any issue of undeveloped or speculative facts in the record before the district

court, nor does it do so here. *See Nebraska Public Power Dist. v. MidAmerican Energy Co.*, 243 F.3d 1032, 1038 (8th Cir. 2000) (discussing the "fitness for judicial decision" inquiry). This case does not present an issue of idle curiosity about the meaning of the Treaty: it is brought by a party to the Treaty aggrieved by the Government's failure to keep its promises.

The United States Supreme Court has held that courts can assume a declaration will affect a government official's behavior—that is, that officials will behave in accordance with a court's ruling—regardless of whether injunctive relief is available. *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). In *Franklin*, the State of Massachusetts and two voters challenged Congress's reapportionment of seats in the House of Representatives as unconstitutional and inconsistent with the Administrative Procedures Act. *Id.* at 796. The plurality found the plaintiffs had standing to seek a declaratory judgment, even without any available injunctive relief, finding it "substantially likely" that executive and Congressional officials "would abide by an authoritative interpretation of the … statute and constitutional provision by the

district court, even though [the officials] would not be directly bound by such a determination." *Id.* at 803.

So too here. While the district court could not compel Congress to appropriate funds, it can issue an authoritative interpretation of what the Treaty requires of the United States. That declaration has significant value. Among other things, the district court's ruling conclusively rejected the Government's misguided argument that it need only furnish a single physician and a house to comply with its duty to provide health care to the Rosebud Tribe. Courts—including this Court and the district court —can assume that government officials will abide by the district court's interpretation of the Treaty.

In this appeal, the Government no longer argues that the district court lacked jurisdiction because the Rosebud Tribe's injury is not redressable. Instead, the Government now argues that the Court's directive "is so vague as to be meaningless." (App. Br. at 23.)

This issue was not before the district court on either the Rosebud Tribe's or the government's motion for summary judgment. The Government's standing argument raised before the

district court was limited to the redressability issue. Issues not presented to the district court will not be considered on appeal. *Lopez v. Tyson Foods, Inc.*, 690 F.3d 869, 875 (8th Cir. 2012). This Court has observed that there is an "inherent injustice in allowing an appellant to raise an issue for the first time on appeal," where no finding exist from the district court to evaluate the issue on appeal. *United States v. Lawson*, 155 F.3d 980, 982 (8th Cir. 1998). Nor should the Government be permitted to argue in this Court that it could not have raised this argument before the district court ruled. *Cf. Gumersell v. Dir., Fed. Emergency Mgt. Agency*, 950 F.2d 550, n.4 (8th Cir. 1991) ("The district court's decision was a well-reasoned interpretation of the law. Moreover, it was appellants' responsibility, not the district court's, to make the case for their position at the time the summary judgment motion was heard; this appeal should not be used to get a second bite of the apple.").

The district court's opinion is not an advisory opinion. The dispute between the Rosebud Tribe and the United States regarding the interpretation of the Treaty is real and concrete. And the dismal reality of health care on the Rosebud Reservation is not

hypothetical—it is a serious and ongoing problem. The district court's opinion was not based on hypothetical facts or conjecture, but instead on numerous undisputed facts regarding the longstanding deficiencies in the health care provided to the Rosebud Tribe. (*See* JA 485-501.)

Contrary to the Government's argument, the district court did not need to determine the legality of every decision or omission by Indian Health Service ("IHS"). (*See* App. Br. at 23.) It just needed to declare the legal rights of the parties under the Treaty based on the set of concrete facts presented in this case. The district court's opinion properly interpreted the Treaty and declared the respective rights of the parties thereunder.

Finally, the district court's interpretation that the United States must provide competent physician-based health care to the Rosebud Tribe is not so vague as to be meaningless. The federal government itself routinely sets standards for competent medical care, which standards apply to the Rosebud Hospital. Indeed, the federal government itself applied those standards to the Rosebud Hospital when it found that the services provided there created an

"immediate and serious threat to the health and safety" of "any individual who comes to [the Rosebud] hospital to receive emergency services." (JA 614.) Moreover, the federal government sets minimum standards for medical care across the country and enforces compliance with those standards, without any indication that such regulations are vague or meaningless.

The district court exercised its authority to interpret the meaning of the Treaty. Contrary to the Government's suggestion, the district court did not need to provide an action plan for the provision of tribal health care in order to interpret the Treaty.[1] Now that the parties have an authoritative interpretation of the obligations of the United States under the Treaty, they can address any additional disputes as they arise.

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[1] Even if this Court believes that the district court's opinion and judgment were impermissibly vague, the proper remedy is to remand to the district court for consideration of the Government's argument in the first instance, and clarification of its opinion if necessary. *United States v. Flute*, 929 F.3d 584, 590 (8th Cir. 2019) (quoting *Williams v. Target Stores*, 479 F. App'x 26, 28 (8th Cir. 2012) (per curiam) ("That issue was not decided below, however, and is a matter best left to the district court to consider in the first instance on remand.")).

## II. The district court properly concluded that the United States has a duty to provide competent, physician-led health care to the Rosebud Tribe.

The United States Supreme Court recently issued an opinion regarding another broken promise between the United States and a tribe:

> The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.

*McGirt v. Oklahoma*, 140 S. Ct. 2462, 2482 (2020). The legal and factual issues in *McGirt* are different than those here, but the tragic pattern of broken promises Justice Gorsuch resoundingly rejected is central to this case.

The United States is accountable for disregarding its longstanding treaty obligation to provide adequate health care services to the Rosebud Tribe. The district court's opinion properly held that the Treaty imposed on the United States a legal duty to provide competent, physician-based health care to the Rosebud Tribe and its members.

### A. The United States has a treaty obligation to provide health care to the Rosebud Tribe.

A treaty between the United States and an Indian tribe is essentially "a contract between two sovereign nations." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979). Treaties are not interpreted as ordinary contracts, however, but are interpreted according to canons of construction "rooted in the unique trust relationship between the United States and the Indians." *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985); *accord Herrera v. Wyoming*, 139 S. Ct. 1686, 1701 (2019); *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring) ("[W]e must 'give

effect to the terms as the Indians themselves would have understood them.'"). These canons "have quasi-constitutional status . . . provid[ing] an interpretive methodology for protecting fundamental constitutive, structural values against all but explicit congressional derogation." *Cohen's Handbook of Federal Indian Law* § 2.02[2], at 118-19 (Nell Jessup Newton, ed., 2012). Courts interpret treaty language "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." *Jones v. Meehan*, 175 U.S. 1, 11 (1899). Ambiguities in the treaty language are resolved in favor of the Indians. *See, e.g.*, *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 174 (1973). The responsibility to interpret treaties in this manner seeks to ensure that treaty terms "are carried out, so far as possible . . . in a spirit which generously recognizes the full obligation of this nation to protect the interests of [Indian] people." *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *Fishing Vessel*, 443 U.S. at 690.

The 1868 Treaty of Fort Laramie created a legal obligation on the federal government to provide health care services to the

Rosebud Tribe. Indeed, the Treaty provides that the federal government will provide health care *in exchange for* the tribes ceasing hostilities and ceding tribal land to the federal government. (JA 328 ("In consideration of the advantages and benefits conferred by this treaty . . . .").

The Government's argument that the Treaty does not create a specific obligation recalls the same type of denial rejected in *McGirt*. To suggest that no duty results from the Treaty is not only contrary to the language of the Treaty itself, but minimizes the sacrifice made by the Tribes in agreeing to exchange millions of acres of their lands for the provision of health care services. *C.f. Cougar Den*, 139 S. Ct. at 1018 (Gorsuch, J. concurring) ("In fact, the millions of acres the Tribe ceded were a prize the United States desperately wanted. U.S. treaty negotiators were 'under tremendous pressure to quickly negotiate treaties with eastern Washington tribes, because lands occupied by those tribes were important in settling the Washington territory.'"). The Treaty was not an aspirational statement of broad policy, as the

Government would characterize it. (*See* App. Br. at 16.) It was a bargained-for exchange.[2]

The most recent Congressional affirmation of this type of bargained-for exchange is found in the 2016 Indian Trust Asset Reform Act:

> (4) the fiduciary responsibilities of the United States…are also founded in part on specific commitments made through written treaties and agreements securing peace, in exchange for which Indians have surrendered claims to vast tracts of land, which provided legal consideration for permanent, ongoing performance of Federal trust duties; and
>
> (5) the foregoing historic and Federal-tribal relations and understandings have benefitted the people of the United States as a whole for centuries and have established enduing and enforceable Federal obligations to which the national honor has been committed.

25 U.S.C. § 5601 (emphases added). Through legislation such as the Snyder Act, the IHCIA, and the ACA, "Congress has unambiguously declared that the federal government has a legal

[2] As part of this bargain, the United States had the option to withdraw the physician and other positions after ten years and substitute additional annual payments. (JA 327 (Article X).) The United States did not do so.

responsibility to provide health care to Indians." *White v. Califano*, 581 F.2d 697, 698 (8th Cir. 1979) (quoting *White v. Califano*, 437 F. Supp. 543, 555 (D.S.D. 1977)). In addition to the obligations the United States undertook when it entered into the Treaty, a tribe can rely on a comprehensive framework of "statutes and regulations [that] clearly establish fiduciary obligations of the Government." *United States v. Jicarilla*, 564 U.S. 162, 177 (2011) (cleaned up); *see United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 222, 224 (1983) (holding statutes that established a comprehensive framework for management of Indian timber resources for the benefit of the Indian landowner "and his heirs," created a fiduciary trust relationship).

The only argument the Government advanced to show there was not any duty at all related to the Tribe's supposed failure to identify a trust corpus. As discussed in Section II.C, *infra*, that attempt to conflate claims for mismanagement of a trust corpus with the Treaty obligation here must fail.

The Government's duty to provide health care to the Rosebud Tribe began when it signed the Treaty in 1868. Congress has repeatedly recognized and reaffirmed that duty. The district court

correctly rejected the Government's argument that it has no duty to provide any type of health care to the Rosebud Tribe.

### B. The district court properly interpreted the scope of the Government's obligation to provide competent physician-led health care to the Rosebud Tribe.

Having correctly concluded that the Treaty created an enforceable duty on the part of the United States, the district court turned to the question of what the scope of that duty was. The Government argued—and continues to argue to this Court—that the plain language of the Treaty only requires the United States to furnish a single physician in a house for the entire Sioux Nation. (*E.g.*, June 28, 2019 Gov't Summ. Judg. Br., Dkt. 81, pp. 16-17.) The Rosebud Tribe argued that the United States must provide health care sufficient to raise the health status of the Rosebud Tribe to the highest possible level. (*E.g.*, Aug. 26, 2019 Pl. Summ. Judg. Br., Dkt. 89, pp. 27-28.) Ultimately, the district court rejected both positions. It interpreted the Treaty to require the United States to provide competent, physician-based health care to the Rosebud Tribe. (Add. 26.)

This Court should uphold the district court's interpretation of the Treaty. Under established Indian law canons of construction, the treaty and statutes on which the Rosebud Tribe relies must be construed liberally in favor of the Rosebud Tribe, and any ambiguous provisions must be resolved to the Rosebud Tribe's benefit. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985); *Oneida*, 470 U.S. at 247 ("The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."). Courts must focus on the historical context of an agreement between the United States and a tribe to ensure that the agreement is construed in accordance with how the tribal representatives would have understood it. *See Herrera*, 139 S. Ct. at 1701; *Cougar Den*, 139 S. Ct. at 1011; *see also Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1511 (2017) (allowing courts to look beyond the written words of a treaty to the practical construction adopted by the parties.). As the Supreme Court has articulated:

> In carrying out its treaty obligations with the Indian tribes the Government is something more

> than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

*Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942); *Nance v. EPA*, 645 F.2d 701, 710-711 (9th Cir. 1981) *cert denied sub nom Crow Tribe Indians Montana, v. EPA,* 454 U.S. 1081 (1981) (trust obligations owed by the United States to Indians must be exercised according to the strictest fiduciary standards, and any federal government action is subject to fiduciary responsibilities, citing *Seminole* for both propositions).

In the Treaty, the United States promised to provide a physician, a farmer, a blacksmith, a carpenter, an engineer, and a miller. (JA 328-29.) In considering what the tribes gave up in the Treaty, and the prevailing standards of the time when the Treaty was executed, the district court concluded that the Rosebud Tribe understood this provision "to require the United States to provide

physician-led health care to tribal members." (Add. 21.) The district court observed that if it adopted the literal interpretation suggested by the Government, "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. This interpretation could not have been the intended result of the negotiating parties." (*Id.*) The district court then inferred that the parties to the Treaty intended that the required physician-led health care entail some level of professional competence. (*Id.* (citing *Fishing Vessel*, 443 U.S. at 681).)

The district court's opinion properly applied the Indian law canons of construction in favor of the Rosebud Tribe. It also correctly looked to the practical understanding of the parties' bargain and adjusted the interpretation to protect the Rosebud Tribe. In so doing, the district court necessarily rejected the literal reading of the Treaty proffered by the Government—the only interpretation of the Treaty the Government has offered in this case. As discussed above, significant Congressional authority—from the Snyder Act to the ACA—confirms the district court's interpretation.

At no point before the district court, or this Court, has the Government offered a plausible interpretation of the Treaty. The logical extension of the Government's position is that it could eliminate health care services to the Rosebud Tribe without violating any duty. That cannot be correct. If it were, the Government's promise—made in exchange for vast territorial concessions and a cessation of hostilities—would be meaningless and illusory. Such an interpretation would also fly in the face of the repeated Congressional affirmations of the United States' responsibilities to provide health care to the Rosebud Tribe. And such an interpretation would be a stunning abrogation of the United States' obligation to act by the most exacting fiduciary standards.

The Rosebud Tribe understands the Treaty to impose on the United States an obligation to meaningfully provide health care. Through its various enactments, Congress has demonstrated that it, too, understands that the United States must provide health care to the Rosebud Tribe. The district court's interpretation correctly required the United States to provide competent physician-led health care to the Rosebud Tribe. That obligation is recognized in

the Treaty, in various statutes, federal government reports, and even in the CMS guidelines that currently apply to the Rosebud Hospital and resulted in its closure.

### C. The Rosebud Tribe did not need to identify a trust corpus to establish an enforceable treaty duty.

The Government advanced the theory that the United States' promises were not enforceable unless the Rosebud Tribe could identify a trust corpus. The district court properly rejected that misreading of the law, and this Court should do the same. The United States at times will manage a trust corpus and can be liable for mismanagement, but it is a *non sequitur* to conclude that all straightforward treaty obligations require a trust corpus for there to be a treaty violation. It would come as a rude shock to tribes all over the country, and would violate every principle of treaty construction and fair dealing if the conclusion were reached that all of the bargained-for treaty obligations that lack a corpus are unenforceable.

As an initial matter, the treaty requires the United States to provide a physician and the corresponding appropriations. The Treaty is sufficient to establish an enforceable obligation, without requiring any trust corpus. *See, e.g. Cougar Den*, 139 S. Ct. at 1010 (obligation to allow travel unburdened by tax); *United States v. Washington*, 853 F.3d 946, 972-75 (9th Cir. 2017) (obligation to remove culverts); *Jones v. United States*, 846 F.3d 1343, 1355, 1364 (Fed. Cir. 2017) (whether United States breached its treaty obligation to arrest bad men is cumulative of the trust inquiry and thus the analysis is collapsed into treaty analysis); *see also Washington v. Daley,* 173 F.3d 1158, 1167-68 (9th Cir. 1999) (finding that the United States could adequately represent tribal interests in suit where their interests coincided because the tribes had a treaty right to fish and the federal government had a trust responsibility to the Tribes obligating them to protect the Tribes' interests); *Quapaw Tribe of Okla. v. United States*, 123 Fed. Cl., 673, 676 (2015) (failure of government to meet its treaty obligations to make educational payments was a breach of fiduciary obligations); *Northwest Sea Farms, Inc., v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515, 1519-

1520 (W.D. Wash. 1996) ("In carrying out its fiduciary duty, it is the government's and subsequently the Corps' responsibility to ensure that Indian treaty rights are given full effect[.]").

A tribe can also rely on a comprehensive framework of "statutes and regulations [that] clearly establish fiduciary obligations of the Government." *Jicarilla*, 564 U.S. at 177 (cleaned up); *see Mitchell II*, 463 U.S. at 222, 224. Here, in addition to the Treaty, numerous federal statutes recognize the Government's special obligation to provide health care to the Rosebud Tribe.

The Supreme Court has repeatedly distinguished between funds appropriated for a treaty obligation, like the funds at issue here, and gratuitous annual appropriations. *See Lincoln v. Vigil*, 508 U.S. 182, 195 (1993) (citing *Quick Bear v. Leupp*, 210 U.S. 50, 80 (1908)). Indeed, in *Quick Bear*, the Supreme Court clearly drew this distinction:

> But the "Treaty Fund" has exactly the same characteristics. They are moneys belonging really to the Indians. They are the price of land ceded by the Indians to the Government. The only difference is that in the "Treaty Fund" the debt to the Indians created and secured by the treaty is

> paid by annual appropriations. They are not gratuitous appropriations of public moneys, but the payment, as we repeat, of a treaty debt in installments.

210 U.S. at 81. Because the United States provides health care services pursuant to the treaty obligation created when it agreed to accept peace and ceded tribal lands *in exchange for* providing health care services to the tribes, the appropriation cannot constitute a gratuitous sum.

The Supreme Court has held that when money is appropriated pursuant to treaty duties, trust responsibility attaches. *See Vigil*, 508 U.S. at 195 (citing *Quick Bear*, 210 U.S. at 80). Notably, the Court has not conditioned this trust attachment on the finding of a trust corpus. *See, e.g.*, *Vigil*, 508 U.S. at 195; *Quick Bear*, 210 U.S. at 80; *White*, 437 F. Supp. at 557-58.

The Government relies on, and misinterprets, *Lincoln v. Vigil*, arguing that *Vigil* stands for the proposition that annual appropriations are not trust resources because the IHS retains discretion on which services and programs to spend the monies. The Supreme Court did not make the leap the Government implies—in

*Vigil* or any other case—that annual appropriations are always discretionary, gratuitous appropriations and cannot therefore qualify as a trust corpus. Rather, the Supreme Court has held that "[w]here money is appropriated to fulfill a treaty obligation, a trust responsibility attaches." *Vigil*, 508 U.S. at 195 (citing *Quick Bear*, 210 U.S. at 80) (emphasis added).

In *Vigil*, the Court addressed an Administrative Procedure Act challenge to IHS's decision to defund a local program benefitting one Tribe's children in favor of creating a comparable nationwide program. *Vigil*, 508 U.S. at 189. The local Tribe argued that IHS violated its trust duty by discontinuing the original program. *Id.* The Court held only that the courts could not review the IHS's decision about the funds pursuant to the APA. *Id.* at 193. While the Supreme Court did observe that "both the Snyder Act and the [IHCIA] . . . speak about Indian health only in general terms," it in no way held that these statutes could not create a special trust duty on the federal government. *See id.* at 194. This case is not about whether the United States must provide specific health care programming—it is about

whether the United States has an enforceable treaty obligation to provide any meaningful health care at all.

Here, the Rosebud Tribe did not seek money damages. It did not seek an order compelling additional appropriations to IHS. Instead, it sought a declaration of the rights and obligations created by the Treaty. There is no requirement that the Rosebud Tribe also identify a trust corpus to vindicate its treaty rights. If this Court were to accept the Government's position, it would necessarily lead to the conclusion that the Government's treaty obligation is unenforceable. The district court correctly rejected the Government's attempt to avoid its treaty and statutory obligations by grafting in a trust corpus requirement that does not fit the case.

## Conclusion

The United States government continues, on a daily basis, to violate its duty to the Rosebud Sioux Tribe by failing to provide adequate health care at the Rosebud Hospital. The district court properly construed and declared the terms of the Treaty, and this Court should affirm.

DATED: September 9, 2020

By: /s/Timothy W. Billion
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## Certificate of Brief Length

The undersigned counsel for Appellee, Rosebud Sioux Tribe, certifies that this brief complies with the requirements of Fed. R. App. P. 32(a)(7)(B) in that it is printed in 14 point, proportionately spaced typeface utilizing Microsoft Word 2016 and contains 6,210 words, including headings, footnotes, and quotations.

DATED: September 9, 2020 By: /s/ Timothy W. Billion

## Certificate of Virus Check

The undersigned counsel for Appellee, Rosebud Sioux Tribe, hereby certifies under 8th Cir. R. 28A(h)(2) that the brief has been scanned for computer viruses and that the brief is virus free.

DATED: September 9, 2020 By: /s/ Timothy W. Billion

## Certificate of Service

The undersigned counsel for Appellee, Rosebud Sioux Tribe, hereby certifies that on September 9, 2020, he electronically filed the Brief of Appellee, Rosebud Sioux Tribe with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. He certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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