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**GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, Plaintiff, v. RICHARD J. McCLOSKEY, Director, Division of Legislation and Regulations, Indian Health Service, and INDIAN HEALTH SERVICE, an Agency of the United States Department of Health and Service, Defendants**

**File No. 1:90:CV:158**

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN**

***1990 U.S. Dist. LEXIS 11243***

**August 23, 1990, Decided**
**August 24, 1990, Filed**

**JUDGES:** [*1] Richard A. Enslen, United States District Judge.

**OPINION BY:** ENSLEN

**OPINION**

*OPINION*

This matter is before the Court on defendants' motion to dismiss or in the alternative, grant summary judgment. Defendants' make their motion pursuant to *Federal Rule of Civil Procedure 12(b)(1)* or *12(b)(6).*

*FACTS*

This case involves a dispute over the eligibility of members of the Grand Traverse Band of Ottawa and Chippewa Indians ("the Band") living in Charlevoix County, Michigan, to Indian Health Service ("IHS") contract health services. Plaintiff in this action, the Band, contracts with IHS under the Indian Self-Determination Act to administer a health services delivery program. *25 U.S.C. § 450 et seq.* The Band administers this program by providing direct health care services at a clinic facility and by purchasing services for eligible Band members from private sector health care providers. Services purchased from private sector health care providers are called "contract health services." Since approximately 1981, the Band has provided contract health services within a five county service area including Benzie, Grand Traverse, Leelanau, Antrim and Manistee Counties.

Health & Human Services regulations [*2] governing eligibility for IHS contract health services require that in order to be eligible a person must reside in a geographic area called a Contract Health Service Delivery Area ("CHSDA"). 42 C.F.R. § 36.23(a). 42 C.F.R. § 36.22 specifically lists certain states and counties as CHSDAs and then states:

(6) with respect to all other reservations within the funded scope of the Indian Health program, the contract health services delivery area shall consist of a county which includes all or part of a reservation, and any county or counties which have a common boundary with the reservation.

The regulation at § 36.22(b) provides that the Secretary may redesignate CHSDAs after consultation with the appropriate tribal government and consideration of several listed factors. However, § 36.22(c) states:

Any redesignation under paragraph (b) of this section shall be made in accordance with the procedures of the Administrative Procedure Act (*5 U.S.C. § 553*).

Thus, the Band's CHSDA is established in § 36.22(a)(6) as any county containing reservation land and also any county which borders on the Band's reservation land. The Band may ask the IHS to initiate proceedings to amend the regulation [*3] to list a CHSDA including Charlevoix County, but it apparently has not done so.

On January 10, 1984, the IHS published a list of CHSDAs by county. At that time, based on information from the Bureau of Indian Affairs regarding the location of the Band's reservation land, the IHS listed only Leelanau County as the Band's CHSDA. The Band, however, continued to provide contract health services within a five county area.

The Secretary published new regulations governing eligibility for IHS services on September 16, 1987. 53 F.P. 35044. The new regulations would have replaced the CHSDAs established in existing regulations applicable only to contract health services with a designated geographic area called a Health Service Delivery Area ("HSDA"). A person would have to reside with the HSDA in order to be eligible for both IHS direct and contract health services. The band initiated the action at hand on February 20, 1990, seeking to compel the IHS to publish a notice in the Federal Register adding Charlevoix County to the Band's Health Service Delivery Area ("HSDA"). The Band's HSDA had been designated in an earlier Federal Register notice on August 25, 1988, listing only Leelanau [*4] County. The IHS published this designation in anticipation of new regulations governing eligibility for IHS services. These new regulations were to go into effect on September 16, 1988. However, Congress has placed a moratorium on implementation of the new regulations, thereby making the August 25, 1988, designating inoperative, and precluding the IHS from using appropriated funds to take any action to implement the new regulation, including publication of the notice plaintiff demands. Because of this moratorium, the old regulations, including CHSDAs, are still in effect.

On September 7, 1988, the Band's chairperson wrote to Richard McCloskey, Director of Legislation and Regulations of the IHS, requesting that Charlevoix County be added to the Band's HSDA. The letter explained that the Band's constitution, approved by the Assistant Secretary for Indian Affairs, Department of the Interior, provided for a six county tribal service area including Charlevoix County. Mr. McCloskey responded on September 30, 1988, explaining that the new regulations were not in effect and that the Band would have to initiate proceedings under the existing regulations to change the Band's CHSDA. Approximately [*5] fifteen months later, on December 14, 1989, the Band's chairperson wrote Dr. Everett Rhoades, the IHS Director, asking that he intervene and add Charlevoix County to the HSDA list published on August 25, 1988. On January 12, 1990, the Band's Council passed a resolution stating that the Band's members residing in Charlevoix County should be provided IHS services, because Charlevoix County was included within the six county tribal service area in the Band's constitution. On January 25, 1990, Mr. Robert Singyke, the IHS Deputy Director, responded to the Band's December 14, 1989 letter, denying the Band's request and explaining that the Band must follow the administrative process set out in the existing regulations to the change the Bands CHSDA. See § 36.22(b) and (c). In response the Band's chairperson wrote to Dr. Rhoades on February 5, 1990, asserting that Charlevoix County should be considered as coming within the CHSDA definition in the existing regulations without following the redesignation procedures. Defendants submit that the IHS is "ascertaining additional facts to determine whether Charlevoix County does in fact come within the CHSDA definition in § 36.22(a)(6), and that [*6] a final decision has not been made at this time. Affidavit ("Aff.") of Richard McCloskey at para. 20. The Band then initiated the instant action.

*STANDARD*

*Motion to Dismiss*

A motion to dismiss under *Rule 12(b)(6)* tests the sufficiency of the pleading. *Elliot Co., Inc. v. Caribbean Util. Co., 513 F.2d 1176 (6th Cir. 1975)*. Technically, of course, the 12(b)(6) motion does not attack the merits of the case -- it merely challenges the pleader's failure to state a claim properly. 5 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1364, at 340 (Supp. 1987). In deciding a 12(b)(6) motion, the court must determine whether plaintiff's complaint sets forth sufficient allegations to establish a claim for relief. The court must accept all allegations in the complaint at "face value" and construe them in the light most favorable to the plaintiff. *Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)*; *Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983)*; *Amersbach v. City of Cleveland, 598 F.2d 1033, 1034-35 (6th Cir. 1979)*; *Davis H. Elliot Co. v. Caribbean Utilities Co., 513 F.2d 1176 (6th Cir. 1975)*.

The complaint must in essence set forth [*7] enough information to outline the elements of a claim or to permit inferences to be drawn that these elements exist. *Jenkins v. McKeithen, 395 U.S. 411 (1969)*; *German v. Killeen, 495 F. Supp. 822, 827 (E.D. Mich. 1980)*.

Conclusory allegations are not acceptable, however, where no facts are alleged to support the conclusion or where the allegations are contradicted by the facts themselves. *Vermillion Foam Products Co. v. General Electric Co., 386 F. Supp. 255 (E.D. Mich. 1974).* The court cannot dismiss plaintiff's complaint unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief." *Conley v. Gibson, 355 U.S. 41, 45-46 (1957).*

*DISCUSSION*

Defendants move to dismiss plaintiff's complaint asserting that the IHS is precluded by law from granting the relief which plaintiff requests. This is clearly true. Pub.L. 101-121 contains a proviso at 103 Stat. 734-5 which states:

Provided further, that none of the funds made available to the Indian Health service in this act shall be used to implement the final rule published in the Federal Register on September 16, 1987 . . . until the Indian [*8] Health Service has submitted a budget request reflecting the increased costs associated with the proposed final rule, and such request has been included in an appropriations Act and enacted into law.

Defendants assert that the IHS has not submitted a budget request at this time. McCloskey Aff at para. 13.

Plaintiffs refuse to concede that the IHS is precluded by law from granting the relief requested, instead claiming that "this Court need not resolve at this juncture the question of whether Congress has prohibited Defendants from granting the specific relief requested, because Plaintiff should be provided an opportunity to amend the complaint in order to request alternative relief." Response Memorandum at 4. Plaintiff asserts that "defendants fail to address the underlying issue regarding the validity of these regulations" and seemingly wishes to amend its complaint to request that this Court declare "that Charlevoix County be listed as part of [the Band's] HSDA by virtue of Charlevoix County being part of [the Band's] historical non-CHSDA geographical service population area." Memorandum at 6. Defendants refer to this as a request to "grandfather" Charlevoix County into the [*9] new HSDA designation, and points out that such a request would merely be a restatement for relief under the "new" regulations which have not be given effect. I agree with the defendants, and believe that, even if amended, plaintiff's complaint would still be asking this Court to enforce an alleged right under regulations which cannot be implemented at this time, and which are not in effect. I will not do this, and accordingly see no reason to grant plaintiff leave to file an amended complaint. [1] See *Neighborhood Development Corporation v. Hudd, 632 F. 2d 21,* (6th Cir. 1980) (Well settled that the district court may deny a motion for leave to amend a complaint if such complaint, as amended, could not withstand a motion to dismiss).

1 The Court notes that plaintiff has not filed a motion requesting leave to grant an amended complaint, but has merely proffered its request in its response to the defendants's motion to dismiss.

I note that the IHS specifically states that it has not refused to entertain a request to [*10] redesignate the Band's CHSDA through the administrative process provided for in the existing regulations. 42 C.P.R. § 36.22(b) and (c). In fact defendants state that "IHS officials have repeatedly encouraged the Band to go forward with this process." Memorandum at 9. I do not read the plaintiff's complaint as asking this Court to order the IHS to redesignate the Band's CHSDA under existing regulations, and note that even if I did, plaintiff would be required to exhaust its administrative remedies under this process before coming to this Court for relief. Nor am I persuaded by plaintiff's argument that defendants are bound to provide the relief requested by the special trust relationship of the federal government to the Indian Tribes. While such a relationship does exist, it does not create a duty to provide particular benefits or services in the absence of a specific provision in a treaty, agreement, executive order, or statute. *Morton v. Ruiz, 94 S. Ct. 1055 (1974)*; *Vigil v. Andrus, 667 F.2d 931 (10th Cir 1982).* Plaintiff has failed to allege any facts which could possibly support a claim for the relief which it is seeking. Accordingly, I will enter a judgment granting defendants' [*11] motion to dismiss.

*JUDGMENT* - August 24, 1990, Filed

In accordance with the written opinion of today's date;

*IT IS HEREBY ORDERED* that defendants' motion to dismiss is *GRANTED.*