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 Electronically filed

THE UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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I. INTRODUCTION

Contrary to Plaintiff Monti Pavatea Gilham's claims, the United States Supreme Court has consistently held that, in order for this Court to have jurisdiction under the Tucker Act or Indian Tucker Act for a breach of trust claim, a plaintiff must identify a substantive source of law that establishes specific, money-mandating duties that the United States allegedly failed to perform. Plaintiff fails to do so here. Plaintiff alleges that the United States—the Bureau of Indian Affairs ("BIA")— breached its fiduciary duties by failing to ensure that she could meet her contractual obligations with the United States Department of Agriculture's ("USDA") Farm Service Agency ("FSA").

Plaintiff, in her own words, "relies upon the Administrative Procedure Act[] (APA) and the [Conservation Reserve Program] contract statutory and regulatory framework as a basis for jurisdiction pursuant to the Tucker Act." Pl.'s Resp. Br. to Dismiss at 7, ECF No. 7 at 11 ("Pl.'s Resp."). But the Federal Circuit has held that the APA does *not* create any money-mandating duty for purposes of Tucker Act jurisdiction. The contracts on their own cannot create enforceable, money-mandating trust duties for BIA because, as the Supreme Court has held, enforceable trust duties must arise from a treaty, statute, or regulation. And the only provision that Plaintiff cites is the "CRP statutory and regulatory framework" which does not create any duties for BIA.

To the extent Plaintiff is now arguing that she has a breach of contract (rather than a breach of trust) claim against BIA, the Complaint does not plead a breach of contract claim. Furthermore, each contract, on its face, does not create any contractual duty for BIA. And, in any event, Plaintiff failed to exhaust her administrative remedies for such a claim.

Finally, even assuming Plaintiff had properly invoked the Tucker Act's waiver of sovereign immunity, which she has not, Plaintiff's claims accrued more than six years before she filed suit

on June 30, 2022, and are therefore outside the statute of limitations. If, as Plaintiff alleges, the United States had a money-mandating duty to ensure she could meet her contractual obligations, the claim accrued at the time USDA terminated the contracts in November 2015. As a result, this case should be dismissed.

II. ARGUMENT

A. Plaintiff still fails to identify a money-mandating statutory or regulatory obligation that could give rise to a Tucker Act breach of trust claim.

The Supreme Court has held that, for a plaintiff to invoke Tucker Act jurisdiction for a breach of trust claim, she must identify a "substantive source of law that establishes specific fiduciary or other duties" owed to her that the United States has failed to fulfill, and which "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of [those] duties." *United States v. Navajo Nation*, 556 U.S. 287, 290-91 (2009) ("*Navajo II*") (quoting *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) *("Navajo I")*; *see also Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015). "The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law . . . ." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011); *accord Menominee Indian Tribe of Wisc. v. United States*, 577 U.S. 250, 258 (2016) ("We do not question the 'general trust relationship between the United States and the Indian tribes,' but any specific obligations the Government may have under that relationship are 'governed by statutes rather than the common law.'" (quoting *Jicarilla*, 564 U.S. at 162, 165)). Thus, the Tucker Act jurisdictional analysis must "train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo II*, 556 U.S. at 301 (citation omitted).

Plaintiff brings two claims: (1) an alleged violation of BIA's duties under the APA, and (2) an alleged violation of BIA's trust and fiduciary duties allegedly owed to Plaintiff pursuant to the

CRP contracts. Compl. ¶¶18-22 and ¶¶ 23-28, ECF No. 1 at 8-10. Neither of the two claims provide a basis for Tucker Act jurisdiction.

1. The APA does not contain money-mandating duties.

The Federal Circuit has held that the APA does not create money-mandating duties for purposes of Tucker Act jurisdiction. *Wopsock v. Natchees*, 454 F.3d 1327, 1332–33 (Fed. Cir. 2006). "[T]he APA does not authorize an award of money damages… [and] specifically limits the Act to actions 'seeking relief other than money damages.'" *Id*. at 1333; *see also Fulbright v. United States*, 97 Fed. Cl. 221, 227 (2011). The Court can end its APA inquiry at the Federal Circuit's binding precedent. Indeed, Plaintiff does not argue that the APA contains a money-mandating fiduciary duty providing the Court of Federal Claims with jurisdiction under the Tucker Act. *See* Pl.'s Resp. at 7-8.

Instead, Plaintiff argues that the APA provides a basis for Tucker Act jurisdiction because "the unique circumstances of this case give rise to a claim under the [APA]." *Id*. at 7. But Plaintiff fails to demonstrate the "unique circumstances" or cite any authority for the proposition that there is an APA-based exception to the Tucker Act's strict waiver of sovereign immunity when "unique circumstances" are present. *Id*. at 11-13. To the extent Plaintiff argues that the APA codified specific requirements from other statutes or regulations, she should identify those specific rights-creating or duty-imposing statutory or regulatory prescriptions. Plaintiff, however, has not done so. Moreover, the Supreme Court has consistently rejected the idea that the general trust relationship between the United States and Indians, standing alone, is enough to create a money

mandating duty or support jurisdiction under the Tucker Act or the Indian Tucker Act[1]. *Navajo I*, 537 U.S. at 506; *United States v. Mitchell*, 445 U.S. 535, 538 (1980) ("*Mitchell I*").

Plaintiff relies heavily on *Inter-Tribal Council of Arizona, Inc. v. United States*, 956 F.3d 1328 (Fed. Cir. 2020) to support the supposed APA-based jurisdiction. Pl.'s Resp. at 9-12. But *Inter-Tribal Council of Arizona* does not support Plaintiffs' cause here for three reasons. First, there is no mention of the APA in *Inter-Tribal Council of Arizona*. Second, the opinion does not state that the APA creates a money mandating duty in a "unique" trust relationship. Third, in *Inter-Tribal Council of Arizona*, the plaintiffs identified a substantive statute that created the duty—the Arizona-Florida Land Exchange Act ("AFLEA"). In this case, by contrast, Plaintiff has not identified any statutes or regulations that impose money-mandating fiduciary duties on the United States.

To summarize, Plaintiff has not identified a statutory or regulatory provision that gives the United States a specific money-mandating duty related to Plaintiff's first claim. This Court therefore should dismiss Plaintiff's claim for lack of jurisdiction.

[1] To the extent Plaintiff attempts to rely on the Indian Tucker Act as the unique circumstance surrounding her claim, Plaintiff misunderstands the Act. The Indian Tucker Act states that "[t]he United States Court of Federal Claims shall have jurisdiction of any claim against the United States… in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President…." 28 U.S.C.A. § 1505. The Indian Tucker Act is not applicable here because Plaintiff is an individual tribe member and not a tribe. In any event, the jurisdictional test under the Indian Tucker Act for a money mandating duty is the same as that under the Tucker Act. *Navajo II*, 556 U.S. 287, 289-290.

2. The CRP contracts cannot create money-mandating fiduciary duties.

Plaintiff's second claim alleges a violation of BIA's trust and fiduciary duties allegedly owed to Plaintiff pursuant to the CRP contracts. Compl. ¶¶ 23-28. In her response brief, Plaintiff alleged jurisdiction based on the "CRP contract statutory and regulatory framework." Pl.'s Resp. at 7. Once again, however, Plaintiff fails in her attempt. The Supreme Court has directly held that the "[g]overnment assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Jicarilla Apache Nation*, 564 U.S. at 177. And, any specific obligations the Government may have under a trust relationship are "governed by statutes rather than the common law.'" *Id*. at 165.

The CRP contracts cannot give rise to a breach of trust claim because they are neither a statute nor a regulation. The only statutory or regulatory provision that Plaintiff identifies is 7 C.F.R. § 1410.32.[2] *See* Pl.'s Resp. at 12, 14. But that regulatory provision says nothing about BIA assuming a trust responsibility to ensure tribal CRP contract recipients can meet the contract's terms. Rather, the regulation merely requires the *owner* of the land (in this case, BIA) to be a signatory of the contract, separate and apart from the *participant* (*i.e.*, Plaintiff), § 1410.32(d), whose obligations are enumerated elsewhere in § 1410.20 ("Obligations of Participant"). None of those regulatory obligations place any obligation on the owner of the land, much less any money-mandating duties. *See generally id*. § 1410.20. Thus, this Court lacks jurisdiction over Plaintiff's second claim and it should be dismissed for this reason.

B. Plaintiff has not pled a viable breach of contract claim.

Perhaps recognizing the lack of any money-mandating fiduciary duty that could give rise to a Tucker Act breach of trust claim, Plaintiff's response brief seems (in places) to be asserting a

[2] Plaintiff does not cite to, or mention 7 C.F.R. § 1410.32 in her Complaint.

breach of contract claims against BIA. The change in tact cannot save the Complaint from dismissal for at least four reasons.

First, the Complaint does not plead a breach of contract claim. Instead, both counts are styled as asserting a "[v]iolation of Defendant's Trust and Fiduciary Duties." Compl. at 8-9. And the count that references the CRP contracts does not allege a breach of any contract term. Rather, it alleges "[t]he United States decision to do nothing to assist Monti to maintain the CRP contracts in good standing was a clear breach of the *trust and fiduciary duties* it owed Monti as an enrolled tribal member of the Blackfeet Tribe." *Id*. at ¶ 27 (emphasis added). Because Plaintiff did not raise a breach of contract claim in her Complaint, she cannot raise this new claim in her response brief. *See Casa de Cambio Comdiv. S.A. de C.V. v. United States*, 291 F.3d 1356, 1366 (Fed.Cir.2002) (holding that claims not raised in plaintiff's complaint are waived); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir.1984) ("[I]t is axiomatic that [a] complaint may not be amended by the briefs in opposition to a motion to dismiss."); *S. Comfort Builders, Inc. v. United States*, 67 Fed. Cl. 124, 153 (2005) ("Plaintiff's failure to identify its … claims in its complaint in this court, therefore, is fatal, regardless of the possible merits of such claims."); *Crest A Apartments, Ltd. II v. United States*, 52 Fed. Cl. 607, 613 (2002) (refusing to consider claim asserted in summary judgment motion but not in complaint).

Second, as explained in the United States' opening brief, BIA's signature on the contracts does not indicate that BIA "co-signed" the CRP contracts as a guarantor for Plaintiff, or that BIA was under a contractual obligation to assist. Def.'s Mem. of P. & A. in Supp. of the U.S.' Mot. to Dismiss Pl.'s Compl. at 9, ECF No. 6 at 15 ("Def.'s Mem."). Instead, the purpose of BIA's signature is to indicate a zero-percent share participant whose sole purpose is to approve (as the

land owner) Plaintiff's re-enrollment in the CRP program and who will not receive any annual rental payment from USDA/FSA. *See* 7 C.F.R. § 1410.32.

Plaintiff does not dispute that BIA is a zero-percent participant and that zero-percent share participants are not liable for upkeep under the CRP contracts. Instead, Plaintiff attempts to rely on 7 C.F.R. § 1410.32 as evidence that BIA "co-signed" the CRP contracts and therefore potentially owes a contractual duty to Plaintiff. *See* Pl.'s Resp. at 14. Plaintiff's understanding of 7 C.F.R. § 1410.32 is incorrect. The regulation simply requires the signature of both the producer and the landowner in re-enrolling in the CRP program. The regulation does not evidence a contract between the producer (here, Plaintiff) and the landowner (BIA). Even the appendix to the CRP contracts explain that "[p]articipants that sign the CRP-1 with zero-percent interest in annual rental payment shall not be held responsible for contract compliance." ECF No. 6-5 at 7. Additionally, a letter from FSA sent to Plaintiff and a letter from FSA to the Blackfeet Tribe also explains that parties who have signed the CRP-1 contract as a zero percent share participant are not jointly or severally liable for complying with the terms and conditions of the CRP-1 contract. ECF No. 6-4 at 2-3; *see also* ECF No. 6-6 at 2. Thus, while authorizing Plaintiff to enter into her contract on what is technically land held by the United States, BIA's signature does not indicate that BIA assumed any of Plaintiff's contractual obligations to the USDA.

Third, Plaintiff has not disputed the points in the United States' opening brief showing that the CRP contracts did not create a contractual relationship between Plaintiff and BIA.[3] The CRP

[3] Plaintiff attempts to avoid dismissal by arguing that "the question of whether a contract exists generally appears not to be a jurisdictional one." Pl.'s Resp. at 13 (quoting *Perry v. United States*, 149 Fed. Cl. 1, 12 (2020)) (internal quotation omitted). But here, no one disputes that a contract existed. The issue is that the contract was between Plaintiff and USDA/FSA, not Plaintiff and BIA. Contract interpretation, including the interpretation of government contracts, is a matter of law. *Medlin Constr. Grp., Ltd. v. Harvey*, 449 F.3d 1195, 1199-200 (Fed. Cir.

contracts were not between BIA and Plaintiff; rather, they were between USDA/FSA and Plaintiff. The basic law of contract requires (1) mutual assent expressed by a valid offer, (2) adequate consideration, and (3) acceptance. *See Buesing v. United States*, 47 Fed. Cl. 621, 630 (2000) (citing *Total Med. Mgmt, Inc. v. United States*, 104 F.3d 1314, 1319 (Fed.Cir.1997)). Here, there is no offer or acceptance of anything between BIA and Plaintiff. Furthermore, there is no consideration granted to BIA—BIA is not getting any share or benefit from Plaintiff or USDA/FSA. *See* ECF No. 6-1. In the CRP contracts, Plaintiff is listed as having the total 100% of the share and BIA is listed as having 0% share. *Id*. And the contracts certainly say nothing about BIA being under an obligation to assist Plaintiff in contract compliance.

Indeed, Plaintiff does not cite anything to show that BIA even has authority to contract or to take-on the conservation responsibilities in a CRP contract. And this Court has previously explained in an analogous scenario that the BIA's signing or approval of contracts in its role as trustee does not equate to an assumption of contractual obligations. *See McNabb v. United States*, 54 Fed. Cl. 759, 768–70 (2002) (rejecting an argument that, in signing lease of tribal land as trustee, BIA was not a party to a lease of Indian land); *see also Saguaro Chevrolet, Inc. v. United States*, 77 Fed. Cl. 572, 576–82 (2007) (same, and discussing case law).

Finally, even if BIA had contractual duties to Plaintiff (it did not), the Court should decline to hear a breach of contract claim because Plaintiff failed to exhaust available administrative remedies. Even where administrative exhaustion is not statutorily prescribed, courts should refrain from exercising jurisdiction where the plaintiff has not availed itself of an available administrative process and the equities weighed in favor of allowing the agency an opportunity address or correct

2006). Interpreting a contract is therefore proper when resolving a motion to dismiss. *See Bell/Heery v. United States*, 739 F.3d 1324, 1330 (Fed. Cir. 2014).

the grievance. *See White & Case LLP v. United States*, 67 Fed. Cl. 164, 170–71 (2005) (discussing prudential exhaustion doctrine). Here, the Department of the Interior has an administrative appeal process for those seeking to compel some agency action allegedly due. *See* 25 C.F.R. § 2.8.[4] Plaintiff has not claimed that she submitted an appeal to BIA in writing regarding the maintenance of her land. Had she done so, BIA would have been required to respond to her request within a certain time, (25 C.F.R. § 2.8(b)), and, if not (or if unsatisfied), Plaintiff could have administratively appealed the issue to higher authorities within the Department of the Interior (*id.* §§ 2.4, 2.9). Instead, Plaintiff waited nearly seven years and directly pursued judicial action. As such, even if she had pled a breach of contract claim, the claim should be dismissed.

C. The Statute of Limitations Bars Plaintiff's Claims.

Plaintiff's claims should be dismissed because they accrued six years and seven months before she filed her complaint on June 30, 2022, and are therefore outside the jurisdictional statute of limitations, 28 U.S.C. § 2501.[5] "When seeking to determine when a claim accrues, a court must decide when the plaintiff 'was or should have been aware' of the material facts that would establish the government's liability." *Blackfeet Hous. v. United States*, 106 Fed. Cl. 142, 145 (2012), aff'd, 521 F. App'x 925 (Fed. Cir. 2013) (quoting *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1350 (Fed. Cir. 2011)). Additionally, plaintiffs bear the burden to prove by a preponderance

[4] Under 25 C.F.R. § 2.8(a), an individual adversely affected by an alleged BIA failure to act can "(1) Request in writing that the official take the action originally asked of him/her; (2) Describe the interest adversely affected by the official's inaction, including a description of the loss, impairment or impediment of such interest caused by the official's inaction; (3) State that, unless the official involved either takes action on the merits of the written request within 10 days of receipt of such request by the official or establishes a date by which action will be taken, an appeal shall be filed in accordance with this part."

[5] Plaintiff incorrectly relies upon 28 U.S.C. § 2401(a), which does not apply to actions in the Court of Federal Claims. Pl.'s Resp. at 15.

of the evidence that the complaint was timely filed. *John R. Sand & Gravel Col. v. United States*, 552 U.S. 130, 134 (2008); *Sikorsky Aircraft Corp. v. United States*, 773 F. 3d 1315, 1320 (Fed. Cir. 2014).

Plaintiff argues that BIA had a trust duty to ensure that she was able to perform her requirements under the CRP contracts. Compl. at 8-9. This claim accrued no later than November 2015 when the USDA/FSA officially terminated Plaintiff's CRP contracts. *See* Def.'s Mem. 11. Plaintiff does not dispute the United States' argument that Plaintiff should have been aware of BIA's alleged failure to assist in maintaining the contracts no later than November 2015 (approximately six years and seven months before Plaintiff filed this lawsuit in June 2022). Additionally, Plaintiff does not seem to dispute that the accrual of this claim occurred when BIA allegedly failed to maintain the property, or at a minimum, when Plaintiff learned that BIA had not done the maintenance. Accordingly, Plaintiff's Complaint falls outside the statute of limitations and should be dismissed.

Plaintiff argues that BIA also had a duty to provide her with assistance throughout the administrative appeal process to USDA and that her case is therefore not time barred. *See* Pl.'s Resp. at 16. Plaintiff may have a point regarding the accrual period for any assistance allegedly due but not provided in her administrative appeal, but the point cannot save the Complaint.

For one, the administrative appeal has nothing to do with the claim Plaintiff brings in this case. The administrative appeal related to the action by USDA/FSA, not BIA. Plaintiff's Complaint, however, seeks damages for alleged breaches of trust by BIA, not USDA/FSA. Moreover, Plaintiff "is seeking payments from Defendants for those funds that she would have otherwise been paid … but for the fact that [the CRP contracts] were terminated prematurely." Compl. ¶14. Essentially, Plaintiff is seeking damages for BIA's alleged failure to step-in and

prevent her contracts from being terminated, in which case she would have continued to receive payment from USDA/FSA. But Plaintiff does not allege to have challenged the termination of the CRP contracts in her USDA administrative appeal; she only pursued relief so that she would not have to repay USDA/FSA the CRP funds that she had already received. *Id*. The contracts remained (and remains) terminated, and have been so since November 2015. The filing of the administrative appeal did not toll the finality of contract termination. Thus, Plaintiff was aware or should have been aware of BIA's alleged breach and, (ignoring the other jurisdictional problems with Plaintiff's Complaint), she could have brought suit when the contracts were terminated in November 2015. But Plaintiff did not file the present suit until June 2022, nearly seven years later.

Further, Plaintiff succeeded in her administrative appeal before USDA. In February 2021, the USDA National Appeals Division granted Plaintiff's requested equitable relief and vacated her debt to USDA. Compl. ¶14. "This allowed Monti to retain the CRP payments to which she was actually paid for prior to the CRP contracts being terminated, so that she did not have to repay those funds back." *Id*.[6] A successful appeal to a different federal agency regarding funds not at issue in this case cannot be the accrual point for the lost income Plaintiff does seek and that resulted from an alleged breach of trust by BIA that occurred more than six years before Plaintiff filed suit.

III. CONCLUSION

Plaintiff has failed to identify any statutes or regulations that establish or impose binding, money-mandating fiduciary duties on the United States to carry out and maintain Plaintiff's CRP contracts. Moreover, Plaintiff has not pled a breach of contract claim. And, even if she had, the

[6] Nor would Plaintiff have standing to pursue a breach of trust claim for an alleged failure by BIA to assist her in the USDA administrative appeal. In order to have standing, a party must first show injury in fact that is concrete and particularized. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Given that Plaintiff succeeded in her administrative appeal, she was not injured by the alleged breach of trust.

claim would fail for the reasons explained above. In addition, Plaintiff's claims for alleged breaches of trust related to the CRP contracts are barred by the statute of limitations. The Court therefore lacks jurisdiction over Plaintiff's Complaint.

For the foregoing reasons, the United States respectfully requests that the Court dismiss Plaintiff's Complaint.

Respectfully submitted on December 27, 2022,

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Certificate of Service

I hereby certify that on December 27, 2022, I electronically filed and served the foregoing using the CM/ECF system.

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