

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HOLLY BERRY,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 21-1017L
)	
THE UNITED STATES OF AMERICA,)	Judge Kathryn C. Davis
)	
Defendant.)	(E-filed August 27, 2021)

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PLAINTIFF’S OBJECTION TO DEFENDANT’S MOTION TO DISMISS

COMES NOW the Plaintiff, Holly Berry, by and through her attorney of record, Deborah A. Reed of Sterling Oaks Law Firm, and hereby submits her Objection to Defendant’s Motion to Dismiss and hereby moves this Court to deny Defendant’s Motion to Dismiss.

MOTION TO DISMISS STANDARD

“Under Fed. R. Civ. P. 8(a)(2), a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937. “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* “A complaint has to ‘show’ such an entitlement with its facts.” *Fowler v. UPMC Shadyside*, 2009 U.S. App. LEXIS 18626. “This ‘plausibility’ determination will be ‘a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.’” *Iqbal*, 129 S. Ct. 1937.

ARGUMENT & AUTHORITIES

I. Defendant and its Beneficiary have more than a “bare trust” relationship.

Typically, when the United States takes land in to trust for Native American tribes, only a “bare trust” relationship is established, with the United States owing only limited duties. *United States v. White Mt. Apache Tribe*, 537 U.S. 465. However, “[w]here the federal government takes on or has control or supervision over tribal monies or properties,” the relationship goes beyond a “bare trust,” and subjects the United States to expansion of duties owed under a heightened standard of scrutiny. *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171. “[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . property belonging to Indians. *United States v. Mitchell*, 463 U.S. 206. 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).” *Id.*

In the case at hand, Defendant very clearly “has control or supervision over tribal monies or properties.” *Navajo Tribe of Indians*, 224 Ct. Cl. 171. For example, Defendant has an ongoing duty to “monitor and investigate. . . Indian gaming operations,” using its power to “inspect, examine, photocopy, and audit all papers, books, and records (including computer records)” 25 CFR 571.1; *See also* 25 CFR 571.5; 25 CFR 522.4(b)(3). Defendant also has a duty to ensure that Beneficiary¹ does not violate any tenets laid out in approved gaming ordinances, including a “substantial violation” such as a “gaming operation’s facility is constructed, maintained, or operated in a manner that threatens the environment or the public health and safety, in violation of a tribal ordinance or resolution approved by the Chair under part 522 of this chapter.” 25 CFR

¹ The Cherokee Nation.

573.4(a)(12). If such a violation does exist, Defendant has the power to temporarily close Beneficiary's operations. *Id.*

II. Failure to perform duties owed subjects Defendant to liability for damages.

“Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained.” *United States v. Mitchell*, 463 U.S. 206. “Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of rights-of-way and to management of Indian funds.” *Id.*; See also *United States v. White Mt. Apache Tribe*, 537 U.S. 465 (“Act of 1960, Pub. L. 86-392, 74 Stat. 8, goes beyond a bare trust and permits a fair inference that the government is subject to duties as a trustee and liable in damages for breach.”)

Here, Defendant has failed in its duty to ensure that Beneficiary's gaming facility was “construct[ed], maintain[ed] and[or] operate[d] . . . in a manner that adequately protects the environment and the public health and safety.” 25 CFR 522.4(b)(3); See also 25 CFR 573.4(a)(12). As a result of Defendant's failure, Plaintiff's property has suffered severe flooding, erosion, and impoundment of water. “Elementary trust law confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.” *White Mt. Apache Tribe*, 537 U.S. 465 “One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets.” *Id.*

III. The nature of the violation necessarily implies a duty owed to Plaintiff.

In the case at bar, the nature of the violation/damage resulting from Defendant's failure bears close inspection. Were this merely a matter of the gaming facilities operating without a

license from the tribe, then this would be a dispute solely between Defendant and its Beneficiary. 25 CFR 573.4(a)(4). Instead, the violation is of the gaming facilities failure to be “construct[ed], maintain[ed] and[or] operate[d] . . . in a manner that adequately protects the environment and the public health and safety.” 25 CFR 522.4(b)(3) (emphasis added). In the former example (operating without a license) the intent of Defendant’s duty to prevent such operation is clearly designed to benefit/protect the Native tribe, and the Native tribe only. In the latter example, there is a necessarily implied intent that prevention of poor construction, maintenance, and/or operation is designed to benefit/protect both the Native tribe and the general public.

Clearly, the regulations encountered in this case requiring Defendant to maintain an active role in its Beneficiary’s affairs stems from the long-held assumption that Native Americans are in a “state of pupilage,” situated in such a way as to be considered “wards” of the “guardian” United States. *Cherokee Nation v. Georgia*, 8 L. Ed. 25, 1831 U.S. LEXIS 337; See also *United States v. Mitchell*, 463 U.S. 206 (“This Court has previously emphasized ‘the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.’”). This relationship accounts for the protective nature implied in Defendant’s duty to prevent gaming facilities operating without a tribal license (see example in preceding paragraph) as doing so protects the Native tribe (the “ward”) from suffering potential/actual harm stemming from such a violation. Plaintiff’s position, however, invokes a different aspect of protection.

As discussed above, the violation at issue (failing to prevent damage to the environment and/or public health/safety) necessarily involves a double layer of protection: one layer for the Beneficiary, and one for the general public. The first layer is the same or similar as the illegal operation example (see above) in that Defendant’s duty is meant to protect its ward from external

factors. The second layer, however, is intended to both protect the ward from itself, and to protect the general public from the actions of the ward.

By failing to ensure that the gaming facility was/is properly constructed, maintained, and/or operated, Defendant has placed its ward in such a position that it could be harmed by external factors (for example, damaging the environment resulting in backlash from the EPA, municipality, or the State.) At the same time, Defendant failed in its duty as a “guardian” to protect Plaintiff from actions taken by its ward. Who then is Plaintiff to look to for redress?

Generally speaking, the harmful actions of a ward are attributed to the guardian. This stems from the very nature of the ward/guardian relationship, in that the ward is assumed to be unlearned in what is “right” or “wrong,” and it is up to the guardian to teach the ward, while at the same time protecting outsiders from the ward’s actions while it is being taught. Practically speaking, the “ward” in this case is a sovereign nation, immune from suit by the general public except in very specific circumstances. This leaves Plaintiff with only one avenue for redress: the guardian, Defendant. It was Defendant that failed in its duty to protect the general public from its ward, and it is Defendant who must redress its failure.

CONCLUSION

Defendant, the United States, established a fiduciary relationship beyond that of a “basic trust” when it entered into a position of control and/or supervision over Beneficiary’s property. This “special relationship” entrusted Defendant with certain duties beyond that required in a “basic trust,” duties which stem from the long-held legal assumption that Defendant is a “guardian” to Native tribes. By failing to adequately perform its duties, Plaintiff’s property has suffered severe flooding, erosion, and impoundment of water. Given the sovereign nature of the

ward, and the general principles of the ward/guardian relationship, Plaintiff is left with only one avenue of redress, that being the Defendant.

WHEREFORE premises considered, Plaintiff respectfully moves that this Court deny Defendant's Motion to Dismiss, and for such other relief as the Court deems just and equitable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of August 2021, a true and correct copy of the above and foregoing was served, via electronic filing with the court, to:

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