

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MONTI PAVATEA GILHAM,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

No. 22-728 L

Judge Richard A. Hertling

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Judd M. Jensen
Browning, Kaleczyc, Berry & Hoven, P.C.
801 W. Main, Suite 2A
Bozeman, MT 59715
Telephone: (406) 585-0888
Facsimile: (406) 587-0165
Email: judd@bkbh.com

Attorneys for Monti Pavatea Gilham

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I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Monti Gilham (“Monti”) is a citizen of Montana and an enrolled member of the Blackfeet Indian Tribe. Compl. ¶¶ 1, 8. Monti is from a family of ranchers and farmers. Compl. ¶ 7. Her family’s occupation as ranchers and farmers goes back many generations. *Id.* Her family conducts its business on a plot of Indian trust land located within the exterior boundaries of the Blackfeet Reservation. Compl. ¶ 8. Monti took over the duties and responsibilities of the family occupation after her father passed away. Compl. ¶ 7.

The family’s ranching and farming operation previously included several hundred acres of Indian trust land¹ which had been enrolled in the Department of Agriculture (“USDA”) Farm Service Agency (“FSA”) Conservation Reserve Program (“CRP”). Compl. ¶ 8, Def. Ex. 1. The family’s Indian trust land had been leased to the FSA through the CRP contract with the approval of the Bureau of Indian Affairs (“BIA”) in their capacity as owners of the Indian trust land. Compl. ¶ 9, *See* Def. Ex. 1. The BIA, in its capacity as the federal government’s representative for ownership of the Indian trust land, was required to co-sign the CRP contract. *See* 7 C.F.R. § 1410.32. However, a dispute has arisen between the parties as to what duties and responsibilities they owed to Monti under these contracts.

¹ Farm No. 5403, Tract Nos. 123450 and 123448 were leased to the CRP. Compl. ¶ 8, *See* Def. Ex. 1.

Between October 2007 and around November 2015, Monti dutifully maintained the family's Indian trust land acreage without incident and providing an environmental benefit to the U.S. Government pursuant to the terms of the CRP contract. Compl. ¶ 14, *See* Def. Ex. 1. However, from 2013 through 2015, Monti's personal life suffered significant changes. Compl. ¶ 10. First, Monti's husband abandoned their family due to drug addiction. *Id.* Monti was shortly thereafter forced to resign from her position at Blackfeet Community College. *Id.* Monti became involved with a man who became physically abusive toward her. *Id.* Monti, without other options, fled the Blackfeet Reservation to Missoula, Montana in order to escape her abuser. *Id.*

In 2015, Monti enrolled in the School of Business Master's program in Missoula. Compl. ¶ 11. Monti's life was temporarily at peace until her abusive boyfriend located her in Missoula and forced himself back into Monti's life. *Id.* Monti's life fell back into turmoil as her boyfriend's abuse began again. *Id.*

In the fall of 2015, Monti suffered numerous physically violent events culminating to a horrific bout of violence on Halloween night. *Id.* On that night, Monti's abusive boyfriend nearly took her life. *Id.* Her abusive boyfriend beat and strangled her for innocuously spending time with friends. *Id.* Her abusive boyfriend put her in the hospital with several severe injuries including: a massive hematoma on her forehead, swelling and bruising around her eyes so bad that

Monti could not see for 3 weeks, bruising around her neck from the strangulation, persistent whiplash related injuries to her neck, and severe emotional trauma. *Id.* Monti withdrew from the master's program and stopped fulfilling her other obligations due to the horrific attack on her life. *Id.*

While Monti was attempting to escape the control of her abusive boyfriend, the FSA was simultaneously attempting to contact her about the Indian trust land enrolled in the CRP program. Compl. ¶ 12. The FSA sent Monti letters to her farm address. *Id.*, See Def. Ex. 2. Unfortunately, no one was at the farm address and Monti had failed to update her contact information with the FSA while fleeing from her abuser. Compl. ¶ 12. Monti only became aware of the FSA issues relating to the CRP land when she received an email from a Glacier County employee. *Id.* Unfortunately, by the time Monti received the email from the Glacier County employee, she was suffering the fallout from her abuser's attempt on taking her life. Compl. ¶ 13. After the attempt on her life, Monti suffered major anxiety attacks, depression, suicidal thoughts, and insomnia. *Id.* She required the help of family to take care of her and her family's basic needs. *Id.* Throughout her recovery, her abuser repeatedly attempted to reconcile their relationship which only served to prolong her recovery. *Id.* Monti was physically unable to address the maintenance issues on the CRP acreage and failed to complete her contractual

obligations. *Id.* In November 2015, the FSA terminated the CRP contracts. *See* Def. Ex. 3.

Monti eventually recovered from the attack and sought equitable relief from the USDA National Appeals Division in 2020 and was awarded the equitable relief she sought on February 19, 2021.² Compl. ¶ 14. The award allowed Monti to retain the CRP payments she was paid prior to the termination of the CRP contracts. Compl. ¶ 14. While Monti administratively sought relief from the USDA in 2020, she sought the assistance of the BIA to support her in its role as Trustee of her tribe. Compl. ¶ 14. Unfortunately, during this time period from 2020-2021, the BIA routinely refused to provide any assistance throughout the administrative process under the misguided belief that they owed her no fiduciary duty as a trustee of the Indian trust land subject to the CRP contracts which they had co-signed. Compl. ¶ 14.

On June 30, 2022, Monti filed suit in the Court of Federal Claims alleging the BIA breached its trust obligations to her by failing to assist her in carrying out their basic contractual obligations of their co-signed CRP contracts which resulted in their termination and for failing to provide her any reasonable assistance her in her later appeal to the USDA in 2020. Compl. ¶ 20.

² The USDA National Appeals Division's award consisted of vacating Monti's debt to the USDA. Monti's debt consisted of several years of payments from the USDA for her dutifully carrying out the terms of the CRP contract.

II. LEGAL STANDARD

R.C.F.C. Rule 12(b)(1) authorizes the dismissal of any claims for lack of subject matter jurisdiction. Subject-matter jurisdiction is a “threshold matter” that must be addressed before the Court may consider the merits of a plaintiff’s complaint. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998). The plaintiff bears the burden of establishing the court’s jurisdiction over their claims by a preponderance of the evidence. *Trusted Integration, Inc. v. U.S.*, 659 F.3d 1159, 1163 (Fed. Cir. 2011). When determining whether it has jurisdiction, the court must accept as true all undisputed facts asserted in the plaintiff’s complaint and draw all reasonable inferences in favor of the plaintiff. *Id.* The Federal Government’s consent to be sued is required and a prerequisite for jurisdiction. *U.S. v. Mitchell*, 463 U.S. 206, 212 (1983) (“Mitchell II”); *United States v. Navajo Nation*, 556 U.S. 287, 289 (2009) (“Navajo II”). The US Supreme Court has determined that the Tucker Act constitutes a waiver of sovereign immunity with respect to specified types of claims. *Mitchell II*, 463 U.S. 206, 212.

The Tucker Act grants the Court of Federal Claims jurisdiction over claims for money damages which rely upon money-mandating constitutional provisions, statutes, or regulations. *Moyer v. U.S.*, 190 F.3d 1314, 1318 (Fed. Cir. 1999). The money-mandating constitutional provision, statute, or regulation relied upon by a

claim does not need a separate waiver of sovereign immunity in the provision as the Tucker Act provides the consent. *Mitchel II*, 463 U.S. 206, 218; *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465, 472-473 (2003).

Two hurdles must be cleared to invoke jurisdiction under the Tucker Act: (1) a tribe or tribal member must “identify a substantive source of law that establishes specific fiduciary or other duties and allege that the Government failed faithfully to perform those duties”; and (2) the court must “determine whether the relevant source of substantive law ‘can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of duties [the governing law] impose[s].’” *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009). When analyzing the second hurdle, principles of trust law may assist in drawing inferences that Congress intended money damages for a breach of duty. *Id.*

III. LEGAL ARGUMENT

The federal government’s trust responsibility toward Indians stems from their historic relationship and the federal government, as guardian to Indians, having failed to conserve Indian land and assets resulting in loss of income and earning power for Indian people. *Mitchell II*, 463 U.S. 206, 221 (quoting Representative Howard). Indian trust responsibilities are assumed by the federal government in various formulations as conferred by statutes or regulation. *U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 177-178 (2011).

Federal statutes or regulations may establish either a “bare trust” or a full trust responsibility. *White Mountain Apache Tribe*, 537 U.S. 465, 472-477. The establishment of a “bare trust” by a statute or regulation imparts no specific duties or damages on part of the federal government. *See U.S. v. Mitchell*, 445 U.S. 535 (1980) (“Mitchell I”). Money damages may be enforced when statutes and regulations specifically implicate substantive obligations imposed on the United States. *Mitchell II*, 463 U.S. 206, 221-228; *White Mountain Apache Tribe*, 537 U.S. 465, 473-474.

A. Plaintiff has identified money-mandating statutory or regulatory obligations that gives rise to jurisdiction for a Tucker Act claim.

In the present case, Plaintiff relies upon the Administrative Procedures Act (APA) and the CRP contract statutory and regulatory framework as a basis for jurisdiction pursuant to the Tucker Act. A detailed analysis of both causes of action is set forth below in more detail.

i. The unique circumstances of this case give rise to a claim under the Administrative Procedure Act.

Monti’s first cause of action alleges the BIA’s decision not to carry out its basic contractual duties as signatories to the CRP contracts effectively violated 5 U.S.C. § 706(2)(A) as BIA’s actions were “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” Monti does not dispute that a claim under Administrative Procedure Act (APA) typically accrues when the

agency has taken final action which depends on whether the agency has completed its decision making process, and whether the result of that process is one that will directly affect the parties. *28 U.S.C. § 2401(a)*. However, the Tucker Act analysis of a claim for a tribal member is significantly different than for a non-tribal member.

Native American tribes and nations were originally excluded from the Tucker Act remedy, leaving Congress to periodically enact special Indian claims statutes. Congress eventually moved to a more permanent remedial mechanism by enacting what is commonly known as the Indian Tucker Act, 28 U.S.C. § 1505. In substance, the Tucker Act and the Indian Tucker are congruous, with the latter extending the Tucker Act remedy to Native American tribes, bands, and groups.

What is distinctive about the Native American claimant under the Indian Tucker Act is the availability of another source of substantive law when seeking a monetary remedy—the Trust Doctrine. Neither the “general trust” relationship that historically describes the uneasy relationship between indigenous peoples and the United States Government, nor the basic common law of trusts, can alone give rise to a cognizable Indian Tucker Act claim. Rather, the tribal claimant must show a “fiduciary” relationship created by a statute or regulation. In this sense, then, like the money-mandating inquiry for a general Tucker Act-based statutory money claim, the Indian Tucker Act fiduciary relationship “analysis must train on specific

rights-creating or duty-imposing statutory or regulatory prescriptions.” *United States v. Navajo Nation*, 537 U.S. 488 (2003).

The unique trust relationship does come into play in determining the appropriate remedy for government breach of trust. Where the statute or regulation does create a fiduciary relationship, then the trust doctrine directs the court to assume the tribal claimant has a right to money damages (whether or not the statute that describes the fiduciary duty in money-mandating language).

In *Inter-Tribal Council of Arizona, Inc. v. United States*, 956 F.3d 1328 (Fed. Cir. 2020), the Federal Circuit found that the pertinent land-exchange statute established a specific fiduciary duty between the United States and Indian tribes. Under the statute, Congress authorized a private entity, Collier’s, to purchase the Phoenix Indian School in Arizona through an exchange of land owned by the Collier’s in Florida, together with additional payment of \$34.9 million to be held in trust for tribes. *Id.* at 1332-1333. If Collier’s chose to pay the additional amount in annual installments, the United States was obliged by statute to obtain security for future payments. *Id.* at 1334-1335.

The United States obtained a deed of trust on the Phoenix school and on additional downtown Phoenix property on which Collier’s had development rights. *Id.* at 1334. When Collier’s eventually defaulted on its payments, the security

collateral proved to be worth millions less than the payments still owed. *Id.* at 1336.

The Federal Circuit in *Inter-Tribal Council* agreed that the plaintiffs’ “failure-to-maintain-sufficient-security” portion of its claim was sufficient to state a claim for jurisdiction under the Indian Tucker Act. *Id.* at 1340-1344. The statute said the government “shall hold in trust the security” and defined the security to be held and its purpose. *Id.* at 1340-1342. The deed of trust confirmed the expectation by specifying that collateral was to be maintained at or above 130 percent of the owed amount. *Id.* at 1341. Together with the government’s discretionary control over the collateral and how it was released, the court concluded the statute expressly defined a fiduciary relationship. *Id.* at 1342.

Turning to the appropriate remedy for a breach of that fiduciary trust, the Federal Circuit rightly concluded in *Inter-Tribal Council* that, because a fiduciary relationship had been established, it then can be fairly inferred that the victims of the breach are entitled to compensation. *Id.* at 1344. As the Supreme Court has said, “principles of trust law might be relevant in drawing the inference that Congress intended damages to remedy a breach.” *United States v. Navajo Nation*, 556 U.S. 287, 288 (2009).

Although the Federal Circuit in *Inter-Tribal Council* described the remedial analysis as the money-mandating step of the jurisdictional test, it is important to

emphasize that this analysis for an Indian breach of trust context is not the same as that applying to the ordinary Tucker Act claim founded on statute.

For a non-tribal claimant asserting a Tucker Act right to recover money based on a statute, the claimant must directly adduce a right to payment from the language of the statute, that is, the traditional requirement that the statute be money-mandating in nature. Breach of a governmental duty does not alone give rise to a premise that money is the proper remedy, but only if the statute speaks in the language of payment or compensation. If the statute is devoid of any text referring to money or financial consequences, then the money-mandating requirement is not satisfied, meaning that the Tucker Act provides no remedy for claimant's allegation that a statute was contravened by government action.

By contrast, for a Native American claim that establishes a fiduciary duty under the pertinent statutes, the breach of trust alone gives rise to a presumptive right to damages as the remedy under the Indian Tucker Act. The common-law trust doctrine assumes a major role in the legal mix by supplying the "inference" that Congress intended a money damages remedy.

Thus, in *Inter-Tribal Council*, when the government breached the duty to maintain adequate collateral for the trust in favor of the tribal plaintiffs, the government became liable for damages regardless of whether the statute went

beyond reference to collateral to also speaking about the payment of money for the government's default in securing it. The same is true in the present case.

Ultimately, even though the APA cannot typically be utilized by non-tribal plaintiffs to base a claim under the Tucker Act, that jurisprudence simply does not apply to this case. Instead, the Court should review the APA claim under the very different standards set forth in *Inter-Tribal Council* and find that Monti has put forth sufficient facts to allow her APA claim to continue at this stage of the litigation.

ii. Plaintiff's claim arising from the breach of the CRP contract, signed by Plaintiff and the BIA, are within the Federal Court of Claims jurisdiction and require a merits based determination.

CRP regulation, 7 CFR 1410.32(d), requires the signature of both the producer and the land owner. In the present case, it is not disputed that Monti signed the CRP contracts at issue as the producer, but a dispute has arisen as to whether BIA only signed the CRP contracts in its role as the landowner. Monti has alleged in her Complaint that she believed the BIA was co-signing the contract on her behalf and that the BIA owed her additional fiduciary responsibilities pursuant to their role as trustee for her tribe.

The Tucker Act, this Court's primary jurisdictional statute, vests this Court with jurisdiction "over claims against the United States based on contracts 'either express or implied in fact.'" *Gonzalez-McCaulley Inv. Grp., Inc. v. United States*,

93 Fed. Cl. 710, 714 (2010) (citing *Hercules, Inc. v. United States*, 516 U.S. 417, 423 (1996)); see also *Barrett Ref. Corp. v. United States*, 242 F.3d 1055, 1059 (Fed. Cir. 2001) (“[T]he court does have jurisdiction over implied-in-fact contracts.”). Consequently, “‘the question of whether a contract exists’ generally appears not to be ‘a jurisdictional one,’ unless, however, a plaintiff does ‘not plausibly allege the existence of a contract.’” *Perry v. United States*, 149 Fed. Cl. 1, 12 (2020) (emphasis in original) (quoting and citing *Engage Learning*, 660 F.3d at 1355), aff’d, 2021 WL 2935075, at *4 (Fed. Cir. July 13, 2021); see also *Ibrahim v. United States*, 799 F. App’x 865, 867 (Fed. Cir. 2020) (“A non-frivolous allegation that a contract exists between a plaintiff and the United States is sufficient to invoke the subject matter jurisdiction of the Claims Court, but dismissal may be proper for lack of subject matter jurisdiction if the claim is wholly insubstantial and frivolous.” (quoting *Lewis v. United States*, 70 F.3d 528, 602–604 (internal quotes omitted)(Fed. Cir. 1995)). “The presumption . . . is that the dismissal of even a very weak case should be on the merits rather than because it was too weak even to engage... jurisdiction.” *Carr v. Tillery*, 591 F.3d 909, 917 (7th Cir. 2010).

Applying the above standards, the Court should conclude that Monti has asserted non-frivolous, factual allegations of a CRP contract sufficient to invoke this Court’s jurisdiction. Plaintiff alleges that her family’s ranching and farming

operation included several hundred acres of Indian trust land³ which had been enrolled in the Department of Agriculture (“USDA”) Farm Service Agency (“FSA”) Conservation Reserve Program (“CRP”). Compl. ¶ 8, Def. Ex. 1. The family’s Indian trust land had been leased to the FSA through the CRP contract with the approval of the Bureau of Indian Affairs (“BIA”) in their capacity as owners of the Indian trust land. Compl. ¶ 9, *See* Def. Ex. 1. The BIA, in its capacity as the federal government’s representative for ownership of the Indian trust land, has admitted that it was required to co-sign the CRP contract. *See* 7 C.F.R. § 1410.32,. As such, there is no dispute that they are a party to the contract and potentially owed duties to the other parties of that contract, including Plaintiff. Moreover, Plaintiff has filed suit in the Court of Federal Claims alleging the BIA breached its trust obligations to her by failing to assist her in carrying out their basic contractual obligations of their co-signed CRP contracts which resulted in their termination. Compl. ¶ 20. Whether these facts are sufficient to entitle Plaintiff to recover – or even whether they are sufficient to support the formation of a valid contract at all – are not jurisdictional questions; rather, these questions require a merits determination. *Engage Learning*, 660 F.3d at 1354 (“[W]hen the Court of Federal Claims determines that the plaintiff has failed as a matter of law to establish the existence of an alleged contract with the government, the proper

³ Farm No. 5403, Tract Nos. 123450 and 123448 were leased to the CRP. Compl. ¶ 8, *See* Def. Ex. 1.

disposition is to dismiss for failure to state a claim, rather than for lack of jurisdiction.”).

Accordingly, considering all of Plaintiff’s alleged facts as true – as the Court must at this stage – the Court should find that Plaintiff plausibly has alleged the existence of a contract with the government sufficient to invoke this Court’s jurisdiction. It is also a question of a fact as to whether the BIA was signing the contract only in its role as landowner, or whether they were co-signing the contract on behalf of Monti in the BIA’s role as trustee of her tribe.

B. The statute of limitations has not barred the Plaintiff’s right of action which accrued with the National Appeals Division Director’s Final Agency Decision on February 19, 2021.

i. 28 U.S.C. 2501 – Statute of Limitations - exceptions

Civil actions against the United States, including actions under the APA, “shall be barred unless the complaint is filed within six years after the right of action first accrues.” 28 U.S.C. § 2401(a); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir.1991); *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir.1988). A claim under the APA accrues when the agency has taken final action which depends on “whether the agency has completed its decision making process, and whether the result of that process is one that will directly affect the parties.” *Franklin v. Massachusetts*, 505 U.S. 788, 797, 112 S. Ct. 2767, 120 L.Ed.2d 636 (1992).

In the present case, the United States argue that the Plaintiff's claims are time barred because they include challenges to agency action related to her CRP contract termination that occurred more than six years before she brought suit. However, the United States fails to acknowledge that Plaintiff's claim also addresses the BIA's failure to perform its trustee action(s) as part of an ongoing improper process related to her 2020-2021 CRP dispute with USDA which was not complete until final agency action resulted in the National Appeals Division Director's Final Decision on February 19, 2021 (hereinafter NAD Decision). While Monti administratively sought relief from the USDA, she has alleged that she sought the assistance of the BIA throughout this process. Compl, ¶ 14. She has further alleged that BIA routinely refused to provide any assistance throughout the 2020-2021 administrative process under the misguided belief that they owed her no fiduciary duty as a trustee of the Indian trust land subject to the CRP contracts which they had co-signed. Compl. ¶ 14.

Ultimately, because Monti's claims are based at least in part on her 2020-2021 appeal and the BIA's alleged misconduct during that administrative appeal process, her claim against the BIA did not mature until NAD issued its final agency decision in 2021. As this final decision was within the six year period before the complaint was filed, the Plaintiffs claims against the United States are not time barred.

IV. CONCLUSION

For the reasons stated herein, this Court should deny Defendant's motion to dismiss.

DATED this 13th day of December, 2022.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By /s/ Judd M. Jensen
Judd M. Jensen

Attorneys for Monti Pavatea Gilham

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that Plaintiff's Response to Defendant's Motion to Dismiss, is double spaced, is a proportionately spaced 14 point typeface, and contains 3866 words.

CERTIFICATE OF SERVICE

I hereby state and certify that on December 13, 2022, I have filed the foregoing document using the ECF system, and that such document will be served electronically on all parties of record.

/s/ Judd M. Jensen
BROWNING, KALECZYC, BERRY & HOVEN, P.C.