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

BRIEF FOR DEFENDANTS-APPELLANTS

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SUMMARY OF THE CASE

The Indian Health Service (IHS) operates the Rosebud IHS Hospital (Rosebud Hospital) in Rosebud, South Dakota. In December 2015, after a finding of serious deficiencies in the Rosebud Hospital's operations, IHS diverted emergency patients to other hospitals. The Rosebud Sioux Tribe (Tribe) responded by bringing an action for declaratory and injunctive relief, alleging that IHS violated the Tribe's rights under numerous statutory and constitutional provisions, as well as the Treaty of Fort Laramie of 1868 (Treaty) and Indian trust law.

The district court granted the government's motion to dismiss several of the Tribe's claims but ultimately issued a declaratory judgment on the Tribe's trust claim, finding that the Treaty language on "furnishing 'to the Indians the physician' requires Defendants to provide competent physician-led health care to the Tribe's members."

The issue before the Court is whether defendants have such a duty under Indian trust law, and whether declaratory relief may be awarded consistent with the standing requirements of Article III of the U.S. Constitution. Because of the importance of the case, the government believes that oral argument is warranted, and respectfully suggests that an allotment of 15 minutes per side would be appropriate.

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STATEMENT OF JURISDICTION

Plaintiff-appellee Rosebud Sioux Tribe (plaintiff, or the Tribe), a federally recognized Indian tribe in South Dakota, brought this action against defendants-appellees Alex M. Azar II, in his official capacity as Secretary, U.S. Department of Health & Human Services (HHS); Michael D. Weahkee, Rear Admiral, in his official capacity as Director, Indian Health Service (IHS)[1]; James Driving Hawk, in his official capacity as Director of the Great Plains Area IHS; HHS; IHS; and the United States of America (collectively, defendants), invoking the jurisdiction of the district court pursuant to 28 U.S.C. §§ 1331, 1346, and 1362. *See* Compl. ¶ 9, Joint Appendix (JA) 3. Both sides moved for summary judgment. By Opinion and Order on Cross-Motions for Summary Judgment, filed on March 30, 2020 (Op.), JA 911-40 (reproduced in Addendum), and accompanying Judgment, JA 941-42, the district court granted plaintiff's motion in part and denied defendants' motion. On May 27, 2020, defendants filed a timely notice of appeal. JA 943. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

[1] Rear Admiral Weahkee was Principal Deputy Director when this action was commenced but is now the Director, having been confirmed by the Senate on April 21, 2020. *See* Comm. on Indian Affairs, U.S. Senate, *Hoeven: Senate Confirms Rear Admiral Michael Weahkee As Indian Health Service Director* (Apr. 21, 2020), https://go.usa.gov/xv7EC.

STATEMENT OF THE ISSUES

The Treaty of Fort Laramie of 1868 (Treaty) requires the United States to "furnish annually," and make sufficient appropriations to employ, one "physician," Treaty, art. XIII, JA 328-29, and also to construct "a residence for the physician, to cost not more than $3,000," *id.*, art. IV, JA 326. The issues presented are:

1. Whether the Treaty gives rise to a duty to the Rosebud Sioux Tribe, grounded in Indian trust doctrine, to provide "competent physician-led health care to the Tribe's members."

United States v. Navajo Nation, 556 U.S. 287 (2009) (*Navajo Nation II*); *United States v. Mitchell*, 463 U.S. 206 (1983) (Mitchell *II*); *Yankton Sioux Tribe v. U.S. Dep't of Health & Human Servs.*, 533 F.3d 634 (8th Cir. 2008); *Ashley v. U.S. Dep't of the Interior*, 408 F.3d 997 (8th Cir. 2005).

2. Whether the district court properly entered a declaratory judgment stating generally that the United States must provide competent physician-led health care.

Aetna Life Ins. Co. of Hartford v. Haworth, 300 U.S. 227 (1937); *Ringo v. Lombardi*, 677 F.3d 793 (8th Cir. 2012).

STATEMENT OF THE CASE

A. General Background

1. The Treaty of Fort Laramie of 1868, between the United States and "the different bands of the Sioux Nation of Indians," Treaty, JA 325, required the United States to "furnish annually," and to make sufficient appropriations to employ, one

physician (as well as providers of several different services, *i.e.*, "teachers, [a] carpenter, miller, engineer, farmer, and blacksmiths") for the entire Sioux Nation. *See* Treaty art. XIII, JA 328-29. In addition, the United States promised to construct "a residence for the physician," at a cost not to exceed $3,000. *Id.* art. IV, JA, 326. The United States also had the right to withdraw the physician and the other promised service providers after a period of ten years, and instead to devote $10,000 a year for the education of the Indians. *Id.* art. IX, JA 327.

2. More than half a century later, Congress enacted the Snyder Act, which, as amended, authorizes IHS to "direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States" for purposes including "relief of distress and conservation of health." 25 U.S.C. § 13.[2]

3. In 1976, Congress first enacted the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. § 1601-1683. That Act, as amended, establishes IHS as an agency in the Public Health Service, *see id.* at § 1661, and authorizes a number of specific programs. The first two sections of the IHCIA set forth legislative findings and aims, *see id.* § 1601(3) (observing that "[a] major national goal of the United States is to

[2] The Snyder Act originally addressed the Bureau of Indian Affairs under the supervision of the Secretary of the Interior. In the Act of Aug. 5, 1954, ch. 658, 68 Stat. 674 (codified at 42 U.S.C. § 2001 *et seq.*), Congress transferred the health-care related functions of the Snyder Act from the Department of the Interior to the Department of Health, Education, and Welfare—the predecessor of the Department of Health and Human Services, the parent agency of IHS.

provide the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level"), and state that "it is the policy of this Nation" to seek "to ensure the highest possible health status for Indians . . . and to provide all resources necessary to effect that policy." *Id.* § 1602(1).

4. IHS delivers health care to more than two million American Indians and Native Alaskans, either directly through IHS-operated programs or indirectly through mechanisms including contracts with tribes under the Indian Self-Determination and Education Assistance Act (ISDEAA). *See* 25 U.S.C. §§ 13 (Snyder Act), 1601-1683 (IHCIA), 5301 *et seq.* (ISDEAA).

B. Factual and Procedural History of this Case

1. The Rosebud Sioux Tribe instituted this action based on dissatisfaction with the health care provided at the Rosebud IHS Hospital (Rosebud Hospital) in Rosebud, South Dakota. Plaintiff was responding, in particular, to IHS's decision to place the emergency department of Rosebud Hospital on "divert status," diverting emergency patients to other local hospitals, in light of deficiencies in the Rosebud Hospital's operations identified by the Centers for Medicare and Medicaid Services. IHS has since reopened the facility, though plaintiff still has concerns about the Rosebud Hospital's operations.

The complaint alleged that IHS had violated the Tribe's rights under a host of statutory and constitutional provisions, as well as Indian trust law.[3] *See* Compl., JA 1-23. The government moved to dismiss, and by Opinion and Order of March 31, 2017, JA 340-65, the district court granted the government's motion with respect to all of the Tribe's statutory and constitutional claims, allowing only the Indian trust law claim to proceed.

2. After discovery, the parties filed cross-motions for summary judgment. On March 30, 2020, the district court denied the government's motion, while granting plaintiff's motion in part and denying it in part. *See* Op. 2, 30, JA 912, 940.

The Tribe claimed that the Treaty, the Snyder Act, and the IHCIA establish an enforceable duty under Indian trust law to provide health care to raise the health status of its members to the highest possible level, while the government contended that these provisions plainly do not do so under Indian trust law jurisprudence. The government urged, in particular, that plaintiff could not demonstrate that the United States had a trust duty, because the Tribe failed to establish the existence of a trust corpus and specific rights-creating statutory, regulatory, or treaty prescriptions. *See, e.g.*, *Mitchell II*, 463 U.S. 206, 225 (1983); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011).

[3] Specifically, the Tribe claimed violations of the IHCIA, the Snyder Act, the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, the Fifth Amendment's Due Process Clause and its equal protection component, and the Treaty.

The district court, however, "d[id] not accept the government's conclusion that it owes no [fiduciary] duty for health care to the Tribe or its members," stating that "the Eighth Circuit has explicitly recognized that [the Snyder Act and the IHCIA] create a 'legal responsibility to provide health care to Indians.'" Op. 20, JA 930, quoting *White v. Califano*, 581 F.2d 697, 698 (8th Cir. 1978). The court further held that "[t]he United States does owe the Tribe some duty to provide health care to its members, even if the fiduciary duty judicially enforceable is just competent physician-led health care based on the construction of the [Treaty]." *Id.* at 23, JA 933.

The court nonetheless rejected the Tribe's assertion that the United States "has breached its duty to provide the level of care that will raise the health status of the Tribe to the highest possible level," finding that plaintiff's view "overstates the Government's duty." Op. 24, JA 934. The court ruled that the language of the IHCIA invoked by the Tribe merely sets forth the "'*goal*'" and the "'*policy*'" of Congress, *id.*, quoting 25 U.S.C. §§ 1601-02 (emphasis added), and thus is purely "aspirational." Op. 25, JA 935. Accordingly, the court concluded that "the Government is wrong that it has no duty whatsoever to the Tribe, but the Tribe is wrong to insist that the duty is coterminous with the goal expressed in the IHCIA . . . ." *Id.* at 26, JA 936. The court therefore held that the United States has a duty under the Treaty "to provide competent physician-led health care to the Tribe." *Id.*

Having resolved the merits, the district court next addressed the question of relief. With respect to plaintiff's request for a declaratory judgment, the court rejected

the government's argument that an abstract, generic, and non-specific declaratory judgment was not warranted because the Tribe failed to satisfy the redressability prong of the Article III standing test. *See* Op. 26-29, JA 936-39. Relying upon the Supreme Court's decisions in *Utah v. Evans*, 536 U.S. 452, 460-64 (2002), *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992), and *Aetna Life Ins. Co of Hartford. v. Haworth*, 300 U.S. 227, 236-43 (1937), the court held that "[b]ecause the parties' primary controversy is the extent of the applicable legal duty, much like the issues in *Aetna Life*, *Franklin*, and *Evans*, a definitive determination of such legal rights may affect the parties' behavior toward one another." Op. 29, JA 939. The court further stated that "[a]s in *Franklin* and *Evans*, it is likely that the Government will abide by this Court's authoritative interpretation of the [Treaty]." *Id.*

The district court issued a declaratory judgment "that the Defendants' duty to the Tribe under the Treaty expressed in treaty language as furnishing 'to the Indians the physician' requires Defendants to provide competent physician-led health care to the Tribe's members." Op. 30, JA 940.

SUMMARY OF ARGUMENT

The district court held that defendants have a trust law duty, grounded in the Treaty, "to provide competent physician-led health care to the [Rosebud Sioux] Tribe's members." Op. 30, JA 940. The court's ruling is incorrect. Plaintiff cannot satisfy the prerequisites for a trust-law duty, as it has identified neither a trust corpus nor a substantive source of law establishing specific duties. While Congress has, by

statute, directed defendants to use applicable congressional appropriations to furnish health care to American Indians and Alaska Natives, defendants have no duty under Indian trust law doctrine, rooted in the Treaty or any other source, to provide any specific care to the Rosebud Sioux Tribe or any other tribe. Relatedly, the generic and abstract declaration issued by the district court does not redress any concrete and particularized injury suffered by the Tribe.

1. The district court's decision rests on a fundamental misunderstanding of Indian trust law, as expounded in Supreme Court case law over the last four decades. That case law requires both a trust corpus consisting of Indian property, *see Mitchell II*, 463 U.S. 206, 225 (1983), and "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*). Neither the Treaty nor any other source of law identified by the district court or the Tribe satisfies either of these requirements. The government is not managing tribal resources, nor does it have "specific fiduciary or other duties." *Id.* There are no "specific rights-creating or duty-imposing" legal prescriptions to be found in this case. *Id.*

The district court relied heavily on *White v. Califano*, 437 F. Supp. 543 (D.S.D. 1977), *aff'd*, 581 F.2d 697 (8th Cir. 1978) (per curiam). That case cannot properly be read to stand for the proposition that a trust duty is created by the sort of general treaty statement upon which the district court relied. In *White*, the court premised its holding on the violation of a specific duty set forth in positive law (an IHS

regulation), to prioritize medical treatment. Here, there is nothing remotely comparable. And even if *White* were properly read to establish a general trust-law responsibility in the absence of any trust corpus or specific fiduciary duties, its decision cannot be reconciled with the last four decades of Supreme Court Indian trust law jurisprudence.

2. Even if the district court had properly identified a general trust-law duty, it independently erred by entering a vague and abstract declaratory judgment. In order to satisfy the requirements of Article III of the Constitution, a declaratory judgment must be "'a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Ringo v. Lombardi*, 677 F.3d 793, 796 (8th Cir. 2012) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). Neither the Tribe's proposed declaratory relief requiring defendants to provide the "highest possible level" of health care, nor the district court's declaratory judgment requiring defendants to provide "competent physician-led health care to members of the Tribe," can reasonably be said to constitute a conclusive decree on particular facts. Indeed, the district court itself stated only that a "definitive determination of [the Tribe's] legal rights *may* affect the parties' behavior toward one another." Op. 29, JA 939 (emphasis added). Such speculation cannot properly form the basis of a declaratory judgment.

STANDARD OF REVIEW

The district court's summary judgment order is subject to *de novo* review. *See, e.g., Green Plains Otter Tail, LLC v. Pro-Environmental, Inc.*, 953 F.3d 541, 545 (8th Cir. 2020).

ARGUMENT

IHS DOES NOT HAVE AN INDIAN TRUST DUTY UNDER THE TREATY OF FORT LARAMIE OF 1868, THE IHCIA, AND/OR THE SNYDER ACT TO PROVIDE "COMPETENT PHYSICIAN-LED HEALTH CARE" TO THE ROSEBUD SIOUX TRIBE'S MEMBERS.

Congress created a general statutory scheme, set out in the Snyder Act and the IHCIA, under which IHS provides health care to American Indians and Alaska Natives. *See, e.g., Lincoln v. Vigil*, 508 U.S. 182, 194 (1993). IHS's statutes are broad and leave a great deal of discretion as to how the agency will operate the health care system. *See id.* at 192, 194. Congress also directly addressed the issue of competence of health care by creating a tort remedy for medical malpractice under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80. But Congress did not create a free-floating trust obligation to provide competent medical care, much less entitle tribes to use general trust principles, in the absence of any statutory mandate or direction, to second-guess the agency's discretionary decisions, thereby disrupting IHS's ability to operate this national health care system.

A. Indian Trust Law Principles Require Both a Trust Corpus and a "Substantive Source of Law that Establishes Specific Fiduciary or Other Duties."

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 *Mitchell II*, 463 U.S. 206, 225 (1983)). Rather, any specific obligations the Government may have under that relationship are "governed by statute rather than the common law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011).

1. To establish a trust duty, the plaintiff "must identify 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). And that source of law must not only "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities," but it must "clearly give the Federal Government full responsibility to manage Indian resources." *Mitchell II*, 463 U.S. at 224; *see also Ashley*, 408 F.3d at 1002.

Trust duties thus apply to a "trust corpus" consisting of tangible property—for example, "Indian timber, lands, [or] funds"— belonging to Indian tribes or their members. *Mitchell II*, 463 U.S. at 225; *accord Yankton Sioux Tribe v. U.S. Dep't of Health & Human Servs.*, 533 F.3d 634, 644 (8th Cir. 2008). A trust duty only exists if the plaintiff can both identify "a substantive source of law that establishes specific

fiduciary or other duties," *Navajo Nation I*, 537 U.S. at 506, and establish that the United States has taken over tribal assets such as tribally-owned land or timber. *See Yankton Sioux Tribe*, 533 F.3d at 644 (citing *Mitchell II*, 463 U.S. at 225). Absent satisfaction of both elements, a breach of trust claim fails; as the Supreme Court explained, "the necessary elements of a common-law trust" (upon which trust obligations of the United States toward Indian tribes are often based) are "a trustee . . . , a beneficiary . . . , and a trust corpus." *Mitchell II*, 463 U.S. at 225; *see also id.* at 227 (noting that available remedies were for mismanagement of a beneficiary's estate).

2. Considering a land allotment statute that required the federal government to "'hold the land . . . in trust for the sole use and benefit of the Indian' allottee," the Supreme Court concluded that the statute "created only a limited trust relationship . . . that does not impose any duty upon the Government to manage timber resources" on the land. *United States v. Mitchell*, 445 U.S. 535, 541-42 (1980) (*Mitchell I*) (holding statutory "trust" language in General Allotment Act of 1887 insufficient to impose specific trust responsibilities). *See also Navajo Nation I*, 537 U.S. at 503, 505 (discussing insufficiency of "bare trust" in *Mitchell I*); *Ashley*, 408 F.3d at 1002 ("The fact that a statute uses the word 'trust' does not mean that an actionable duty exists, for a 'bare trust' that does not impose upon the government the extensive and well-articulated duties described above falls short of creating such a duty.") (citing *Mitchell II*, 463 U.S. at 224; *Mitchell I*, 445 U.S. at 541).

By contrast, in *Mitchell II*, the Court found that such a duty did exist where a network of statutes and regulations "establish[ed] a fiduciary relationship and define[d] the contours of the United States' fiduciary responsibilities" over forests and property belonging to Indians. 463 U.S. at 224; *see also id.* at 225 ("All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)."). Unlike the "bare trust" created by the general language in *Mitchell I*'s land allotment statute, the statutes and regulations in *Mitchell II* "clearly g[a]ve the Federal Government full responsibility to manage Indian resources." *Id.* at 224.

B. Under a Proper Application of Indian Trust Law Principles, IHS Does Not Have a Trust Duty.

The Tribe's contention that the government has a trust duty in this case fails because plaintiff is unable to identify either a trust corpus or any source of law establishing specific duties owed by the government.

1. As an initial matter, plaintiff has failed to identify a trust corpus, which would consist of property held in trust for the Tribe's benefit. *See Yankton Sioux Tribe*, 533 F.3d at 644. There is no trust corpus at issue here. The establishment of IHS by Congress is not the equivalent of taking over and managing Indian assets so as to create an enforceable trust. Thus, in *Yankton Sioux Tribe*, this Court rejected a claim alleging that the closure of an emergency room constituted a violation of trust principles, noting that "[t]he Tribe ha[d] 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; *see also Allred v. United States*, 33 Fed. Cl. 349, 356-57 (1995) (rejecting claim that defendants violated trust responsibility to provide health services and holding that "because this court finds that the statutes in question only pertain to Indian health care generally and do not require that any tribal property be managed, plaintiffs have failed to establish the property element of a breach of trust claim").

To the contrary, the only resources at issue are congressional lump-sum appropriations that the United States Supreme Court held are to be allocated at IHS's discretion. *Vigil*, 508 U.S. at 194-95 (citing *Quick Bear v. Leupp*, 210 U.S. 50, 80 (1908), for the "distin[ction] between money appropriated to fulfill treaty obligations, to which trust relationship attaches, and 'gratuitous appropriations'"). By failing to identify any trust corpus such as Indian-owned timber, lands, or funds, plaintiff fails to establish any trust duty. *See Mitchell II*, 463 U.S. at 222-25.

The district court erroneously relied on the Supreme Court's 1908 decision in *Quick Bear* for the proposition that the trust corpus consists of the undifferentiated portion of IHS's general appropriations that funds the government's medical obligations under the Treaty. *See* Op. 16, 22-23, JA 926, 932-33. But *Quick Bear* actually supports the government here, because 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 Quick Bear*, 210 U.S. at 80-81; *Vigil*,

508 U.S. at 194-95.

In *Quick Bear*, the Court held that funds that were appropriated under the heading "Fulfilling Treaty Stipulations with, and Support of, Indian Tribes" were not subject to a proviso limiting the expenditure of appropriated funds on sectarian schools. *Quick Bear*, 210 U.S. at 79-80. The Court treated the funds as "moneys belonging really to the Indians," and distinguished them from general appropriations under the heading "Support of Schools." *Id.* at 80-81. The Supreme Court did not remotely suggest that an unspecified amount of a general appropriation—such as IHS's annual appropriation—should be labeled by the courts (though not by Congress) as fulfilling a treaty obligation.

To the extent that *Quick Bear* is relevant here, it highlights the absence of any designated funds for fulfilling treaty obligations. There can be no serious argument that the entire IHS budget is held in trust based on the Treaty, and Congress has not designated any funds as belonging to the Tribe or appropriated in satisfaction of its treaty obligations. And the Supreme Court has since made clear that the funds made available to IHS constitute a lump-sum appropriation to be expended at the discretion of IHS. *Vigil*, 508 U.S. at 192. Because there is no trust corpus, there is no trust obligation, and the judgment should be reversed on that ground alone.

2. Apart from the trust corpus requirement, 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); *see also Quechan Tribe of Fort Yuma Indian Reservation v. United States*, 599 Fed. App'x 698, 699 (9th Cir. 2015) ("Neither the Snyder Act nor the Indian Health Care Improvement Act contains sufficient trust-creating language on which to base a judicially enforceable duty."). That independent requirement also is not satisfied here.

As the district court appeared to recognize, "broad, aspirational" policy statements do not meet the threshold burden to establish a specific statutory trust obligation. *See* Op. 24-26, JA 934-36. Congress established IHS under broad authorities that grant the agency discretion to carry out health care programs to benefit American Indians and Alaska Natives throughout the United States, and Congress funds all such activities through annual, lump-sum appropriations to IHS. This does not suffice to create an enforceable trust duty.

The district court incorrectly concluded that a trust duty arose from the Treaty. *See* Op. 26, JA 936. By its terms, the Treaty requires the government to furnish a single physician, to fund that physician through annual appropriations, and to construct a residence for the physician. *See* Treaty, arts. IV, XIII, JA 326, 328-29. This language bears none of the hallmarks of a trust-creating instrument. It does not purport to create any fiduciary duty, much less identify any assets to be held in trust or otherwise indicate that it is creating a trust relationship. Indeed, the declaratory judgment ultimately issued does not even purport to identify any trust obligation that

must be fulfilled, but instead just provides the court's interpretation of the Treaty. For this reason alone, the district court's determination that the government was under a trust obligation was flawed.

In any event, the district court's analysis is mistaken on its own terms. The Treaty required the government to furnish to all of the signatory tribes one physician, at government expense, and plaintiff does not even contend in its complaint that the government failed to comply with that provision—the furnishing of services through IHS programs plainly satisfies the government's obligation and more. Even under canons of liberal construction applicable to interpreting treaty language with Indian Nations, there is no way to construe a requirement that the government provide a physician and a residence to provide a general, perpetual duty under Indian trust law to furnish health care services to plaintiff and other signatory tribes—especially not one that is judicially enforceable in its own right. It stretches credulity to say that either tribal signatories or U.S. government representatives had such an understanding in 1868. Article XIII plainly cannot be deemed "a specific, applicable, trust-creating" treaty provision within the meaning of *Navajo Nation I*, *Navajo Nation II*, and other Supreme Court rulings over the last forty years. *See Jicarilla Apache Nation*, 564 U.S. at 177; *see also Vigil*, 508 U.S. at 194-95.

3. The district court relied heavily on this Court's decades-old decision in *White v. Califano*, 581 F.2d 697 (8th Cir. 1978) (per curiam), which affirmed and incorporated by reference the district court's analysis in *White v. Califano*, 437 F. Supp. 543 (D.S.D.

1977). That case cannot support the great weight that the district court placed on it. The referenced district-court decision was ultimately grounded in the violation of a specific duty set out in a regulation, so the decision cannot stand for the broad proposition for which it was cited. And as noted, that broad proposition—and, for that matter, the narrower holding of *White* itself—cannot be reconciled with Supreme Court Indian trust law rulings spanning the last four decades.

White concerned responsibility for the involuntary commitment of a mentally ill member of an Indian tribe. The district court in *White* (whose reasoning was adopted by this Court, *see* 581 F.2d at 698) held that IHS must "conform their policy to" an existing regulation, which stated that "'[p]riorities for care and treatment, as among individuals who are within the scope of the program, will be determined on the basis of relative medical need.'" 437 F. Supp. at 556. The court thus concluded that IHS could not "abandon" a mentally ill tribe member, whose "medical need was extreme." *Id.* at 555, 556. The court expressly recognized that the IHS "cannot meet all health needs of all Indian people" given its limited budget, and therefore limited its ruling to holding that the agency, "[i]n exercising [its] discretion," must comply with "agency regulations." *Id.* at 556. Here, by contrast, the district court pointed to no statute or regulation that the government is alleged to have violated.

White itself thus does not stand for the proposition that a court can fashion a trust obligation from the sort of language at issue here. And any such proposition has been thoroughly refuted by the Supreme Court in numerous subsequent cases. Since

White was decided, the Supreme Court has addressed Indian trust obligations in numerous cases, discussed above, and has made clear that the general trust relationship does not give rise to enforceable health-care duties that displace IHS's discretion or otherwise permit the relief plaintiff seeks. The *White* decision thus cannot be good law to the extent that it is read to stand for the proposition that general trust principles give rise to an enforceable obligation to provide health care.

As previously stressed, a trust obligation must be premised not only on an obligation to perform a particular function, but also on a trust corpus. *See, e.g.*, *Jicarilla Apache Nation*, 564 U.S. at 192-94 (Sotomayor, J., dissenting) (discussing how Congress has "'define[d] the contours of the United States' fiduciary responsibilities' *with regard to its management of Indian tribal property and other trust assets*" (emphasis added)). And IHS's discretionary appropriations are not trust resources, but rather lump-sum appropriations expended generally for health care of all tribes. *See Vigil*, 508 U.S. at 192.

In addition, the Supreme Court has held that IHS's appropriations, the Snyder Act, and the IHCIA speak of Indian health only in general terms and do not impose trust obligations. *Vigil*, 508 U.S. at 194-95. This holding directly invalidates the *White* court's reliance on the IHCIA, including the statute's "declaration of policy," as "adequate specificity [t]hat the trust relationship require[d]" IHS to provide health care. *White,* 437 F. Supp. at 555. As the Supreme Court has repeatedly made clear, a trust obligation must be founded on a trust corpus and specific rights-creating

statutory language, rather than on general notions and broad policy statements. *See Jicarilla Apache Nation*, 564 U.S. at 174 ("'[T]he analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.'" (quoting *Navajo Nation I*, 537 U.S. at 506)); *Navajo Nation II*; *Mitchell II*; *Mitchell I*. Moreover, the Supreme Court has characterized *Morton v. Ruiz*, 415 U.S. 199 (1974), upon which *White* relied, *see* 437 F. Supp. at 556, as depending on the agency's "failure to abide by its own procedures," *Vigil*, 508 U.S. at 199. Similarly, *White* should be read to stand, at most, for the proposition that the government is not free to violate its own regulations.

To the extent that the district court read *White* to establish a general trust obligation to provide health care, the court's ruling that more recent Supreme Court "cases do not overrule or contradict the Eighth Circuit or District Court holding or reasoning in *White*," Op. 19, JA 929, is simply wrong.[4] Furthermore, the mode of analysis employed in *White* is also at odds with more recent Indian trust law decisions

[4] This Court cited *White* with approval in *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), an environmental cleanup case focusing primarily on the Resource Conservation and Recovery Act of 1976 (RCRA), and only secondarily on the IHCIA and the Snyder Act. *See id.* at 1100-01. In *Blue Legs*, the Court held that federal agencies acted unlawfully when they participated in unlawful waste disposal. Even if it remains good law, that holding does not suggest that agencies have an affirmative obligation to provide a specific level of services to tribal members in the absence of any specific statutory requirement to do so. And even at the time it was decided, *Blue Legs* was at the outer bounds of Indian trust law, as evidenced by the concurring opinion's conclusion that the majority's IHCIA/Snyder Act holding improperly extended *White*. *See id.* at 1101 (Magill, J., concurring).

in this Court. As noted, in *Yankton Sioux Tribe*, this Court rejected a claim based on trust law because the plaintiff "ha[d] not identified any assets taken over by the government . . . which would give rise to a special trust duty" and had not "alleged violation of any statutory or treaty obligation that could be characterized as a breach of trust or fiduciary duty." 533 F.3d at 644; *see also Ashley*, 408 F.3d at 1003 (noting that statute at issue "does not provide the reticulated legal structure necessary to create an actionable duty under the Supreme Court's precedent"). And the district court's reliance on *White* is inconsistent with its own acknowledgment that the "broad, aspirational" statements of goals and policy in the IHCIA cannot establish a duty under Indian trust law. *See* Op. 25, JA 935.

C. The District Court Independently Erred by Awarding Abstract Declaratory Relief.

Even if the Treaty did impose some general obligation to provide adequate health care, the district court independently erred by entering an abstract declaratory judgment that does not clearly define the rights and obligations of the parties in the context of any concrete controversy. Because the district court did not purport to identify any specific and concrete obligation grounded in a statute or regulation, it could not frame its declaratory judgment in concrete terms. Relatedly, plaintiff did not identify any specific action or inaction of the federal government that it seeks to challenge as inconsistent with the government's alleged trust obligations. Instead, plaintiff seeks generally to improve the health care provided to tribal members.

Having properly concluded that plaintiff was not entitled to a more prescriptive and specific injunction, the district court erred in nonetheless granting declaratory relief.

The court's declaratory judgment consists entirely of a general statement that the government is compelled "to provide competent physician-led health care to the Tribe's members." Op. 30, JA 940. Although the court characterized this declaration as "a definitive determination of [the parties'] legal rights," *id.* at 29, JA 939, it does not determine with any specificity the rights and obligations of the United States. It thus stands in stark contrast to declaratory judgments that resolve a concrete dispute about whether a party was, or was not, required to take a discrete action. *See, e.g.*, *MedImmune, Inc. v. Genentech*, 549 U.S. 118 (2007) (determining whether a party was compelled to make payments under a licensing agreement).

Indeed, the seminal case upholding the declaratory judgment remedy, *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227 (1937), involved a determination of the specific question of whether an insured had been "totally and permanently disabled" under the terms of an insurance policy prior to its lapse. *See id.* at 242-43. The Supreme Court thus was adjudicating "a real and substantial controversy admitting of specific relief through a decree of a conclusive character," where the Court could provide "an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged[.]" *See id.* at 240-41.

Here, by contrast, plaintiff generally avers that health care to tribal members should be improved—and IHS already strives to improve health care to the extent

possible consistent with its limited resources and the needs of all American Indians and Alaska Natives—but the judgment does not determine the legality of any particular act or omission. In fact, the district court itself 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). Article III courts are not empowered to provide advisory opinions with legal interpretations that may affect future conduct by the parties; instead, a declaratory judgment must be "'a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Ringo v. Lombardi*, 677 F.3d 793, 796 (8th Cir. 2012) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).

Both the declaratory relief requested by the Tribe and that awarded by the district court in this case are far too nebulous to constitute a conclusive decree on particular facts. Plaintiff's complaint challenges the adequacy of the health care provided by IHS at the Rosebud Hospital. Its proposed declaration that the agency must ensure that health services provided to members of the Tribe are raised to the "highest possible level" is so vague as to be meaningless, however, and does not provide concrete guidance to the agency regarding what conduct was required. The same may be said for the court's declaration that the United States has a duty "to provide competent physician-led health care to the Tribe's members." Op. 30, JA 940. A vague directive of this kind is not the proper subject of a declaratory-

judgment action.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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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 6,041 words, excluding exempt material, according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 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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