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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SUSANVILLE INDIAN RANCHERIA,)

Plaintiff,)

vs.)

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.)

CASE NO. _____

COMPLAINT

1 The Plaintiff, for its cause of action against the Defendants named above, alleges as
2 follows:

3 INTRODUCTION

4 1. This action concerns the negotiation of a Compact of Self-Governance and Funding
5 Agreement between the Susanville Indian Rancheria ("the Tribe") and the Indian Health Service
6 ("IHS") under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25
7 U.S.C. § 450 et seq. The Secretary of Health and Human Services, through the IHS, is directed
8 to negotiate and enter into compacts and funding agreements with Indian tribes under Title V of
9 ISDEAA. *See* 25 U.S.C. § 458aaa-(1) –(18). The dispute between the parties arises from IHS'
10 improper rejection of the Tribe's proposal to include a pharmacy services program in its Funding
11 Agreement for 2007.
12

13 2. The Tribe has operated an array of health services programs, including pharmacy
14 services, for a number of years under a self-determination contract and Annual Funding
15 Agreements (AFA) with the IHS under Title I of the ISDEAA. The Tribe has been negotiating
16 with the IHS to assume these programs under a Compact of Self-Governance and Funding
17 Agreement (FA) for 2007 under Title V of the ISDEAA. Title V provides that in the event the
18 parties are unable to agree on a matter, the Tribe may submit a final offer to the Secretary which
19 the Secretary may only reject on one of four grounds listed in the statute. *See* 25 U.S.C. §§
20 458aaa-6(b) and (c). The IHS rejected Susanville's final offer to include pharmacy services in its
21 FA for 2007 on the ground that charging co-payments to certain Indian beneficiaries would be
22 operating the program in a manner that would result in significant danger or risk to the public
23 health. *See* 25 U.S.C. § 458aaa-6(c)(1)(A)(iii). The Tribe brings this civil action to appeal and
24 challenge IHS' rejection of its final offer.
25

JURISDICTION AND VENUE

3. This court has jurisdiction over this action under section 110 of the ISDEAA, 25 U.S.C. § 450m-1, granting United States district courts original jurisdiction over “any civil action or claim against the appropriate Secretary arising under the [ISDEAA].” This statute authorizes the district courts to order appropriate relief, including money damages, injunctive relief, or mandamus, including immediate injunctive relief to reverse a declination and compel the Secretary to award and fund an approved self-determination contract. Section 110 is made applicable to self-governance compacts and funding agreements by Section 511(a) of the ISDEAA, 25 U.S.C. § 458aaa-10(a).

4. The ISDEAA provides that the Tribe may forego an administrative appeal and “in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court pursuant to section 450m-1 of this title.” 25 U.S.C. § 458aaa-6(c)(1)(C).

5. Venue is proper under 28 U.S.C. § 1391(e).

PARTIES

6. Plaintiff Susanville Indian Rancheria is a federally recognized Indian tribe established in 1969 pursuant to the Indian Reorganization Act. The Tribe’s headquarters are located at 745 Joaquin Street, Susanville, in Lassen County, California.

7. Defendant Michael O. Leavitt is the Secretary of the United States Department of Health and Human Services (“DHHS”). As such, he has overall responsibility for carrying out all the functions, responsibilities, authorities and duties of DHHS, including provision of health services to American Indians and Alaska Natives and negotiating and entering into agreements with Indian Tribes and tribal organizations under Titles I and V of the ISDEAA. His office is located in Washington, D.C. He is sued in his official capacity.

8. Defendant Charles W. Grim is the Director of the Indian Health Service, a component of DHHS. As such, he has overall responsibility for carrying out all the functions, responsibilities, authorities and duties of the IHS, including the provision of health services to American Indian and Alaska Natives and negotiating and entering into compacts and funding agreements with Indian tribes and tribal organizations under the ISDEAA. His office is located in Rockville, Maryland. He is sued in his official capacity.

9. Defendant Margo Kerrigan is the Area Director of the IHS California Area. As such, she has overall responsibility for carrying out all the responsibilities, functions, authorities, and duties of the IHS within the IHS California Area, including provision of health services to American Indians in California and negotiation and entering into Compacts and Funding Agreements with Indian tribes and tribal organizations under the ISDEAA. Her office is located in Sacramento, California. She is sued in her official capacity.

GENERAL ALLEGATIONS

10. The IHS has been contracting with the Tribe for a number of years under Title I of the ISDEAA to administer an array of health service delivery programs. The programs administered by the Tribe have for many years included a pharmacy services program.

11. The Tribe's current Title I Funding Agreement ("FA") includes a pharmacy services program, as have prior FAs.

12. Tribal agreements with the Secretary under the ISDEAA may take two forms: self-determination contracts and AFAs under Title I, or self-governance compacts and FAs under Title V. Under Title V of the ISDEAA, Indian tribes that have operated programs under Title I self-determination contracts and FAs with no uncorrected significant and material audit

1 exceptions are eligible to enter into the self-governance program and enter into Compacts and
2 FAs. *See* 25 U.S.C. § 458aaa-2(c).

3 13. Under Title V the Secretary is directed to negotiate and enter into a written compact
4 and FA with each tribe participating in self-governance. *See* 25 U.S.C. § 458aaa-3(a) and §
5 458aaa-4(a).

6 14. Early last year the Tribe was admitted to the self-governance program by the IHS
7 and months later it began negotiating with the IHS to reach agreement on a self-governance
8 Compact and FA for Calendar Year 2007. During these negotiations the Tribe proposed to
9 include its pharmacy services program in its self-governance FA in language virtually identical
10 to the language that is in its current AFA.
11

12 15. The Tribe's proposed language describing its pharmacy services program for its self-
13 governance FA is virtually identical to the description of the Tribe's pharmacy services program
14 in the Tribe's current FA under Title I, referenced in paragraph 11 above.

15 16. Last fall during negotiations with IHS representatives, the Tribe was orally told by
16 IHS negotiators that the IHS would likely not agree to inclusion of the Tribe's proposed
17 language for its pharmacy services program in the self-governance FA because "tribes do not
18 have the legal authority to charge eligible Indians for services."
19

20 17. The IHS was referring to the Tribe's Pharmacy Policy, which requires eligible
21 beneficiaries to pay a co-pay (a \$5.00 dispensing fee plus the acquisition cost of the medicine).
22 The co-pay requirement applies only to those patients who can afford it. Indigent members and
23 elders are exempt from this charge. The Tribe has administered its pharmacy services program
24 under this policy since its adoption in July of 2006. The Tribe informed the IHS at that time that
25

1 it was implementing that policy, and the IHS is aware that the policy has been in place since
2 then.

3 18. On December 19, 2006, the IHS informed the Tribe at negotiations that either the
4 Tribe must include in the self-governance FA an “overt statement that Susanville would not be
5 charging for pharmacy services” or, alternatively, delete the pharmacy services program
6 altogether from its proposed self-governance FA. If the Tribe would not agree to either of IHS’
7 alternative demands, the negotiations over inclusion of the Tribe’s pharmacy services program in
8 the self-governance FA had reached the “final offer” stage.
9

10 19. The term “final offer” is a reference to Section 507(b) of the ISDEAA, 25 U.S.C.
11 §458aaa-6(b), which provides that “In the event the Secretary and a participating Indian tribe are
12 unable to agree, in whole or in part, on the terms of a compact or funding agreement (including
13 funding levels), the Indian tribe may submit a final offer to the Secretary.” 25 U.S.C. §458aaa-
14 6(b).

15 20. If the Secretary does not respond to the Tribe’s final offer within 45 days, or within
16 the time agreed to by the tribe, the final offer proffered by the tribe is deemed approved. *See* 25
17 U.S.C. §458aaa-6(b). Otherwise, the Secretary must affirmatively reject the tribe's final offer in
18 accordance with Section 507(c) of the ISDEAA governing rejection of final offers. *See*
19 *generally* 25 U.S.C. § 458aaa-6(c). Under the statute and applicable regulations the portions of
20 the Compact and FA that are not in dispute are deemed accepted by the Secretary and become
21 automatically effective. *See* 25 USC §458aaa-6(b) ("in the absence of a timely rejection of the
22 offer, in whole or in part, made in compliance with subsection (c) of this section, the offer shall
23 be deemed agreed to by the Secretary") *and* 42 C.F.R. §137.147 (portions not in dispute go into
24 effect)
25

1 21. The Tribe submitted its pharmacy services language referenced in paragraph 15
2 above in its proposed FA as a final offer by letter dated December 15, 2006. Thus, the proposed
3 language describing pharmacy services in the final offer is virtually identical to what is already
4 in the Tribe's current FA under Title I.

5 22. In December the parties agreed to an extension of the existing contract and AFA for
6 an additional 45 day period until February 15, 2007, while IHS deliberated on its response on the
7 Tribe's final offer.

8 23. Defendant Charles Grim, by letter dated January 29, 2007, to Tribal Chairman Stacy
9 Dixon, rejected the Tribe's final offer to include pharmacy services in its proposed FA.
10

11 24. When the Secretary decides to reject a final offer, whether in whole or in part, he
12 must provide:

13 (A) a timely written notification to the Indian tribe that contains a specific finding that
14 clearly demonstrates, or that is supported by a controlling legal authority, that—

15 (i) The amount of funds proposed in the final offer exceeds the
16 applicable funding level to which the Indian tribe is entitled under this
title;

17 (ii) The program, function, service or activity (or portion thereof)
that is the subject of the final offer is an inherent Federal function that
cannot legally be delegated to an Indian tribe;

18 (iii) The Indian tribe cannot carry out the program, function, service
or activity (or portion thereof) in a manner that would not result in
19 significant danger or risk to the public health; or

20 (iv) The Indian tribe is not eligible to participate in self-governance
under section 503 [25 U.S.C. § 458aaa-2].

21 25 U.S.C. § 458aaa-6(c)(1)(A).

22 25. Defendant Grim used the third listed criterion to reject the Tribe's proposed
23 pharmacy services language: "The Indian tribe cannot carry out the program, function, service or
24 activity (or portion thereof) in a manner that would not result in significant danger or risk to the
25 public health." 25 U.S.C. § 458aaa-6(c)(1)(A)(iii).

CAUSES OF ACTION

COUNT 1 – Defendants’ Rejection of the Tribe’s Final Offer Violates the ISDEAA

26. Plaintiff hereby incorporates by reference the allegations of paragraphs 1 through 25 of this Complaint as though fully set forth herein.

27. The Secretary bears the burden of proof by clear and convincing evidence to establish the validity of the grounds for rejecting a final offer. 25 U.S.C. § 458aaa-6(d).

28. The four criteria listed in subsection 507(c)(1)(A) of the ISDEAA, 25 U.S.C. §458aaa-6(c)(1)(A), are the only grounds on which the Secretary may lawfully reject a final offer arising out of negotiations for a self-governance compact and funding agreement. This limitation on the grounds on which rejection may be based is confirmed in the Secretary’s regulations implementing Title V of the ISDEAA. *See* 42 C.F.R. § 137.140 (four bases the Secretary may use to reject final offer).

29. IHS’ rejection of the Tribe’s proposal is not based on the language proposed to describe the pharmacy services program, which already exists in the Tribe’s FA under Title I. Rather, IHS rejected the Tribe’s inclusion of a pharmacy services program in its self-governance FA because of the “manner” in which the Tribe will implement the program under the Tribe’s Pharmacy Policy. That policy provides for charging otherwise eligible Indians, who can afford to pay, a co-pay associated with each prescription.

30. Defendants apparently chose the third criterion for rejecting inclusion of the Tribe’s pharmacy services program because the third criterion is the only criterion that allows the IHS to reject a final offer because of the “manner” in which a tribe will conduct the program.

(iii) the Indian tribe 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.

1 25 U.S.C. § 458aaa-6(c)(1)(A)(iii) (emphasis added).

2 31. The third rejection criterion restricts rejections based on the manner in which a tribe
3 will conduct a program to those instances which would “result in significant danger or risk to the
4 public health.” 25 U.S.C. § 458aaa-6(c)(1)(A)(iii).

5 32. Defendant Grim in his rejection letter makes no attempt to tie charging certain
6 Indians a co-pay for each prescription under the Tribe’s pharmacy policy to a significant danger
7 or risk to public health. Such a determination would have been contrary to the facts and would
8 have very disquieting implications for the provision of health care generally in this country.
9

10 33. Section 515(c) of the ISDEAA provides specific language on charging:

11 (c) Obligations of the United States

12 The Indian Health Service under this Act shall neither bill nor charge
13 those Indians who may have the economic means to pay for services, nor
require any Indian tribe to do so.

14 25 U.S.C. § 458aaa-14(c).

15 34. Section 515(c) is included in the ISDEAA under the heading “Obligations of the
16 United States.” It provides that the IHS may not charge Indians who have the economic means
17 to pay for services; and it prohibits the IHS from requiring any Indian tribe to do so in an
18 ISDEAA agreement. It is a proscription on the IHS, not the tribes. It does not say that tribes may
19 not charge Indians who have the economic means to pay. To the contrary, it gives tribes the
20 flexibility to make a decision whether to charge such Indians based on tribal priorities and needs.
21

22 35. Defendants rely instead on Section 505(b) of the ISDEAA, 25 U.S.C. 458aaa-4(b),
23 which, in subsection (b)(1), authorizes Indian tribes to receive full tribal share funding for
24 programs which the tribe conducts and administers under self-governance compacts and FAs;
25 and in subsection (b)(2), lists the legislative authorities under which the IHS administers covered
programs, services, functions, and activities. *See* 25 U.S.C. 458aaa-4(b)(1) & (2).

1 36. A pharmacy services program is clearly within the scope of section 505(b). That
2 section says nothing about charging; nor does it authorize the IHS to control the manner in which
3 tribes administer programs included in Compacts and FAs through rejections of final offers.

4 37. Defendants have made no serious attempt to meet their burden of proof under the
5 criterion they chose to reject the Tribe's final offer. Consequently, their rejection is contrary to
6 the ISDEAA and must be reversed.

7
8 PRAYER FOR RELIEF

9 WHEREFORE, Plaintiff prays this Court to grant the following relief:

10 1. Declare that Defendants' refusal to accept the Tribe's final offer on the grounds
11 and in the manner asserted is contrary to law and a violation of the ISDEAA;

12 2. Declare that Defendants' requirement that the Tribe be forced to agree not to
13 charge Indian beneficiaries for services as a condition of approving the Tribe's Title V Compact
14 and FA is contrary to law and a violation of ISDEAA;

15 3. Declare that the Tribe's proposed Compact and FA is in full force and effect;

16 4. Issue such temporary and preliminary injunctive relief as is necessary to preserve
17 the status quo permitting the Tribe to continue to operate its health center, including the
18 pharmacy program with the co-pay feature, pending the resolution of this litigation;

19 5. Order Defendants immediately to enter into and fully fund the Compact and
20 Funding Agreement for 2007 proposed by the Tribe;

21
22 5. Permanently enjoin Defendants from rejecting the Tribe's final offer with respect
23 to the Tribe's pharmacy services program and order Defendants to incorporate the proposed
24 pharmacy services language as submitted in the Tribe's final offer into the Compact and
25 Calendar Year 2007 FA;

6. Award the Tribe its legal costs and attorney fees in this matter;

7. Grant such other relief as the Court deems appropriate.

Respectfully Submitted,

/s/ Timothy Carr Seward

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DATED this 9th day of February, 2007.

Served: The Honorable Alberto R. Gonzales
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