UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ISAAC WILLIAM HESS,

Plaintiff,

v.

DEB HAALAND, Secretary,
Department of Interior, et al.,

Defendants.

Civil Action No. 22-3385 (CJN)

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

COMES NOW Defendant United States Department of the Interior and Deb Haaland, Secretary of the Interior (collectively, the "Federal Defendants"), by and through undersigned counsel, and submit this Reply in further support of their Motion to Dismiss (ECF No. 7).

INTRODUCTION

Although in his Response Plaintiff provides some additional explanation of his allegations against Federal Defendants, they remain insufficient to establish subject matter jurisdiction in this Court or to state a claim upon which relief may be granted. Accordingly, the Federal Defendants' Motion to Dismiss should be granted pursuant to both Rules 12(b)(1) and 12(b)(6).

In addition to repeating his allegation that the Cherokee Nation District Court has failed to exercise jurisdiction over his custody and visitation case, and an Idaho state court instead has improperly done so, Plaintiff alleges that the Federal Defendants, pursuant to their plenary authority over Indian affairs, should have clarified the law so that both he and these courts better understood jurisdiction over his child custody case. According to Plaintiff, if the Federal Defendants had not negligently failed to clarify the law, he would have brought his case in the proper court and/or the proper court would have exercised jurisdiction.

These additional allegations and explanations are insufficient to establish subject matter jurisdiction in this Court. As more fully explained herein, Plaintiff still lacks standing to assert a claim against the Federal Defendants because he cannot show that the harm he has suffered is fairly traceable to any action or inaction of the Federal Defendants, nor can he show how relief against the Federal Defendants would redress his claims. In this procedural rights case, Plaintiff still has not identified a federal statute that obligates the Federal Defendants to control the conduct of tribal court decisionmaking or to give Plaintiff advisory guidance on how properly to file a child custody case. At most, Plaintiff relies on the general trust relationship between the United States and Indians and argues that the Federal Defendants have total authority over all Indian affairs, obligating them to micromanage every action taken by an Indian tribe or its tribal courts. This is simply not the law. The general trust relationship, in and of itself, does not impose a duty on the Federal Defendants to control tribal courts, to ensure that they exercise jurisdiction over Plaintiff's child custody matter, or to prevent a state court from doing so. In the absence of some other substantive source of law imposing such duties, Plaintiff cannot trace his procedural injury to any action or inaction of the Federal Defendants. Similarly, any relief entered by the Court against the Federal Defendants would not redress his injuries.

Additionally, Plaintiff's claims against the Federal Defendants should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The statutes cited by Plaintiff in his Response do not create a cause of action in federal court, nor do they create any cause of action against the Federal Defendants. And it remains the case that the Treaty of 1866 does not create an individual right of action in Plaintiff nor does it require the Federal Defendants to supervise or control decisions made by a separate sovereign's tribal court. Moreover, the general trust relationship also does not, by itself, create a cause of action

against the Federal Government. Accordingly, any claim against the Federal Defendants must be dismissed pursuant to Rule 12(b)(6).

ARGUMENT

I. Dismissal Remains Proper Under Rule 12(b)(1)

A. Plaintiff Lacks Standing

Plaintiff is unable to show that the complained-of conduct is fairly traceable to the Federal Defendants or that a decision of this court against the Federal Defendants would redress Plaintiff's alleged injuries. Plaintiff does not point to any specific statute or treaty provision obligating the Federal Defendants to regulate the conduct of tribal courts or otherwise intercede in Plaintiff's child custody proceeding. Plaintiff argues that the Federal Defendants had a "duty to manage the Indian affairs concerning the applicability of the UCCJEA to the Indian tribes and their members." Pl.'s Resp. ¶ 7, ECF No. 17. However, the UCCJEA is not a federal statute; it is a uniform state law which "does not create any federal right of action." *Gottlieb v. Schneiderman*, 2016 U.S. Dist. LEXIS 12959, *16 (E.D.N.C. Feb. 3, 2016); *Smith v. Pines Treatment Center*, 472 F. Supp. 2d 784, 786 (E.D. Va. 2007) ("Because the UCCJEA is only a state procedural statute . . . , it does not confer federal question jurisdiction.").[1] Even assuming that Plaintiff could demonstrate federal court jurisdiction over his claim that his child custody case should be heard in Cherokee tribal court as opposed to Idaho state court, there is no basis for asserting such a claim against *the Federal Defendants*. Indeed, the entire purpose of the statutes cited by Plaintiff is to establish procedures

[1] Plaintiff erroneously cites 28 U.S.C. § 1738A as the UCCJEA. As explained, the UCCJEA is a uniform state law and is not codified in the U.S. Code. Rather, § 1738A is the Parental Kidnapping Prevention Act (PKPA). However, federal courts do not have jurisdiction to hear PKPA claims because it does not create a private cause of action in federal court to determine the validity of conflicting child custody determinations. *See Thompson v. Thompson*, 484 U.S. 174, 182-83, 187 (1988). "[T]ruly intractable jurisdictional deadlocks" under the PKPA are appealed directly to the U.S. Supreme Court, not federal district courts. *Id.* at 187.

for when state and tribal court child custody determinations should be accorded full faith and credit in each other's courts, and to remove the federal government from any role in the process, reflecting the long tradition of keeping the federal government out of domestic relations cases. *See Brown v. Wilson*, Civ. A. No. 14-0032 (BNB), 2014 U.S. Dist. LEXIS 21993, *7 (D. Colo. Feb. 19, 2014).[2]

Plaintiff's Response confirms that his only argument tracing his alleged injury to the Federal Defendants is premised on the general trust relationship between the United States and Indian tribes and the Federal Defendants' alleged failure to micromanage every action taken by or affecting an Indian tribe. For example, Plaintiff argues that the United States is responsible for "all Indian affairs," Pl.'s Resp. ¶ 5, including "responsib[ility] for managing the enumerating of which federal laws apply or do not apply to the tribes." *Id.* More specifically, Plaintiff suggests that there is uncertainty about the applicability of the UCCJEA to Indian tribes and that "because of the negligence of the [Federal] Defendants . . . not managing the Indian affair issue, . . . they have allowed the various jurisdictions to rule vastly different on the topic instead of establishing who actually has jurisdiction in child custody cases." *Id.* ¶ 9. According to Plaintiff, the Federal Defendants "could have clarified the law to outline the applicability to the Indian tribes in order to fulfill their responsibility to manage all Indian affairs." *Id.* ¶ 10.

This is wholly insufficient to establish this Court's jurisdiction. Federal courts have held in a variety of contexts that an allegation of the general trust relationship is insufficient to impose liability on the federal government. Instead, there must be a separate substantive "'source of law that establishes specific fiduciary or other duties.'" *Lower Brule Sioux Tribe v. Haaland*, Civ. A.

[2] Nor does the Indian Child Welfare Act (ICWA) establish jurisdiction; its definition of "child custody proceedings" does not include divorce proceedings. *See* 25 U.S.C. § 1903(1); *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 514 (8th Cir. 1989).

No. 21-3018, 2022 U.S. Dist. LEXIS 165838, at *35 (D.S.D. Sept. 12, 2022) (quoting *El Paso Nat. Gas Co. v. United States*, 774 F. Supp. 2d 40, 51 (D.D.C. 2011) (in turn quoting *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003)). Plaintiff cites 25 U.S.C. § 2 as giving the Federal Defendants responsibility for all of Indian affairs. However, that statute merely establishes the general trust relationship between the federal government and tribes; it does not impose any enforceable duties of its own. *See Navajo Nation v. United States*, 68 Fed. Cl. 805, 811 (Fed. Cl. 2005), *aff'd*, 356 F. App'x. 374 (Fed. Cir. 2009).

The Plaintiff admits that his injury stems from "adverse rulings" issued by state and tribal courts. Pl.'s Resp. ¶ 9. The Federal Defendants are not responsible for these rulings. Plaintiff argues that the Federal Defendants "could have clarified the law," which would have led him to file in the correct court and avoid "jurisdictional challenges." *Id.* ¶ 10. Plaintiff's argument relies on a misapprehension of the separation of powers in our constitutional system. The Federal Defendants, which are Executive agencies and employees, do not "clarif[y]" meanings of federal (or uniform state) statutes. That is the province of the courts. There can be no cause of action against an Executive agency for a litigant's misunderstanding of the law. As a result, Plaintiff's failure to understand the law is not traceable to any action (or inaction) of the Federal Defendants.

Assuming that the Cherokee tribal court has improperly refused to exercise jurisdiction over Plaintiff's child custody case, as explained in the Motion to Dismiss, the Federal Defendants are not responsible or liable for the alleged wrongful acts of that court. *Landreth v. United States*, 797 F. App'x. 521, 524 (Fed. Cir. 2020).[3] Tribes are separate sovereigns and have the inherent

[3] Although not alleged in his Complaint, in his Response Plaintiff argues that the Federal Defendants were "negligent in their duty to manage the Indian affairs concerning the applicability of the UCCJEA to the Indian tribes and their members." Pl.'s Resp. ¶ 7. Although highly unlikely that this is a reference to the Federal Tort Claims Act (FTCA), out of an abundance of caution, if it is, it must be dismissed for lack of subject matter jurisdiction. For one, Plaintiff has not exhausted

right to establish tribal courts. *See* 25 U.S.C. § 3061(4); *Wheeler v. Dep't of Interior*, 811 F.2d 549 (10th Cir. 1987). Further, this sovereignty predates the United States and, as a result, tribes are not subject to most U.S. constitutional provisions imposing limitations on federal or state authority. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Although Congress has guaranteed certain civil rights protections to individual tribal members via the Indian Civil Rights Act, including their treatment in and by tribal courts, ICRA does not create a general cause of action for injunctive or declaratory relief in federal court to enforce the terms of ICRA. *Id.* at 68-69.[4] Plaintiff's requested relief would have the effect of compelling the Federal Defendants to "micro-manage the [Tribe's] affairs when no basis for the interference exists." *Vizenor v. Babbit*, 927 F. Supp. 1193, 1202 (D. Minn. 1996). Plaintiff's theory of the case "seek[s] pervasive federal government oversight of the [Tribe's] essential governmental functions. A more invasive action could hardly be imagined." *Id.* at 1203. Accordingly, it cannot seriously be argued that the Federal Defendants have any responsibility for the alleged wrongdoing of the tribe or its tribal courts.

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his administrative remedies, which is a complete barrier to federal court jurisdiction. *See Green v. Presidential Bank*, Civ. A. No. 20-0183, 2020 U.S. Dist. LEXIS 94090 (D.D.C. May 29, 2020) (Nichols, J.) (citing *Beck v. United States Gov't*, 777 F. App'x 525, 526 (D.C. Cir. 2019)). Further, the FTCA effects only a limited waiver of the United States' sovereign immunity. The United States, as trustee, has not waived its sovereign immunity for acts allegedly committed by a beneficiary tribe. The FTCA only waives the United States' sovereign immunity for actions of its employees, not its independent contractors. "A critical element distinguishing an agency from a contractor is the power of the Federal Government to control the detailed performance of a contractor." *United States v. Orleans*, 425 U.S. 807, 814 (1971) (internal quotation omitted). "[U]nless the United States actually supervised and controlled the day-to-day operations of" the tribal court, "the Tribe was an independent contractor, not an employee[]" and "the actions of the Tribe cannot be attributed to the United States for the purpose of imposing liability under the FTCA." *See Robinson v. United States*, Civ. A. No. 04-0734, 2011 U.S. Dist. LEXIS 10543, *12-13 (E.D. Cal. Jan. 27, 2011). As explained in the Motion and above, Indian tribes have the inherent sovereign power to establish their own courts. The United State does not "supervise[] and control[] the day-to-day operations" of the Nation's tribal courts.

[4] The one exception is a writ of habeas corpus challenging the legality of detention by a tribe. *Id.* Plaintiff has not alleged that the Cherokee tribe or tribal court has illegally detained him.

With respect to redressability, Plaintiff concedes that he "is not seeking to have the Defendants enforce or impose anything upon the Cherokee Nation." Pl.'s Resp. ¶ 11. But this concession only reinforces the Court's lack of jurisdiction here. As explained in the Motion, in procedural-rights cases, plaintiffs cannot satisfy the standing requirement when they seek a remedy against the Federal Government as a means to alter the conduct of a third party that the Federal Government does not control. *See Ashley v. Dep't of Interior*, 408 F.3d 997 (8th Cir. 2005). In lieu of any relief against the Federal Defendants, Plaintiff suggests he merely wants a declaratory judgment outlining in which cases state or tribal courts have jurisdiction over child custody disputes. But "'[t]he Declaratory Judgment Act does not extend the jurisdiction of the federal district courts. It simply extends the range of remedies available in the federal courts.'" *Lower Brule Sioux Tribe*, 2022 U.S. Dist. LEXIS 165838 at *33 (quoting *Smith v. Dept. of Agric.*, 888 F. Supp. 2d 945, 953 (D. Iowa. 2012)) (cleaned up). If there is no underlying source of federal jurisdiction requiring the Federal Defendants to police tribal court rulings and conflicting child custody determinations, Plaintiff cannot invoke the Declaratory Judgment Act. In effect, what Plaintiff is seeking is an advisory opinion about the allocation of jurisdiction over child custody determinations. This Court lacks authority to issue such an advisory opinion. *See* U.S. Const., art. III, § 2, cl. 1 (limiting jurisdiction to "Cases" and "Controversies"); *Pub. Serv. Elec. & Gas Co. v. FERC*, 783 F.3d 1270, 1274 (D.C. Cir. 2015) (quoting *Flast v. Cohen*, 392 U.S. 83, 96 (1968)).[5]

[5] Plaintiff's Response admits that his requested relief is not limited to any present case or controversy and is hypothetical in nature. Plaintiff states that the declaratory relief he seeks would ensure "that jurisdiction is properly known by *all* the states and Indian tribes for *all* cases of child custody involving members of Indian tribes." Pl.'s Resp. ¶ 11 (emphasis added); *see also id.* ¶ 12 ("This Declaratory Relief will simply be helping the Indian tribes, in the trust relationship that the United States has with them, to understand their jurisdiction, as to when they have it and when they do not. This will also help to inform the various states about tribal jurisdiction and help the Indian tribes to retain their sovereignty.").

II. Dismissal is also Proper under FRCP 12(b)(6)

Plaintiff's Complaint is also subject to dismissal under Rule 12(b)(6). Despite not including any allegations against the Federal Defendants in his Complaint, Plaintiff attempts in his Response to more fully explain his claims against the Federal Defendants which, as explained above, are largely based on the general trust relationship and Plaintiff's allegation that the Federal Defendants are responsible for any and every issue involving Indian affairs.

For many of the same reasons Plaintiff cannot satisfy Article III's standing requirement, he cannot state a claim upon which relief may be granted. The general trust relationship between the United States and Indians is not sufficient, by itself, to substantiate a cause of action against the Federal Defendants in this case. *See El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 892 (D.C. Cir. 2014) ("[T]his general trust relationship alone does not afford an Indian tribe with a cause of action against the Government . . . ."). Instead, there must be some other source of substantive law imposing duties on the Federal Defendants.

As more fully explained above, Plaintiff has not cited any federal statute imposing a duty on the Federal Defendants to ensure that tribal courts render decisions to Plaintiff's liking. His citation of 25 U.S.C. § 2 does nothing more than establish the general trust relationship between the United States and Indians and Indian tribes. It does not create an all-encompassing cause of action for anything involving Indian affairs. Additionally, the United States Supreme Court and lower federal courts have held that neither the PKPA nor the UCCJEA create a private right of action in federal court, and certainly not against the Federal Defendants. As explained in the Motion, the Treaty of 1866 also does not create a cause of action against Federal Defendants because it creates only collective rights enforceable by a tribe, not individual rights enforceable by individual tribal citizens. *See Apache Stronghold v. United States*, 519 F.Supp.3d 591, 599-600

(D. Ariz. 2021). And, even assuming it did, the plain text of Article XIII of the Treaty does not authorize the Federal Defendants to control tribal court decision making.

Additionally, in the remote chance that Plaintiff's claim is one under the FTCA because he states in his Response that the Federal Defendants were "negligent in their duty to manage the Indian affairs concerning the applicability of the UCCJEA to the Indian tribes and their members," Pl.'s Resp. ¶ 7, he has not stated and cannot state a claim under the FTCA. "[I]n order for there to be liability under the FTCA, there must exist some duty owed to the plaintiff by the United States." *Robinson v. United States*, Civ. A. No. 2:04-0734 (RRB) (DAD), 2011 U.S. Dist. LEXIS 10543, *28 (E.D. Cal. Jan. 27, 2011). The general trust relationship, standing alone, does not create an enforceable duty, the breach of which would be actionable under the FTCA. *Id.* at *20-21.[6] Plaintiff has not identified a separate statute imposing a duty on the Federal Defendants to manage the conduct of tribal courts or to issue advisory interpretations of the meaning of federal or other statutes.

CONCLUSION

For the foregoing reasons, Plaintiff's claims against the Federal Defendants should be dismissed under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

* * *

[6] Moreover, any FTCA claims that Plaintiff might attempt to state also fail for the reasons stated in *supra* n.3.

Date: February 9, 2023
Washington, DC

Respectfully submitted,

MATTHEW M. GRAVES, D.C. Bar #481052
United States Attorney

BRIAN P. HUDAK
Chief, Civil Division

By: */s/ Sam Escher*
SAM ESCHER, D.C. Bar #1655538
Assistant United States Attorney
601 D Street, N.W.
Washington, D.C. 20530
(202) 252-2531
Sam.Escher@usdoj.gov

Attorneys for the United States of America