

1 McGREGOR W. SCOTT
United States Attorney
2 JOHN F. GISLA, SB #42829
Assistant U.S. Attorney
3 501 I Street, Suite 10-100
Sacramento, California 95814
4 Telephone: (916) 554-2740
5 Attorneys for the United States

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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 SUSANVILLE INDIAN RANCHERIA,
12 Plaintiff,
13 v.
14 MIKE LEAVITT, et al.,
15 Defendants.
16
17

No.2:07-cv-259-GEB

OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION

DATE: February 26, 2007
TIME: 2:00 p.m.
COURTROOM: No. 10
(13th Floor)

18 Federal Defendants Michael Leavitt, Secretary of the United
19 States Department of Health and Human Services; Charles Grim,
20 Director of the Indian Health Service; and Margo Kerrigan, Director
21 of the California Area Indian Health Service, by and through the
22 undersigned counsel, hereby oppose plaintiff's Motion For
23 Preliminary Injunction ("Motion") as follows.

24 **I. INTRODUCTION**

25 This is an action for injunctive relief brought by plaintiff,
26 the Susanville Indian Rancheria ("Susanville"), to force the
27 Secretary of the United States Department of Health and Human
28

1 Services to enter into a compact under Title V of the Indian Self-
2 Determination and Education Assistance Act (ISDEAA), 25 U.S.C. §
3 458aaa et seq. Defendants, however, lack the legal authority to
4 execute the compact under the terms and conditions as proposed by
5 Susanville. The proposed ISDEAA compact would allow Susanville to
6 provide a wide range of health care services, including pharmacy
7 services. Under its on-site pharmacy program, Susanville proposes
8 to charge Indian patients, who are otherwise eligible for health
9 care services, a co-pay, and in certain instances, the full amount
10 of the pharmaceuticals. The ISDEAA prohibits the Indian Health
11 Service (IHS) from billing or charging "those Indians who may have
12 the economic means to pay" for such services. 25 U.S.C. § 458aaa-
13 14(c). It is the position of the IHS that it cannot contract with
14 tribes and tribal organizations under the ISDEAA to carry out
15 activities that the IHS itself has no legal authority to carry out.
16 The IHS therefore cannot agree to that portion of Susanville's
17 proposal to bill or charge eligible Indian patients for pharmacy
18 services.

19 On February 14, 2007, this Court heard plaintiff's Motion for
20 Temporary Restraining Order. During the hearing, Defendants pointed
21 out that the status quo was an extension of Plaintiff's current
22 Title I Contract and Annual Funding Agreement (AFA), and not the
23 Title V compact as requested by Susanville.¹

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25 ¹ Susanville sought an Order "restraining Defendants and their
26 officers, agents, servants, employees and attorneys and those in
27 active concert or participation with them from excluding the Tribe's
28 pharmacy services component from the programs authorized under the
Tribe's self-governance Compact and Calendar Year 2007 Funding
Agreement, which by operation of law went into effect on January 29,
2007, and directing Defendants to sign the Compact and CY 2007

1 The Court did not grant the specific relief requested by
2 Plaintiff. The Court's February 14, 2007 Order states "the status
3 quo will be preserved as agreed by Defendants at the hearing;
4 therefore, the 2006 Annual Funding Agreement is extended until a
5 ruling on Plaintiff's motion for preliminary injunction issues."

6 **II. DEFENDANTS AGREE TO AN EXTENSION OF THE TITLE I CONTRACT**

7 On February 16, 2007, Government counsel contacted counsel for
8 Susanville, and offered to stipulate to a further extension of the
9 Title I Contract and AFA until a decision is issued by this Court on
10 the parties' cross-motions for summary judgment. Counsel for
11 Susanville rejected this proposal. With respect to the pending
12 motion for preliminary injunction, Defendants agree that the Court's
13 February 14, 2007 Order on Plaintiff's Motion For TRO may be
14 extended until the Court issues its decision on the parties' cross
15 motions for summary judgment. The issues relating to the merits of
16 the case and irreparable harm are therefore not at issue in the
17 present motion for preliminary injunction. Instead, the only issue
18 to be decided in the pending motion is the nature and extent of the
19 status quo.

20 **III. LEGAL ARGUMENT**

21 **A. A FURTHER EXTENSION OF THE TITLE I CONTRACT AND ANNUAL FUNDING**
22 **AGREEMENT WILL PRESERVE THE STATUS QUO**

23 In late December, 2006, the parties agreed to extend
24 Susanville's 2006 Title I Contract and AFA, which was set to expire
25 on January 1, 2007, to February 15, 2006. See Mackay Declaration,

26 Funding Agreement and provide such funding as is authorized under
27 these agreements without imposing any condition that would prevent
28 the Tribe from charging beneficiaries for services." Plaintiff's
Motion for a Temporary Restraining Order, pp. 1-2.

1 Exhibit A, p. 43. Thus, when Susanville filed its Motion for
2 Temporary Restraining Order and Preliminary Injunction on February
3 9, 2007, Susanville was operating the Lassen Indian Health Clinic
4 pursuant to the ISDEAA Title I Contract and AFA. As a result, the
5 status quo was the operation of the Lassen Indian Health Clinic
6 under the Title I Contract and AFA, and preservation of the status
7 quo would be achieved through a further extension of the Title I
8 Contract and AFA.

9 **B. PLAINTIFF HAS IN EFFECT ACKNOWLEDGED THAT AN EXTENSION OF THE**
10 **TITLE I CONTRACT AND AFA IS THE STATUS QUO**

11 Susanville in effect has acknowledged that the status quo is an
12 extension of the Title I Contract and AFA, and that such action
13 alleviates any harm that would be suffered by Susanville. In its
14 Motion for a Temporary Restraining Order, Susanville states:

15 "Defendants agreed to one 45 day extension of the status quo while
16 they conducted their own internal review of the Tribe's final offer,
17 and so have acknowledged there is no harm from preserving the status
18 quo while consideration of the merits is pending." Plaintiff's
19 Memorandum of Law In Support of Temporary Restraining Order and
20 Preliminary Injunction, p. 2.

21 Susanville may argue that it will suffer additional irreparable
22 harm if the Secretary does not sign the Title V Compact and FA,
23 pointing out that under the Title V Compact and FA, Susanville is
24 entitled to full payment of the annual title V funding in advance,
25 and arguing that it will lose interest on the full amount while its
26 appeal is pending (since the Title I extension is for a limited
27 period of time, Susanville will receive a pro rata share of its
28 funding, and not the full amount). It is well settled, however,

1 that economic loss does not constitute irreparable harm. Wisconsin
2 Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). "Mere
3 injuries, however substantial in terms of money, time and energy
4 necessarily expended" are inadequate. Id., quoting Virginia
5 Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).
6 Moreover, Susanville has the option of seeking the recovery of lost
7 interest as an element of damages. Susanville will therefore not
8 suffer additional irreparable harm if the Secretary does not sign
9 the Title V Compact and FA.

10 **C. THE TITLE V COMPACT AND FUNDING AGREEMENT ARE NOT THE STATUS**
11 **QUO BECAUSE THEY DID NOT GO INTO EFFECT BY OPERATION OF LAW**

12 Susanville argues that the proposed Compact and FA submitted to
13 the IHS "by operation of law went into effect January 29, 2007 ...",
14 even though the FA included the pharmacy provision that was
15 specifically rejected by the Secretary, and neither the Compact nor
16 the FA have been signed by the Secretary. (Plaintiff's Motion for
17 Temporary Restraining Order, p. 1.)

18 Susanville was fully aware that the IHS would not enter the
19 Title V Compact and FA unless there was an express statement that
20 Susanville would not bill eligible Indians, or unless the pharmacy
21 provision was deleted from the Compact and FA. In fact,
22 Susanville's December 15, 2006 final offer states: "Other areas of
23 disagreement also came up during the negotiations. In particular,
24 you and your team expressed disagreement over the Tribe's existing
25 pharmacy policy in which it bills beneficiaries for prescription
26 fees . . . [D]uring the negotiations the Agency took a very strong
27 position that the Tribe is not legally able to collect these
28 dispensing fees." In addition, the Secretary's January 29, 2007

1 response to Susanville's final offer states: "the IHS lacks
2 authority to contract with Susanville for the existing pharmacy
3 program. The IHS could agree to contract with Susanville if there
4 were an overt statement in the FA that Susanville would not be
5 charging eligible patients; otherwise, the pharmacy provision would
6 have to be deleted from the FA. Susanville disagreed, and submitted
7 its final offer, which included the FA with the pharmacy provision
8 without the IHS recommended language stating that it would not
9 charge eligible patients, as requested by the IHS." See Mackay
10 Declaration, Exhibit D, p. 2.

11 The unsigned Compact and FA, which contain the pharmacy
12 provision specifically rejected by the Secretary, therefore did not
13 go into effect by operation of law, as alleged by Susanville. On
14 the contrary, the law provides:

15 If the Secretary rejects an offer made under subsection (b) (or
16 one or more provisions or funding levels in such offer), the
17 Secretary shall provide . . . (D) the Indian tribe with the
18 option of entering into the severable portions of a final
19 proposed compact or funding agreement, or provision thereof,
(including a lesser funding amount, if any), that the Secretary
did not reject, subject to any additional alterations necessary
to conform the compact or funding agreement to the severed
provisions.

20 25 U.S.C. § 458aaa-6(c)(1)(D). Despite the specific statutory
21 requirement, Susanville did not submit the "severable portions of
22 the proposed compact and funding agreement . . . that the Secretary
23 did not reject" when it submitted its proposed Compact and FA to the
24 IHS with its Final Offer on December 15, 2006. Rather, Susanville
25 submitted a proposed Compact and FA with the pharmacy provision that
26 the IHS specifically had rejected. Thus, the IHS's position was
27 that it did not have the legal authority enter into the Compact and
28 FA under the terms and conditions in the proposed Compact and FA

1 submitted by Susanville; and as a result, the Secretary did not sign
2 the Compact and FA as submitted by Susanville.

3 Contrary to Susanville's assertions that the proposed Compact
4 and FA went into effect by operation of law, the law actually
5 requires affirmative action by the parties. First, entering into
6 the severable portions of the Compact and FA is merely an "option"
7 that must be affirmatively elected by the tribe. Second, the
8 severable portions of the compact and FA must be entered into - the
9 parties demonstrate their affirmative assent to the terms and
10 conditions by signing the Compact and FA. Moreover, Susanville's
11 proposal contains the language (the pharmacy provision) that the
12 Secretary specifically rejected. Thus, there was no meeting of the
13 minds on a material term of the FA, and therefore the Secretary
14 could not and did not execute the Compact.

15 **D. THE REGULATIONS SUPPORT THE INTERPRETATION OF THE IHS**

16 The ISDEAA Title V regulations set forth at 42 C.F.R. Part 137
17 demonstrate that Susanville's interpretation of 25 U.S.C. § 458aaa-
18 6(c)(1)(D) is incorrect. If the Secretary rejects a tribe's final
19 offer, as the Secretary did in this case, then the regulations
20 merely state that the severable portions of the compact or FA go
21 into effect in accordance with 25 U.S.C. § 458aaa-6(c)(1)(D):

22 **§ 137.147 Do those portions of the compact, funding agreement,
23 or amendment not in dispute go into effect?**

24 **Yes, subject to section 507(c)(1)(D) of the Act [25 U.S.C. §
458aaa-6(c)(1)(D)].**

25 42 C.F.R. § 137.147 (emphasis added). As explained above, 25 U.S.C.
26 § 458aaa-6(c)(1)(D) merely gives a tribe the option to enter into
27 the severable portions of the compact and FA that the Secretary did
28 not reject.

Susanville's confusion may stem from the Title V regulations that provide that if the Secretary fails to respond to a tribe's final offer, then the final offer is accepted as a matter of law:

§ 137.136 What happens if the agency takes no action within the 45 day review period (or any extension thereof)?

The final offer is accepted automatically by operation of law.

42 C.F.R. § 137.136. If the Secretary fails to respond, the regulations further provide that the disputed terms that are the subject of the final offer are added to the Compact and FA, but only after the final offer is deemed accepted:

§ 137.138 Once the Indian Tribe's final offer has been accepted by operation of law, what is the next step?

After the Indian Tribe's final offer is accepted or deemed accepted, the terms of the Indian Tribe's final offer and any funds included therein, shall be added to the funding agreement or compact within 10 days of the acceptance or the deemed acceptance.

42 C.F.R. § 137.138 (emphasis added). In this case, however, the Secretary responded within the 45 day time limit, and therefore these acceptance "by operation of law" provisions are inapplicable.

E. THE IHS'S INTERPRETATION IS CONSISTENT WITH THE IHS AND TRIBAL PRACTICE REGARDING FINAL OFFERS

The IHS's practice with regard to final offers is consistent with its interpretation of the statutory provisions and regulations cited above. The Secretary provides the tribe the option of entering into the severable portions of the compact and FA that the Secretary did not reject, and the provisions or portions that were rejected by the Secretary are excluded from the compact and funding agreement. See the Declaration of Dennis Heffington in support of Defendants' opposition to Plaintiff's motion for preliminary injunction. To the extent a tribe then prevails in an appeal of its

1 final offer, the compact and FA are amended to include the
2 provisions or portions that were previously rejected. The IHS is
3 entitled to deference to its statutory interpretation because this
4 has been its consistently held position. E.g., Good Samaritan
5 Hospital v. Shalala, 508 U.S. 402, 417 (1993).

6 **IV. CONCLUSION**

7 The relief requested by Susanville in its Motion for a
8 Preliminary Injunction should be rejected because it is above and
9 beyond the status quo, and because the relief it seeks is wholly
10 unnecessary. The relief that Susanville seeks in the pending motion
11 should only be granted, if at all, if Susanville actually prevails
12 on the merits.

13 DATED: February 20, 2007

McGREGOR W. SCOTT
United States Attorney

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16 By: /s/ John F. Gisla
JOHN F. GISLA
Assistant United States Attorney
Attorneys for the United States
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