UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALICIA SISAUDIA,

Plaintiff,

v.

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

Defendants.

Civil Action No. 22-3689 (CJN)

FEDERAL DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM OF LAW

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 moves the Court to dismiss the claims against it set forth in Plaintiff's Complaint, ECF No. 1, pursuant to Federal Rules of Civil Procedure ("Rules") 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

INTRODUCTION

Plaintiff's Complaint seeks a declaration that the courts of the Cherokee Nation have jurisdiction over a case involving the custody and visitation of Plaintiff's minor child. *See* Compl. ¶¶ 1-2, ECF No. 1.[1] Plaintiff alleges that the 1866 Treaty between the United States and Cherokee Nation[2] gives the Nation exclusive jurisdiction over all civil cases, including Plaintiff's custody and visitation case. *Id.* ¶¶ 35-37. She appears to allege that the Cherokee Nation District Court has

[1] The Complaint identifies the custody and visitation case as Case No. CVPAT-22-114, filed in Cherokee Nation District Court. *Id.* ¶ 1.

[2] Treaty With the Cherokee, July 19, 1866, 14 Stat. 799 ("1866 Treaty").

failed to exercise jurisdiction over her custody and visitation case, instead waiving its jurisdiction and allowing an Arizona court to assume jurisdiction. *Id.* ¶ 41.5.

Plaintiff's claims against the Federal Defendants should be dismissed pursuant to Rule 12(b)(1) due to the absence of subject matter jurisdiction because she lacks standing. Specifically, Plaintiff has not traced her alleged injury (the failure of the Cherokee Nation District Court to exercise jurisdiction over her custody and visitation case) to any discrete action or inaction by the Federal Defendants. There is no allegation in the Complaint that the Federal Defendants played any role in the tribal court's decision with respect to its jurisdiction or that it possesses any authority to do so. For much the same reason, any order entered by the Court against the Federal Defendants would not redress Plaintiff's alleged injury which stems from actions by the Cherokee Nation's tribal court, not the Federal Defendants.

Additionally, Plaintiff's claims against the Federal Defendants should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Plaintiff has failed to meet the most minimal burden of alleging any facts that the Federal Defendants took (or failed to take) some action related to the Cherokee Nation tribal court's decision to not exercise jurisdiction over Plaintiff's child custody and visitation case. The only mention of the Federal Defendants in the Complaint is in the prefatory section identifying the parties and a threadbare legal conclusion that "[a]ll of the Defendants are responsible for the adherence and administration of the [1866 Treaty]." Compl. ¶ 14, ECF No. 1. Plaintiff alleges no facts supporting this conclusion or explaining how or why the 1866 Treaty requires the Federal Defendants to supervise or control decisions made by a separate sovereign's tribal court. Accordingly, any claim against the Federal Defendants must be dismissed.

STANDARD OF REVIEW

Subject matter jurisdiction is a "threshold matter" which must be considered before evaluating the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). Plaintiff, who is invoking this Court's jurisdiction, bears the burden of proving subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Because Plaintiff is *pro se*, her pleading must be liberally construed, but she is not excused from the burden of establishing the Court's jurisdiction over her claims. *Newby v. Obama*, 681 F. Supp. 2d 53, 55 (D.D.C. 2010). If the Court lacks jurisdiction over a claim, the Court must dismiss it.

"To survive a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), [a plaintiff] must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Cravens v. Pact, Inc.*, Civ. A. No. 19-1357, 2020 WL 956526 (D.D.C. Feb. 27, 2020) (Nichols, J.) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). "A claim is facially plausible if 'the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A complaint that only formulaically recites elements of a cause of action or offers only "naked assertion[s] devoid of "further factual enhancement" is insufficient. *See Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557). "[P]ro se status does not render a plaintiff immune from pleading facts upon which a valid claim can rest." *In re Watson*, 910 F. Supp. 2d 142, 148 (D.D.C. 2012) (cleaned up).

ARGUMENT

I. Plaintiff Does Not Have Standing to Bring this Suit

A. Traceability

To establish standing in federal court, a plaintiff must "'present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and

likely to be redressed by a favorable ruling.'" *Hawkins v. Haaland*, 991 F.3d 216, 224 (D.C. Cir. 2021) (quoting *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019)). "Causation requires a 'fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant.'" *Id.* (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998)).

Plaintiff alleges a procedural injury: that the Cherokee Nation tribal courts failed to exercise jurisdiction over a child custody and visitation proceeding involving Plaintiff allegedly in violation of the Treaty of 1866. "To establish traceability in a procedural-injury case, 'an adequate causal chain must contain at least two links:' (1) a connection between the omitted procedure and a government decision and (2) a connection between the government decision and the plaintiff's particularized injury." *Id.* (quoting *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013)). Particularly in procedural-rights cases, the standing inquiry ensures that "a plaintiff who has suffered personal and particularized injury has sued a defendant who has caused the injury." *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)).

Here, Plaintiff cannot satisfy Article III standing's traceability requirement because she has not alleged any connection between the omitted procedure and a decision from the Federal Defendants nor any connection between her injury and a decision by the Federal Defendants. Notably, Plaintiff has not identified decision by the Federal Defendants at all. Nowhere in the Complaint does Plaintiff allege that the Federal Defendants made any decision (or failed to make a decision or undertake some action) connected to the Cherokee Nation tribal court's alleged failure to exercise jurisdiction over Plaintiff's custody case. It is entirely unclear what the Federal Defendants did or did not do that had any bearing on the tribal court's decision.

Even assuming the tribal court failed to exercise its alleged exclusive jurisdiction over the child custody and visitation case, that decision is the tribal court's alone and not attributable to any action or inaction of the Federal Defendants.[3] *See Landreth v. United States*, 797 F. App'x 521, 523 (Fed. Cir. 2020) ("[E]very act described in the complaint is alleged to have been committed by the Tribe, not by the United States[.]"). "Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems." 25 U.S.C. § 3061(4); *see also Wheeler v. Dep't of Interior*, 811 F.2d 549 (10th Cir. 1987). The Federal Defendants do not control tribal court decision-making. Plaintiff does not identify any law authorizing federal control over or responsibility for tribal court decisions.[4] Accordingly, Plaintiff cannot trace her alleged injury to any action by the Federal Defendants and she therefore lacks standing to assert any claim against them.

B. Redressability

"[R]edressability requires a litigant to demonstrate 'a likelihood the requested relief will redress the alleged injury.'" *Hawkins*, 991 F.3d at 224 (quoting *Steel Co.*, 523 U.S. at 103). For much the same reason that there is no causal link between any decision by the Federal Defendants and the omitted procedure and/or Plaintiff's injury, the relief Plaintiff requests will not redress her

[3] Of course, the Federal Defendants do not concede the substance of Plaintiff's claims against the Cherokee Nation or suggest that they have merit. The Nation submitted its own motion to dismiss the claims against it. *See* ECF No. 7. The Federal Defendants only argue that they may not be held liable for the decision of the Cherokee Nation District Court alleged in the Complaint.

[4] To the extent Plaintiff suggests that the general trust relationship between the United States and Indian tribes renders the Federal Defendants liable for any actions taken by a tribe or its governmental units, that claim must be rejected. *See Landreth*, 797 F. App'x at 524 ("Landreth has not demonstrated why the United States, as trustee, should be liable for the alleged wrongful acts of its beneficiary."). Further, Plaintiff has not alleged any facts establishing an agency relationship between the Federal Defendants and the Nation, or that the Federal Defendants induced the tribal court to act. *See id.*

injury. *See Fla. Audubon Soc.*, 94 F.3d at 668 (lack of connection between government action and omitted procedure "foreshadows the issue of redressability") (citations omitted).

The court cannot issue any order in this case against the Federal Defendants that is likely to redress Plaintiff's claims. In procedural-rights cases, plaintiffs face particular standing difficulties when they seek a remedy against the Federal Defendants as a means to alter the conduct of a third party (the tribal court). "For this approach to be successful the defendant must have control over the third party's behavior." *Ashley v. Dep't of Interior*, 408 F.3d 997 (8th Cir. 2005). Plaintiff does not cite any law giving the Federal Defendants control over the decisions of the Cherokee Nation tribal courts. Indeed, such control would be antithetical to principles of tribal self-government and the government-to-government relationship between the United States and Indian tribes. *See* 25 U.S.C. § 3601.

The Treaty of 1866 does not contain any language giving the Federal Defendants control over the Cherokee Nation's tribal courts. Article XIII of the Treaty authorized the United States to establish a territorial court in the Cherokee Nation but preserved tribal court jurisdiction in civil and criminal cases involving exclusively tribal members and arising within the Cherokee Nation. *See* 1866 Treaty, Art. XIII, 14 Stat. 803. It does not imbue the United States with authority to supervise how the Cherokee Nation tribal courts exercise their jurisdiction. There is no order the court could issue against the Federal Defendants that would remedy Plaintiff's harm because "the government cannot control the Tribe on this score," *Ashley*, 408 F.3d at 1003, nor is there "any authority that would allow the government to prohibit the Tribe" from issuing the ruling it made with respect to its jurisdiction. *Id.*[5]

[5] To the extent Plaintiff is alleging the Federal Defendants have breached the Treaty of 1866 by not ensuring the Cherokee Nation tribal court exercises jurisdiction over the child custody matter, Plaintiff likely lacks standing to assert such a claim. "A treaty 'is essentially a contract

II. Plaintiff Fails to State a Claim Upon Which Relief Can Be Granted

Plaintiff's claims against the Federal Defendants must be dismissed pursuant to Federal Rule 12(b)(6) because she has failed to plead any facts that would allow the court to draw a reasonable inference that the Federal Defendants are liable for the misconduct alleged.[6] From a review of Plaintiff's Complaint and accepting the allegations therein as true, the Cherokee Nation tribal court has improperly failed to exercise jurisdiction over a child custody and visitation matter. There is no allegation whatsoever that the Federal Defendants played a role (or should have) in the tribal court's decision. Beyond naming them as defendants in the caption and prefatory sections of her Complaint, Plaintiff never again even mentions them, let alone alleges any facts setting forth a plausible claim for relief against them.

At most, the Complaint states that the Treaty of 1866 requires the Cherokee Nation tribal courts to exercise jurisdiction over the child custody matter and includes a conclusory allegation that "[a]ll of the Defendants are responsible for the adherence and administration of the Treaty[.]" Compl. ¶ 14, ECF No. 1. But the court need not accept this bare legal conclusion as true or plausibly stating a claim for relief. The United States is "not a private trustee." *United States v.*

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between two sovereign nations,' not between individuals." *Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 599 (D. Ariz. 2021) (quoting *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019). "Where a treaty grants rights to an entire tribe rather than to individual tribal members, only the tribe that signed the treaty . . . can exercise treaty rights." *Id.* at 600 (cleaned up). Article XIII of the Treaty of 1866, which Plaintiff cites in support of her allegation that the Cherokee Nation tribal courts must exercise jurisdiction over the child custody matter, is a provision that allows the judicial tribunals of the Cherokee nation to retain exclusive jurisdiction over civil and criminal cases between Cherokee tribal members arising in the Cherokee Nation. *See* Treaty of 1866, art. XIII, 14 Stat. 803. This provision, which concerns government powers and is addressed to the Cherokee "nation," clearly speaks to tribal, rather than individual, rights. *See Apache Stronghold*, 519 F. Supp. 3d at 600.

[6] As a result, even though a *pro se* plaintiff's complaint should be construed liberally, drawing all inferences in her favor, Plaintiff cannot even meet this minimal burden because she has alleged no facts with respect to the United States.

Jicarilla Apache Nation, 564 U.S. 162, 173 (2011). Any actions it must take with respect to an Indian tribe must be stated specifically in law; general references to its trust responsibility or the common law are insufficient. *Id.* There is no allegation in the Complaint that the Federal Defendants have any obligation or authority pursuant to the 1866 Treaty to ensure that the Cherokee Nation tribal court exercises its jurisdiction over civil matters like Plaintiff's.[7] And if the Federal Defendants do not have any obligation or authority with respect to the Cherokee Nation District Court's decision, "[i]t follows, *a fortiori*, that the same standard must apply . . . where a third party is suing the United States for its acts or omissions as the trustee." *Robinson v. United States*, Civ. A. No. 04-0734, 2011 WL 302784, *7 (E.D. Cal. Jan. 27, 2011); *see also Tolliver v. United States*, 957 F. Supp. 2d 1236, 1247 (W.D. Wash. 2012).

As a result, Plaintiff has failed to allege any factual content that allows the court to draw the reasonable inference that the Federal Defendants are liable for the misconduct alleged. At most, Plaintiff has simply offered a "formulaic recitation" of the Declaratory Judgment Act and "nakedly assert[ed] a bare legal conclusion that the Federal Defendants are responsible for adherence to and administration of the 1866 Treaty. *Twombly*, 550 U.S. at 557. She has alleged no "further factual enhancement" explaining how or why the Federal Defendants are liable for the actions of the Cherokee tribal court detailed in the Complaint. *Id.*

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[7] To the extent Plaintiff is alleging a claim against the Federal Defendants for breach of trust, she has failed to state a claim. To state a claim for breach of trust, litigants "'must identify a source of substantive law that establishes specific fiduciary duties, and allege that the United States has failed faithfully to perform those duties.'" *Standing Rock Sioux Tribe v. Army Corps of Eng'rs*, 440 F. Supp. 3d 1, 29 (D.D.C. 2020) (quoting *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003)). The "general trust relationship" between the Government and Indians "does not afford an Indian . . . with a cause of action against the Government." *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 892 (D.C. Cir. 2014). The only law identified by Plaintiff is the Treaty of 1866, but it does not impose any trust duty on the Federal Defendants with respect to the Cherokee Nation tribal court's exercise of jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should grant the Federal Defendants' Motion to Dismiss.

Date: January 20, 2023
Washington, DC

Respectfully submitted,

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