

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**TUNICA-BILOXI TRIBE OF LOUISIANA,
and RAMAH NAVAJO SCHOOL BOARD,**

INC.,

PLAINTIFFS,

vs.

UNITED STATES OF AMERICA, *et al.*

DEFENDANTS.

**No. 1:02CV02413 (RBW)
Magistrate Judge
Deborah A. Robinson**

NOTICE OF RECENT AUTHORITY

On January 2, 2008, the Honorable Garland E. Burrell, Jr., entered judgment in favor of plaintiff in *Susanville Indian Rancheria v. Leavitt*, No. 02:07-CV-259-GEB-DAD in the United States District Court for the Eastern District of California.

The plaintiff in *Susanville* challenged the refusal by the United States, through the Indian Health Service, to enter into a self-governance compact under Title V of the Indian Self-Determination Act, 25 U.S.C. §§ 450 *et seq.* (ISDA).

The *Susanville* ruling is relevant to the statutory construction issue surrounding Plaintiffs' claim for damages for so-called "cap years". Since 1998 the annual appropriation for Indian health services has included a "not to exceed" sum for contract support costs. Defendants argue that 25 U.S.C. § 450j-1(b)'s proviso, "provision of funds under [ISDA] is subject to the

availability of appropriations . . .”, limits the contractual obligation of the United States. The argument equates “provision of funds” with “contract authority”, even though a contract obligation can exist when payment authority does not.

The proviso does not state, as numerous other statutes do, that the contract obligation of the United States is limited to available appropriations. It limits only the Secretary’s duty to pay, a much different proposition.

In ruling for plaintiff in *Susanville*, Judge Burrell, slip opinion at 13-16, rejected the Government’s attempt to give words in ISDA a meaning not supported by the language of the statute:

[H]ad Congress intended to prohibit tribes from billing, and to prohibit the IHS from allowing tribes to bill, Congress simply could have used the word “permit”. . . rather than “require.”

Id. at 13 n. 2. His analysis of the precise words used in ISDA in context confirms the view of the law set forth in this action in *Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment*, at 22-31 (Dkt. No. 121): If Congress had intended to limit contract authority rather than the Secretary’s payment authority, it clearly knew how to do so. *See especially id.* 25 n. 22 and exhibit 8 (citing 25 U.S.C. § 1658—enacted by the same Congress that enacted the payment-authority proviso in 25 U.S.C. § 450j-1(b)—, 25 U.S.C. § 2008(j)(2), and 49 other statutes using explicit language to limit contract authority).

A copy of Judge Burrell's opinion is attached as Exhibit 1 to this Notice. The passages cited above have been highlighted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SUSANVILLE INDIAN RANCHERIA,)
) 2:07-cv-259-GEB-DAD
Plaintiff,)
) ORDER
v.)
)
MIKE LEAVITT, Secretary of the)
United States Department of)
Health and Human Services;)
CHARLES W. GRIM, Director of)
the Indian Health Service; and)
MARGO KERRIGAN, Area Director of)
the California Area Office of)
the Indian Health Service;)
)
Defendants.)
)

Plaintiff Susanville Indian Rancheria ("Plaintiff" or "the Tribe") and Defendants Mike Leavitt, Secretary of the United States Department of Health and Human Services ("DHHS"); Charles W. Grim, Director of the Indian Health Service ("IHS"); and Margo Kerrigan, Area Director of the California Area Office of the IHS (collectively, "Defendants" or "IHS") cross-move for summary judgment. Oral argument on the motions was heard on September 17, 2007.

BACKGROUND

Susanville Indian Rancheria is a federally-recognized Indian tribe that provides health care and pharmacy services to eligible

1 Indians in rural Northeastern California through a Tribal health
2 clinic known as the Lassen Indian Health Center. (Joint Stip. of
3 Facts, Findings of Fact ("FOF") 1, 2.) The IHS is an agency of DHHS
4 which provides health care services to American Indians and Alaska
5 Natives throughout the United States, and negotiates and enters into
6 compacts and funding agreements ("FA") with Indian tribes and tribal
7 organizations under the Indian Self-Determination and Educational
8 Assistance Act ("ISDEAA"). (FOF 4, 5.)

9 Plaintiff has been providing health care services at the
10 Lassen Indian Health Center to Tribal members and other eligible
11 beneficiaries since 1986 under a series of self-determination
12 contracts and Annual Funding Agreements ("AFA") with the IHS under
13 Title I of the ISDEAA. (FOF 7.) The ISDEAA was originally enacted in
14 1974 as Public Law 93-638 (codified at 25 U.S.C. §§ 450 - 458bbb-2).
15 (FOF 6.) Title V was added to the ISDEAA in 2000 as Public Law
16 106-260. (FOF 6.) Title V establishes the procedures and standards
17 pursuant to which tribes can enter into self-governance compacts and
18 funding agreements with the Secretary of DHHS. (FOF 6.) Said
19 compacts and funding agreements concern planning, conducting,
20 consolidating, and receiving full tribal share funding of certain
21 programs, services, functions, and activities ("PSFAs") carried out by
22 DHHS (codified at 25 U.S.C. §§ 458aaa-1 - 458aaa-18). (FOF 6.)

23 Since at least 1995, the contracts and/or AFAs between
24 Plaintiff and the IHS have included pharmacy services as one of the
25 PSFAs provided by the Tribe. (FOF 8.) Early in 2006, the Tribe was
26 admitted to the ISDEAA Title V self-governance program by the IHS and
27 several months later, it began negotiating with the IHS to reach
28 agreement on an ISDEAA Title V self-governance Compact and FA for

1 Calendar Year 2007. (FOF 9.) As part of the health care services the
2 Tribe would provide, the Tribe adopted a Pharmacy Policy, which
3 requires certain eligible beneficiaries to pay (a \$5.00 dispensing fee
4 plus the acquisition cost of the medicine) for pharmacy services.
5 (FOF 10.) The Policy exempts from this payment requirement those
6 Native Americans and Alaska Natives permanently residing in the
7 Tribe's service area whose income is equal to or less than 125% of the
8 Federal Poverty Guideline as published by DHHS. (FOF 10.)

9 During negotiations with IHS representatives over the
10 proposed Title V self-governance compact and FA for the year 2007, the
11 Tribe was orally told by IHS negotiators that the IHS would likely not
12 agree to inclusion of the Tribe's proposed language for its pharmacy
13 services program in the self-governance FA because it was IHS's
14 position that tribes do not have the legal authority to charge
15 eligible Indians for services provided through the ISDEAA, and that
16 the Tribe would need to either delete the pharmacy provision from the
17 FA or include language stating that the Tribe would not bill eligible
18 Indian customers for pharmacy services. (FOF 11.) The Tribe refused
19 to accept either of the two options presented by the IHS regarding the
20 Tribe's pharmacy services. (FOF 12.) This refusal led to the "final
21 offer" stage of Section 507(b) of the ISDEAA, which provides that
22 "[i]n the event the Secretary and a participating Indian tribe are
23 unable to agree, in whole or in part, on the terms of a compact or
24 funding agreement (including funding levels), the Indian tribe may
25 submit a final offer to the Secretary." (FOF 12 (quoting 25 U.S.C.
26 § 458aaa-6(b)).)

27 The matter in dispute is the Tribe and the IHS's failure to
28 reach agreement on the pharmacy services issue. (FOF 13.) The Tribe

1 submitted its "final offer" to the IHS by letter on December 15, 2006.
2 (FOF 14.) The Tribe's "final offer" included pharmacy services in the
3 proposed FA and did not include an express statement that the Tribe
4 would not charge eligible beneficiaries for pharmacy services. (FOF
5 14.)

6 Because of the dispute, and since the existing Title I
7 contract and AFA were set to expire on December 31, 2006, and the
8 ISDEAA prescribes that the IHS had 45 days to respond to the Tribe's
9 final offer, the Tribe and the IHS agreed to an extension of the
10 existing Title I contract and AFA for an additional 45 day period
11 (until February 15, 2007). (FOF 15.) Defendant Charles W. Grim, by
12 letter dated January 29, 2007, to Tribal Chairman Stacy Dixon,
13 rejected the Tribe's final offer, on the grounds set forth therein
14 ("Grim Letter"). (FOF 16.)

15 On February 9, 2007, Plaintiff commenced this action,
16 asserting that Defendants' rejection of its final offer violates the
17 ISDEAA. (Compl. ¶¶ 26-37.) Also on February 9, 2007, Plaintiff filed
18 a motion for a temporary restraining order ("TRO") and a motion for
19 preliminary injunction. On February 14, 2007, a TRO issued extending
20 the parties' 2006 AFA, and on February 28, 2007, a preliminary
21 injunction issued directing the parties to execute a Compact and
22 Calendar Year 2007 FA (as proposed by Plaintiff in its final offer).
23 (Feb. 14, 2007 Order; Feb. 28, 2007 Order.) The preliminary
24 injunction further provided that "[i]f a judicial determination is
25 made that Defendants' rejection of Plaintiff's final offer (and
26 imposition of conditions on executing the Compact and 2007 FA proposed
27 therein) was lawful, either (1) all references to the Tribe's pharmacy
28 services program in the 2007 FA shall be deleted, no further funds

1 shall be allocated to the Tribe's pharmacy services program, and any
2 funds specifically allocated for the pharmacy services program shall
3 be returned; or (2) a provision shall be added to the 2007 FA stating
4 that eligible beneficiaries will not be charged for services pursuant
5 to the pharmacy services program." (Feb. 28, 2007 Order at 16.)

6 The parties now cross-move for summary judgment on
7 Plaintiff's claim that Defendants' rejection of Plaintiff's final
8 offer was contrary to law and a violation of the ISDEAA.

9 SUMMARY JUDGMENT STANDARD

10 "[Federal Rule of Civil Procedure] 56(c) mandates the entry
11 of summary judgment . . . against a party who fails to make a showing
12 sufficient to establish the existence of an element essential to that
13 party's case, and on which that party will bear the burden of proof at
14 trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In this
15 case, Defendants bear the burden of demonstrating, by clear and
16 convincing evidence, the legality of their rejection of Plaintiff's
17 final offer. 25 U.S.C. § 458aaa-6(d); see also Pl.'s Mot. at 6;
18 Defs.' Mot. at 8.

19 DISCUSSION

20 A. Whether Defendants Lawfully Rejected the Tribe's Final Offer
21 Based on the Concern that the Tribe's Pharmacy Program Would
Result in Significant Danger or Risk to the Public Health

22 Under Title V of the ISDEAA, "[i]f the [DHHS Secretary
23 ("Secretary")] rejects [a final offer], the Secretary shall provide
24 . . . a timely written notification to the Indian tribe that contains
25 a specific finding that clearly demonstrates, or that is supported by
26 a controlling legal authority, that [one of four criteria in 25 U.S.C.
27 § 458aaa-6(c)(1)(A) is met]." 25 U.S.C. § 458aaa-6(c)(1). The
28 "Secretary shall have the burden of demonstrating by clear and

1 convincing evidence the validity of the grounds for rejecting the
2 offer (or a provision thereof)." Id. § 458aaa-6(d).

3 In the Grim Letter, the Secretary cited the third criterion
4 in § 458aaa-6(c)(1)(A), as a basis for rejecting Plaintiff's final
5 offer. (Grim Letter at 6 (citing 25 U.S.C. § 458aaa-6(c)(1)(A)(iii).)
6 Section 458aaa-6(c)(1)(A)(iii) provides that a final offer can be
7 rejected if "the Indian tribe cannot carry out the program, function,
8 service, or activity (or portion thereof) in a manner that would not
9 result in significant danger or risk to the public health." 25 U.S.C.
10 § 458aaa-6(c)(1)(A)(iii).) The Grim Letter stated:

11 [T]he IHS believes strongly that allowing Tribes
12 and Tribal organizations to bill IHS beneficiaries
13 . . . will negatively impact numerous eligible
14 [American Indians/Alaska Natives] and other
beneficiaries by creating barriers to access IHS-
funded health services.

15 ***

16 [E]nforcement of [Plaintiff's] Pharmacy Policy
17 could jeopardize health care services to the
18 eligible [American Indians/ Alaska Natives] who
19 are otherwise eligible for health care services.
20 Therefore, the proposed language is rejected on
the grounds that [Plaintiff] cannot "carry out the
program, function, service or activity (or portion
thereof) in a manner that would not result in
significant danger or risk to the public health."

21 (Grim Letter at 5, 6.)

22 Plaintiff argues it is entitled to summary judgment because
23 the Grim Letter "failed to make the required 'specific finding that
24 clearly demonstrates' that one of the four permissible rejection
25 criteria was present." (Pl.'s Mot. at 1.) Plaintiff argues there is
26 "no basis for IHS to meet its burden of demonstrating that imposing a
27 fee for pharmacy services would in any way create 'a significant
28 danger or risk to the public health.'" (Id. at 15.) Plaintiff

1 contends that establishing a "'significant risk' requires evidence and
2 a particularized inquiry that would demonstrate the presence of such
3 risk or danger," and that Defendants' "conclusory speculation in the
4 Grim Letter regarding 'significant risk' fails to meet the standard
5 for demonstrating such risk in any context." (Id. at 17.)

6 Plaintiff further argues that "the facts of this case cannot
7 plausibly bear out any finding of such risk" since "[t]he IHS knew as
8 early as May 2006 that the Tribe was charging beneficiaries for
9 pharmacy services, and took no steps to prevent the Tribe from doing
10 so - nor did IHS even mention to the Tribe, when it did state concerns
11 about the program, that it presented any danger or risk to the public
12 health," and in fact, "never mentioned to the Tribe any concern about
13 risk or danger to public health until Dr. Grim's letter in January
14 2007." (Id. at 18.)

15 Defendants counter that their rejection of Plaintiff's final
16 offer was lawful and appropriate since "enforcement of [Plaintiff's]
17 pharmacy policy could jeopardize the health and safety of Indians who
18 are otherwise eligible for health care services," and since
19 Plaintiff's "failure to prioritize [the provision of pharmacy
20 services] based on medical need and access to other arrangements for
21 obtaining necessary care poses a significant danger or risk to public
22 health."¹ (Defs.' Mot. at 38.) Defendants contend that the failure
23 of the pharmacy policy to "accommodate patients who have a medical

24
25 ¹ Defendants note that this failure to prioritize does not
26 comply with "the IHS's eligibility regulations [regarding persons to
27 whom services will be provided], which require[, in part, that when
28 funds are insufficient,] 'Priorities for care and treatment, as among
individuals who are within the scope of the program, will be
determined on the basis of relative medical need and access to other
arrangements for obtaining the necessary care.'" (Defs.' Mot. at 38
(quoting 42 C.F.R. § 136.12(c)).)

1 need for a particular prescription, do not have the ability to pay for
2 the medication, and do not have access to other arrangements for
3 obtaining the necessary care . . . poses a significant danger or risk
4 to the health of individual eligible Indians." (Id. at 39.)

5 Plaintiff responds that concern regarding a lack of
6 prioritization does not relate to the co-pay issue and is therefore
7 irrelevant. (Pl.'s Opp'n at 11.) Plaintiff argues that if
8 prioritization was the actual problem that Defendants had with the
9 pharmacy program, "IHS had the duty to provide technical assistance
10 and advice to [Plaintiff] during the negotiating process to remedy
11 such a deficiency." (Id. at 12 (citing 25 U.S.C. § 458aaa-
12 6(c)(1)(B).))

13 Defendants further assert that "[a]lthough [Plaintiff]
14 states that only those patients who have 'the ability to pay' must pay
15 for their pharmaceutical costs, in fact, the policy targets the
16 working poor - those whose income is greater than 125% of the federal
17 poverty guideline and who are too poor to afford health insurance.'" (Defendants' Mot. at 39.) Defendants also assert "there are many
18 medications that are extremely expensive, and would pose a hardship
19 for those who ostensibly have the 'ability to pay.'" (Id. at 40.)

20 Defendants also contend that although Plaintiff "asserts
21 that without charging for pharmacy services, its pharmacy program is
22 not financially viable[,] the reason [Plaintiff's pharmacy] program is
23 failing is that the current prescription workload is too small for the
24 pharmacy to be financially viable." (Id. (citing Decl. of Christopher
25 Watson ¶¶ 4-8, 10).) Defendants argue that "if [Plaintiff] did not
26 operate an on-site pharmacy, this would not create 'public health
27 problems,' [and] the eligible Indian patients [would not] necessarily
28

1 have to purchase drugs elsewhere at higher costs." (Defs.' Mot. at
2 40.) Defendants suggest that "[o]n the contrary, [Plaintiff] would be
3 able to do, and should do, what it has done in the past - contract
4 with a local pharmacy and use its Contract Health Services funds to
5 pay the pharmacy costs of its eligible Indian patients." (Id. at 41.)
6 Defendants contend that "contrary to [Plaintiff's] representations
7 that the choice is between an on-site pharmacy under which its
8 eligible Indian population has to pay for pharmacy services, versus
9 not providing pharmacy services at all, [Plaintiff] actually has many
10 options to provide pharmacy services without charge." (Defs.' Opp'n
11 at 2.)

12 Defendants argue that Plaintiff's "pharmacy policy [also]
13 poses a significant danger or risk to public health [since it] fails
14 to address outbreaks of disease that pose a significant danger or risk
15 to public health." (Defs.' Mot. at 41.) Defendants contend that the
16 pharmacy policy "does not take into account a patient's inability to
17 pay for medications to contain, address, or cure communicable
18 diseases" and therefore "[t]he co-pay and payment requirement could
19 interfere with an individual eligible Indian's access to health care
20 to a point that the patient could become a significant health hazard."
21 (Id.)

22 Plaintiff counters that "Defendants' assertion that the
23 [p]harmacy policy does not address situations where there is an
24 'outbreak' of disease is simply without basis in fact. . . . The
25 belated expression of concern by the IHS over the purported lack of
26 prioritization in the [p]harmacy [p]olicy is a classic red herring:
27 it does not relate to the co-pay element of the policy and it is
28 completely irrelevant to the dispute in this case." (Pl.'s Opp'n at

1 11.)

2 Plaintiff also argues that "the Tribe may . . . choose not
3 to operate any pharmacy program at all if the Tribe decides that
4 operating such a program is not the best use of the limited funds
5 provided to the Tribe for serving the health care needs of its
6 community." (Pl.'s Reply at 1 (citing 25 U.S.C. § 458aaa-5(e)).) "If
7 not providing pharmacy services is an option, Defendants' reliance on
8 the 'significant danger or risk to the public health' criterion is
9 wholly misplaced. Defendants cannot demonstrate that the Tribe's
10 provision of pharmacy services with a co-pay poses a greater danger or
11 risk to the public health than the Tribe's choice not to provide such
12 services at all." (Id. at 2.)

13 Plaintiff further contends the "focus for inquiry in this
14 case is . . . the Grim Letter" since it was "the 'written
15 notification' required by the statute," and the Grim Letter "fails to
16 provide the statutorily mandated finding" since it contains no
17 "evidence to support Defendants' assertion that their rejection of the
18 Tribe's 'final offer' was appropriately based on the 'significant
19 danger or risk to the public health' criterion." (Pl.'s Mot. at 12,
20 15.) Plaintiff argues "Defendants cannot now bring forward points or
21 evidence not cited in the Grim Letter, since the Court 'can uphold an
22 agency's decision only on the basis of the reasoning in that
23 decision.'" (Id. at 15 (quoting De la Fuente v. F.D.I.C., 332 F.3d
24 1208, 1219 (9th Cir. 2003).)

25 Defendants disagree, arguing that "[t]he IHS is merely
26 bringing forward the evidence and further argument that support the
27 decision and reasoning set forth in its written response to
28 [Plaintiff's] final offer." (Defs.' Opp'n at 14.) Defendants argue

1 there is a "difference between a post hoc rationalization, which is a
2 new rationale for an agency action, and a post hoc explanation, which
3 is an agency's discussion of the previously-articulated rationale for
4 the challenged action." (Id. (quoting Nat'l Oil Seed Processors Ass'n
5 v. Browner, 924 F. Supp. 1193, 1204 (D.D.C. 1996)).)

6 Section 458aaa-6(c)(1) requires that the written
7 notification to the Indian tribe (here, the Grim Letter) "*contain[] a*
8 *specific finding* that clearly demonstrates, or that is supported by a
9 controlling legal authority," that one of the four rejection criteria
10 is met. 25 U.S.C. § 458aaa-6(c)(1) (emphasis added); see also De la
11 Fuente, 332 F.3d at 1219 ("We can uphold an agency's decision only on
12 the basis of the reasoning in that decision."); N.W. Env't'al Def. Ctr.
13 v. Bonneville Power Admin., 477 F.3d 668, 688 (9th Cir. 2007) ("[I]n
14 reviewing [an agency] action, [the court] must look to [the agency's]
15 reasoning in making its decision . . . , and not to other reasons for
16 its decision that [the agency] might marshal before [the court]. . . .
17 [The court] 'may not accept appellate counsel's post hoc
18 rationalizations for agency action.'" (internal citations omitted)).
19 The Grim Letter does not contain a specific finding that clearly
20 demonstrates that the Tribe cannot carry out its pharmacy program "in
21 a manner that would not result in significant danger or risk to the
22 public health."

23 Moreover, even if Defendants' new evidence and arguments are
24 considered, Defendants have not shown, by clear and convincing
25 evidence, that the Tribe cannot carry out its pharmacy program "in a
26 manner that would not result in significant danger or risk to the
27 public health." Defendants cite only speculative and/or curable risks
28 of harm, and do not adequately show how the existence of a pharmacy

1 services program that charges some beneficiaries a co-pay is more of a
2 risk to the public health than no pharmacy services program at all
3 (since it is within the Tribe's discretion to close down its pharmacy
4 altogether if it is not allowed to charge a co-pay). Therefore,
5 § 458aaa-6(c)(1)(A)(iii) was not a proper basis for rejecting
6 Plaintiff's final offer.

7
8 B. Whether Defendants Lawfully Rejected the Tribe's Final Offer
Because Plaintiff's Pharmacy Program Called for Patient Billing

9 The Secretary also rejected the final offer on the ground
10 that the IHS could not sign the Compact with the co-pay feature
11 because the IHS cannot bill or charge beneficiaries for services under
12 the ISDEAA and cannot contract with tribes under the ISDEAA to carry
13 out activities that the IHS itself has no legal authority to carry
14 out. (Grim Letter at 4 (citing 25 U.S.C. § 458aaa-14(c) ("§ 14(c)").)
15 Specifically, the Secretary stated:

16 [T]he IHS cannot agree to the pharmacy provision
17 submitted by [Plaintiff] because the IHS cannot
18 contract or compact with Tribes to carry out
19 activities that the agency has no authority to
20 carry out itself. See 25 U.S.C. § 450f(a)(1),
21 458aaa-4(b)(2). [Plaintiff's] proposed pharmacy
22 program is not a program provided to eligible
23 beneficiaries under Federal law, 25 U.S.C. §
24 458aaa-4(b)(1), nor is it a program that IHS is
25 authorized to administer. 25 U.S.C. § 458aaa-
4(b)(2). In addition, the IHS is prohibited from
entering into a contract for an activity that
cannot be lawfully carried out. . . . Here, there
is no legal authority for the IHS to enter into an
ISDEAA contract with [Plaintiff] to bill eligible
[American Indians/ Alaska Natives] for services
provided under the contract. Therefore, the IHS
is prohibited from entering into the contract, and
must reject the proposed language.

26 (Grim Letter at 5-6.)

27 Defendants argue that "when read in the context of the
28 ISDEAA and the entire Indian health legislative scheme, [§ 14(c)]

1 unambiguously prohibits tribes and tribal organizations from billing
2 under ISDEAA Title V compacts." (*Id.* at 4, 8.) Plaintiff counters
3 that § 14(c) only prohibits the IHS from charging eligible
4 beneficiaries, and does not prohibit tribes from doing so. (*Id.*)

5 "Our first step in interpreting a statute is to determine
6 whether the language at issue has a plain and unambiguous meaning with
7 regard to the particular dispute in the case. Our inquiry must cease
8 if the statutory language is unambiguous and 'the statutory scheme is
9 coherent and consistent.' The plainness or ambiguity of statutory
10 language is determined by reference to the language itself, the
11 specific context in which that language is used, and the broader
12 context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519
13 U.S. 337, 340-41 (1997) (internal citations omitted).

14 Section 14(c) provides: "The Indian Health Service under
15 this subchapter shall neither bill nor charge those Indians who may
16 have the economic means to pay for services, nor require any Indian
17 tribe to do so." On its face, § 14(c) does not prohibit Tribes from
18 billing. If Congress had intended to prohibit Tribes from billing,
19 Congress could have replaced the word "require" with the word
20 "permit," "allow," or "authorize." Congress could also have stated
21 that "neither the IHS nor any tribe" shall bill or charge Indians, in
22 lieu of the clause "nor require any Indian tribe to do so."²

23 _____
24 ² Defendants argue that § 14(c) does not expressly include a
25 prohibition against tribes billing because that section is entitled
26 "Obligations of the United States" and focuses on the obligations of
27 the United States rather than on the obligations of tribes. However,
28 had Congress intended to prohibit tribes from billing, and to prohibit
the IHS from allowing tribes to bill, Congress simply could have used
the word "permit" in § 14(c), rather than "require."

Further, the IHS contends, in the Grim letter, and in its briefs,
(continued...)

1 See, e.g., Brown v. Gardner, 513 U.S. 115, 117-18 (1994) (rejecting
2 Veterans Administration's attempt to add a "fault" requirement to a
3 liability statute "[d]espite the absence from the statutory language
4 of so much as a word about fault on the part of the VA").

5 When Congress enacted § 14(c), it expressly added the clause
6 "nor require any Indian tribe to do so." (Pl.'s Mot. at 21.) If §
7 14(c) is read as Defendants suggest, the entire phrase "nor require
8 any Indian tribe to do so" is rendered redundant since the first
9 clause alone would prohibit IHS from requiring tribes to charge for
10 services. (Id. at 21-22.) Courts "should avoid an interpretation of
11 a statute that renders any part of it superfluous and does not give
12 effect to all of the words used by Congress." Beisler v. C.I.R., 814
13 F.2d 1304, 1307 (9th Cir. 1987); see also Jarecki v. G.D. Searle &
14 Co., 367 U.S. 303, 307-08 (1961) (rejecting an interpretation of one
15 subpart of statute where that interpretation would render the
16 immediately following subpart "a mere redundancy").

17 Moreover, the ISDEAA prescribes that "[e]ach provision of
18 [the ISDEAA] and each provision of a compact or funding agreement
19 shall be liberally construed for the benefit of the Indian tribe
20 participating in self-governance and any ambiguity shall be resolved

21
22
23 ²(...continued)
24 that § 14(c) obligated the IHS to reject the tribe's final offer. If
25 that is in fact true, then such an "obligation" could have been
26 included in the "Obligations of the United States" stated in § 14(c).
27 Defendants contend that a provision prohibiting tribal billing
28 was unnecessary since tribal billing was not an issue at the time
§ 14(c) was enacted. But, the IHS acknowledges that prior to the
enactment of § 14(c), parties had litigated over whether tribes should
be allowed to bill. (Defs.' Mot. at 6, 19 (discussing Nizhoni Smiles,
Inc. v. IHS, DAB Dec. No. CR450 (1996)).)

1 in favor of the Indian tribe." 25 U.S.C. § 458aaa-11(f).³

2 Defendants contend that "[Plaintiff's] interpretation [of
3 § 14(c)] must be rejected because it is inconsistent with legislative
4 intent and numerous provisions of the ISDEAA and the [Indian Health
5 Care Improvement Act ("IHICIA")], and will lead to absurd results."⁴
6 (Defs.' Mot. at 24.) Plaintiff disagrees, arguing that "[t]he 'absurd
7 results' postulated by Defendants . . . are policy arguments as to how
8 Defendants feel the statutory framework should work." (Pl.'s Opp'n at
9

10 ³ Defendants argue that "[t]he ISDEAA statutory provisions
11 favoring [Plaintiff's] interpretation do not apply because Plaintiff's
12 interests are in conflict with the interests of its own members and
13 other eligible Indians." (Defs.' Mot. at 23; Defs.' Opp'n at 2, 7.)
14 Defendants also argue that interpreting § 14(c) to permit tribal
15 billing would be detrimental to other Indian tribes because, for
16 example, the accommodation that the Centers for Medicare and Medicaid
17 Services ("CMS") have made to waive co-payments, premiums, and
18 deductibles for Indians in several CMS programs may be threatened if
19 tribes are billing. (Defs.' Reply at 15.) However, Defendants have
20 not shown that Plaintiff's interests are not aligned with the
21 interests of its members. Further, § 11(f) does not require that
22 § 14(c) be liberally construed for the benefit of Indian tribes;
23 rather, the focus in § 11(f) is on the Indian tribe at issue. Here,
24 Plaintiff has determined that tribal billing is, in fact, in its best
25 interest. Moreover, the risks that Defendants state may result from
26 tribal billing are speculative, especially in light of the fact that
27 Defendants acknowledge that some tribes have already been billing (and
28 cost-sharing waivers have still been made available). These matters
are better addressed before Congress rather than this court.

21 Defendants also argue that "to the extent this Court finds
22 ambiguity in the billing prohibition, the IHS's interpretation of the
23 provision is owed deference [since] courts are to accord deference to
24 the official interpretations of a statute adopted by the agency that
25 has been 'charged with responsibility for administering the provision'
26 by Congress." (Defs.' Mot. at 20 (quoting Chevron U.S.A. Inc. v.
27 Natural Resources Def. Council, Inc., 467 U.S. 837, 865 (1984)).)
28 §§ 458aaa-11(f) and 458aaa-11(a)(1)).) However, since the statute is
unambiguous, this argument need not be addressed.

26 ⁴ Defendants make numerous arguments regarding the implications
27 of adopting Plaintiff's interpretation of § 14(c). However, the role
28 of this court is to interpret § 14(c) and the eligibility regulations,
and since those provisions do not prohibit Plaintiff from billing, in
the context at issue, those arguments need not be addressed herein.

1 48.) "A dispute over competing policy visions for the ISDEEA does not
2 provide the grounds for rewriting the statute to incorporate a
3 prohibition against tribal billing where the statute does not contain
4 such a prohibition." (Id.)

5 Defendants contend that "[Plaintiff's] interpretation of the
6 billing provision must be rejected because it is in direct conflict
7 with the IHS's eligibility regulations, set forth at 42 C.F.R.
8 § 136.11-14, which the tribes and tribal organizations are required to
9 follow."⁵ (Defs.' Mot. at 25.) The eligibility regulations provide:

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11 ⁵ Defendants also argue that the statutory scheme suggests that
12 tribes are prohibited from billing because (1) "in those limited
13 instances where Congress has authorized the IHS and tribes and tribal
14 organizations to generate revenue through billing, Congress not only
15 has stated so explicitly, but also has dictated the amount that can be
16 billed"; (2) "[t]hose instances where Congress has granted contracting
17 tribes different authority than the IHS under the ISDEEA are explicit
18 and clear"; (3) "[b]illing will lead to enormous inequities in the
19 delivery of health care and override Congress' stated goal of
20 achieving parity among direct service and contracted programs and
21 maintaining the same level of services" since "[i]t will be impossible
22 for the IHS to fulfill [that goal] if tribes can unilaterally, and
without limitation or guidelines, bill eligible Indian patients"; (4)
"Congress has addressed resource deficiencies in the ISDEEA and the
IHCIA, and has explicitly directed both the IHS and contracting tribes
how to address insufficient resources"; and (5) "[t]here is not a
single reference in the entirety of the ISDEEA and IHCIA, as well as
the legislative history, that Congress intended that eligible Indians
would be billed, that such billing is an appropriate source of funding
for contracting tribes, how such funding will be used, how the funding
will be accounted for, etc." (Defs.' Mot. at 13, 14, 16, 18.)

23 Plaintiff correctly notes that these arguments are misplaced
24 because: (1) the billing authorizations that Defendants cite do not
25 support the point Defendants are attempting to make and are therefore
26 not relevant; (2) the statute Defendants cite (25 U.S.C. § 458aaa-
27 7(h)) to support their assertion that Congress distinguishes between
28 authorities of the IHS and tribes whenever such authorities are
different does not support Defendants' position; (3) the requirements
regarding equity and parity do not preclude or prohibit billing; (4)
although Congress has established mechanisms for addressing the under-
funding of the Indian health care system, it has never prohibited
tribes from using resources in addition to what Congress appropriates

(continued...)

1 "Services will be made available, as medically indicated, to persons
2 of Indian descent belonging to the Indian community served by the
3 local facilities and program." 42 C.F.R. § 136.12(a). Additionally,
4 the regulations direct that, when funds are insufficient, "Priorities
5 for care and treatment, as among individuals who are within the scope
6 of the program, will be determined on the basis of relative medical
7 need and access to other arrangements for obtaining the necessary
8 care." Id. § 136.12(c). Further, the regulations relating to care
9 and treatment of ineligible individuals specifically state that those
10 individuals can be charged. Id. § 136.14(b).

11 Defendants argue "[Plaintiff's] interpretation of the
12 billing prohibition violates the eligibility regulations by altering
13 the criteria for providing health services by adding an additional
14 eligibility criteria (in the form of a financial status assessment and
15 payment requirement) for those who are otherwise eligible for such
16 services." (Def's.' Mot. at 26.) Defendants also contend that the
17 "pharmacy policy is in direct violation of the eligibility regulations
18 because its priorities for care and treatment are not based on
19 relative medical need and access to other arrangements for obtaining
20 necessary care, as required by the regulations, but rather on payment
21 for services and financial status." (Id.) Defendants contend that
22 "if a service is available, the regulations do not provide for any
23 discretion to require payment or predicate the provision of that
24 service on the patient's financial status." (Id.)

25 _____
26 ⁵(...continued)
27 to provide health care to Indian people; and (5) the fact that
28 Congress does not specifically authorize tribes to bill does not mean
that they are prohibited from doing so, especially since Congress
could have easily prohibited tribes from billing when it enacted
§ 14(c). (See Pl.'s Opp'n at 30, 31, 32, 39, 20.)

1 Plaintiff counters that the regulations describing
2 eligibility "do not mention charging, except in § 136.14, which
3 authorizes the IHS to provide emergency services to ineligible
4 individuals and to charge for those services," and although Defendants
5 attempt to "argue that § 136.14 precludes charging eligible Indians by
6 negative implication, . . . § 136.14 deals exclusively with ineligible
7 persons." (Pl.'s Opp'n at 33.) Plaintiff argues, "the 'direct
8 conflict' that Defendants assert is with Defendants' purported
9 *interpretation* of their regulations, not with any *specific provision*
10 in those regulations prohibiting charging." (*Id.*) Plaintiff contends
11 the eligibility regulations do not bar charging. (*Id.* at 34, 35.)

12 The Tribe's pharmacy policy is not in violation of the
13 eligibility regulations and does not alter eligibility criteria. "All
14 of the eligible individuals who will receive pharmacy services under
15 the Tribe's policy are still eligible for IHS services. Charging a
16 co-pay does not terminate their eligibility under the regulations."
17 (Pl.'s Reply at 12.) Eligibility is distinct from availability or
18 accessibility, and requiring a beneficiary to pay a co-pay does not
19 create an eligibility criterion. See 42 C.F.R. §§ 136.11, 12; accord
20 Lincoln v. Vigil, 508 U.S. 182, 198-99 (1993) (distinguishing between
21 denial of access and eligibility). For the reasons stated, Defendants
22 have not shown by clear and convincing evidence that their decision to
23 reject Plaintiff's final offer on the ground that § 14(c) prohibits
24 tribes from billing was valid.

25 Defendants also argue that, even if § 14(c) does not
26 prohibit Plaintiff from billing, the rejection of the final offer was
27 lawful since "the IHS can only transfer such authority as it has
28 itself, or as is otherwise provided by law, to a contracting tribe

1 pursuant to a contract under the ISDEAA," and § 14(c) prohibits the
2 IHS from billing eligible beneficiaries. (Defs.' Mot. at 8-9.)
3 Defendants argue that "[p]ursuant to [25 U.S.C. §] 458aaa-4(b)(1) and
4 458aaa-4(b)(2), a tribe may only contract for those programs that the
5 IHS is legally authorized to provide[, and] the explicit language of
6 these provisions limits the [PSFAs] to those the IHS is legally
7 authorized to administer." (Defs.' Mot. at 10.)

8 Section 458aaa-4(b) of the ISDEAA establishes what may be
9 included in a Title V Funding Agreement. 25 U.S.C. § 458aaa-4(b). It
10 authorizes a tribe to administer PSFAs "that are carried out for the
11 benefit of Indians because of their status as Indians without regard
12 to the agency or office of the Indian Health Service within which the
13 program, service, function or activity (or portion thereof) is
14 performed." Id. § 458aaa-4(b)(1). Further, 458aaa-4(b)(2) restates
15 this authority by providing that PSFAs "with respect to which Indian
16 tribes or Indians are primary or significant beneficiaries,
17 administered by the Department of Health and Human Services through
18 the Indian Health Service and all local, field, service unit, area,
19 regional, and central headquarters or national office functions so
20 administered under the authority of" the enumerated statutes may be
21 included in an FA. Id. § 458aaa-4(b)(2).

22 Plaintiff argues that Defendants' reliance on § 458aaa-
23 4(b)(1) and (2) "is misplaced and directly inconsistent with § 458aaa-
24 5(e) which authorizes a tribe to 'redesign' programs 'in any manner
25 which the tribe deems to be in the best interest of the health and
26 welfare of the Indian Community served . . . ' unless the redesign
27 denies services to otherwise eligible Indians." (Pl.'s Opp'n at 25.)
28 Plaintiff contends that § 458aaa-4(b)(1) "makes no reference to the

1 manner in which the program is operated," and "the words 'administered
2 by the [DDHS] through the [IHS] and all local . . . functions so
3 administered' in § 458aaa-4(b)(2) do not address the manner in which a
4 program is carried out by IHS, but are used to distinguish between (1)
5 IHS programs and (2) programs of *other* DHHS agencies 'with respect to
6 which Indian tribes or Indians are primary or significant
7 beneficiaries' but which Congress did not intend to include in Title
8 V." (Id.)

9 Defendants rejoin that § 458aaa-4(b)(1) and (2) "are not
10 limited to the programs a tribe is authorized to operate [and instead]
11 set forth the 'programs, services, functions, and activities' that a
12 tribe is authorized to administer." (Def.' Mot. at 12.) Defendants
13 also contend that § 458aaa-4(b)(1) and (2) prohibit tribes from
14 billing eligible Indian patients since the ISDEAA states that PSFAs
15 "shall include administrative functions of the Department of the
16 Interior or the Department of Health and Human Services . . . that
17 support the delivery of services to Indians," and since "[b]illing or
18 charging eligible patients clearly falls into the category of an
19 administrative 'function' or 'activity.'" (Id. at 12-13.)

20 Plaintiff counters that Congress's authorization for tribes
21 to assume administrative functions of DDHS "was meant to *expand* tribal
22 authority, not, as Defendants argue, to constrict it, and this
23 provision certainly does not prevent tribes from carrying out
24 administrative functions the best way they deem fit." (Pl.'s Opp'n at
25 26.) Plaintiff also rejoins that "the purpose of the 'functions' and
26 'activities' language was to address IHS resistance to carrying out
27 Congress's policy of tribal self-determination, not to restrict self-

28

1 determination by prohibiting tribes from billing beneficiaries." (Id.
2 at 28.)

3 Sections 458aaa-4(b)(1) and (2) serve to describe what PSFAs
4 the tribe may assume self-governance over. Under an ISDEAA Title V
5 FA, the IHS does not contract with or delegate its authority to a
6 tribe; rather, it turns over the provision of federal PSFAs to that
7 tribe.⁶ As Title V makes clear, the Tribe is not required to operate
8 a PSFA in the same manner as the IHS.⁷ Therefore, § 458aaa-4(b)(1)
9 and (2) do not establish, as Defendants contend, that the Tribe may
10 not engage in billing since the IHS cannot engage in billing.⁸

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13 ⁶ The IHS has not shown that Congress has prohibited billing in
14 the program at issue here.

15 ⁷ Section 458aaa-4(b)(1) states that a tribe may operate these
16 programs "without regard to the agency or [IHS]" and § 458aaa-5(e)
17 explicitly allows a tribe to redesign programs "in any manner it deems
18 to be in the best interest of the health and welfare of the Indian
19 community being served" so long as it does not deny services to
20 eligible population groups. In addition, § 458aaa-16(e) provides that
21 "[u]nless expressly agreed to by the participating Indian tribe in the
22 compact or funding agreement, the participating Indian tribe shall not
23 be subject to any agency circular, policy, manual, guidance, or rule
24 adopted by the [IHS]" except for eligibility regulations.

25 Additionally, "the Secretary shall interpret all Federal laws
26 . . . in a manner that will facilitate- (1) the inclusion of programs,
27 services, functions, and activities (or portions thereof) and funds
28 associated therewith, in the agreements entered into under this
section; (2) the implementation of compacts and funding agreements
entered into under this part; and (3) the achievement of tribal health
goals and objectives." 25 U.S.C. § 458aaa-11(a). Further, Title V
was designed to "give Indian tribes who meet certain criteria the
right to take over the operation of IHS functions [thereby] remov[ing]
needless and sometimes harmful layers of federal bureaucracy that
dictate Indian affairs. H.R. Rep. No. 106-477, at 65-66 (Nov. 17,
1999), reprinted in 2000 U.S.C.A.A.N. 573, 599-600; see also 25 U.S.C.
§ 458aaa-6(e) ("The Secretary shall carry out [Title V] in a manner
that maximizes the policy of tribal self-governance").

⁸ Nothing in this order addresses whether tribes may bill under
Title I of the ISDEAA.

1 Accordingly, Defendants have not shown, by clear and
2 convincing evidence, that their decision to reject Plaintiff's final
3 offer on the ground that the ISDEAA prohibited the IHS from accepting
4 the final offer since the Tribe intended to bill for pharmacy services
5 was valid.

6 Therefore, Plaintiff's summary judgment motion is granted.

7 C. Whether Plaintiff Is Entitled to Injunctive/ Mandamus Relief

8 Plaintiff argues that it is entitled to injunctive and
9 mandamus relief to protect its rights under Title V of the ISDEAA.
10 (Pl.'s Mot. at 26.) Plaintiff contends that because it seeks a
11 statutorily authorized injunction (under 25 U.S.C. § 450m-1(a)),
12 rather than an equitable injunction, it "is entitled to the injunctive
13 and mandamus relief requested without a balancing of any equities."

14 (Id. at 27.)

15 25 U.S.C. § 450m-1(a) provides:

16 [D]istrict courts may order appropriate relief
17 including . . . injunctive relief against any
18 action by an officer of the United States or any
19 agency thereof contrary to this subchapter or
20 regulations promulgated thereunder, or mandamus to
21 compel an officer or employee of the United
22 States, or any agency thereof, to perform a duty
23 provided under this subchapter or regulations
24 promulgated hereunder (including immediate
25 injunctive relief to reverse a declination finding
26 under section 450f(a)(2) of this title or to
27 compel the Secretary [of the United States
28 Department of Health and Human Services] to award
and fund an approved self-determination contract).

24 25 U.S.C. § 450m-1(a) (made applicable to Title V by 25 U.S.C.
25 § 458aaa-10(a)). "The traditional requirements for equitable relief
26 need not be satisfied [when a statute] expressly authorizes the
27 issuance of an injunction." United States v. Estate Preservation
28 Servs., 202 F.3d 1093, 1098 (9th Cir. 2000) (citing Trailer Train Co.

1 v. State Bd. of Equalization, 697 F.2d 860, 869 (9th Cir. 1983));
2 Atchison, Topeka & Santa Fe Ry. v. Lennen, 644 F.2d 255, 260 (10th
3 Cir. 1981) (per curiam); Star Fuel Marts, LLC v. Sam's East, Inc., 362
4 F.3d 639, 651-52 (10th Cir. 2004); Nat'l Wildlife Fed. v. Burlington
5 N. R.R., Inc., 23 F.3d 1508, 1511 (9th Cir. 1994) (finding that in
6 order to get an injunction under the Endangered Species Act ("ESA"), a
7 "plaintiff must make a showing that a violation of the ESA is at least
8 likely in the future"); Crownpoint Inst. of Tech. v. Norton, Civ. No.
9 04-531 JP/DJS, Findings of Fact and Conclusions of Law at 26, ¶ 30
10 (stating, in an ISDEAA case involving Title I, that where a tribal
11 organization sought an injunction pursuant to 25 U.S.C. § 450m-1(a),
12 "[t]he specific mandamus relief authorized by ISDA relieves [the
13 plaintiff tribal organization] of proving the usual equitable elements
14 including irreparable injury and absence of an adequate remedy at
15 law.").

16 The appropriate relief to which Plaintiff is entitled
17 follows: Defendants are permanently enjoined from rejecting the
18 Tribe's final offer with respect to the Tribe's pharmacy services
19 program on the grounds and with the conditions asserted in the Grim
20 Letter; and are required to continue providing such funding as is
21 authorized under the Compact and Calendar Year 2007 FA (as proposed by
22 Plaintiff in its final offer and which the February 28, 2007 Order
23 directed the parties to execute) without imposing any condition that
24 would prevent Plaintiff from charging beneficiaries for services. The

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1 Clerk of the Court shall enter judgment in favor of Plaintiff in
2 accordance with this Order.

3 IT IS SO ORDERED.

4 Dated: January 2, 2008

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8 GARLAND E. BURRELL, JR.
9 United States District Judge
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