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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SUSANVILLE INDIAN RANCHERIA, Plaintiff vs. MIKE LEAVITT, et al., Defendants.	CASE NO. 2:07-cv-259-GEB-DAD PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF SUMMARY JUDGMENT Hearing date: July 9, 2007 Hearing time: 9:00 AM Judge Garland E. Burrell

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Introduction

Plaintiff Susanville Indian Rancheria ("Tribe") is entitled to judgment on its claims as a matter of law. Defendants' attempt to condition or reject the Tribe's Title V Compact and Funding Agreement ("FA") is based on a legal position at odds with the plain language of the Indian Self-Determination and Education Assistance Act ("ISDEAA"). The restriction on the Indian Health Service ("IHS") charging Indians found in 25 U.S.C. §458aaa-14(c) is not a restriction on the *Tribe* charging Indians. Defendants are also wrong as a matter of law that the IHS cannot agree to a compact in which the Tribe may carry out the program at issue in a manner that is different from the manner in which the IHS may carry out that program. Finally, in their rejection of the Tribe's "final offer" of a Title V Compact and FA, Defendants failed to make the required "specific finding that clearly demonstrates" that one of the four permissible rejection criteria was present. Instead, Defendants merely put forward a vague, generalized assertion that speculates as to the presence of one of the criteria. Defendants cannot meet the "clear and convincing" evidentiary burden to demonstrate that IHS met its legal obligations under the ISDEAA. Under the applicable standard for summary judgment, which requires looking at the evidence through the lens of the legal standard and burden on Defendants, the Tribe is entitled to summary judgment.

I. Undisputed Facts

The material facts in this case are undisputed and are set out in more detail in the Joint Stipulation of Undisputed Facts and in Plaintiff's Statement of Additional Undisputed Facts, supported by the Declarations of Jim Mackay and Robert Marsland. Since 1986, the Tribe has provided health care services to eligible Indians in its service area in rural Northeastern California through the Lassen Indian Health Center ("LIHC") under a series of self-

determination contracts and Annual Funding Agreements ("AFA") with the IHS pursuant Title I of the ISDEAA. Since 1995, the AFAs have included pharmacy services as one of the programs, services, functions, or activities ("PSFAs") provided by the Tribe. *See* Joint Stipulated Exhibit A, Title I Self-Determination Contract and Annual Funding Agreement for CY 2006 between the Tribe and IHS. The Title I Contract and AFA do not contain a specific line item identifying funds provided to the Tribe specifically for the purpose of carrying out a direct services pharmacy program. *Id.*

In 2006 the Tribe began negotiating with the IHS to reach agreement on an ISDEAA Title V self-governance Compact and FA for Calendar Year 2007. During these negotiations the Tribe proposed to include its pharmacy services program in its self-governance FA in language virtually identical to the language that is in its CY 2006 Title I AFA, neither of which contains any statement about charging beneficiaries for pharmacy services. *Compare* Exhibit A with Joint Stipulated Exhibit D, Tribe's Final Offer of Title V Self-Governance Compact and Funding Agreement. Like the Title I Contract and AFA, the Title V Compact and FA also do not identify any funds being provided to the Tribe for the purpose of carrying out a direct services pharmacy program. *Id.*

The Tribe made the determination that without the ability to implement a co-pay policy, in which certain patients who utilize the pharmacy would be charged a fee for certain products and services, the Tribe would not be able to provide pharmacy services in a fiscally sound manner. Mackay Decl. at ¶ 9. The Tribe has the discretion, if it determines that operating the pharmacy is not fiscally sound, or for any other reason, not to provide pharmacy services. Marsland Decl. at ¶ 10. If the Tribe chooses not to operate a pharmacy, beneficiaries would have to go to the drugstore and pay full price for their medication.

On or about May 15, 2006, the Tribe enacted a Pharmacy Policy that requires eligible beneficiaries to pay a co-pay (a $5.00 dispensing fee plus the acquisition cost of the medicine) for pharmacy services. Indigent beneficiaries are exempt from this co-pay policy. *See* Joint Stipulated Exhibit B, Tribe's Pharmacy Policy. The Tribe has been operating its pharmacy under this policy since July 1, 2006. Mackay Decl. at ¶ 9.

The IHS was aware that the Tribe had a Pharmacy Policy requiring beneficiaries to make payments as early as May 2006. Mackay Decl. at ¶ 11; Exhibits F and G to Mackay Decl. Through the course of the Title V negotiations, the Tribe informed the agency representatives that it had already implemented this Policy and planned to continue to do so. Mackay Decl. at ¶12. IHS informed the Tribe orally that the agency's position was it did not believe that tribes have the legal authority to charge eligible Indians for services provided through ISDEAA. However, although IHS knew the policy was implemented and being used by the Tribe, IHS did not take any steps to stop the Tribe from carrying out the policy under its then existing Title I contract and CY 2006 AFA. Mackay Decl. at ¶ 12. Moreover, at no point did IHS take any steps to reassume the Tribe's programs or to otherwise prohibit the Tribe from charging beneficiaries. *Id.* Nor did the IHS negotiating team nor any other IHS representative raise any concern with the Tribe that the Pharmacy Policy presented a risk or danger to public health. *Id.*

On December 22, 2006, IHS informed the Tribe in writing that if the Tribe wanted to have a signed Title V Compact and Funding Agreement in place by January 1, 2007, the Tribe would have to either (1) submit a revised version of the FA with an overt statement that the Tribe will not bill or charge eligible Indians for pharmacy services, or (2) submit a revised version of the FA with references to pharmacy services deleted. Mackay Decl. at ¶ 13.

The Tribe refused to accept either of the two conditions presented by IHS regarding the Tribe's pharmacy services, thus leading to the "final offer" stage of Section 507(b) of the ISDEAA, which provides that "In the event the Secretary and a participating Indian tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels), the Indian tribe may submit a final offer to the Secretary." 25 U.S.C. §458aaa-6(b). Except for one other item, which is not at issue in this suit and which the Tribe has conceded, the Tribe and the IHS had reached agreement on all other issues in the Title V Compact and FA aside from the question of billing for pharmacy services.

The Tribe submitted its "final offer" to IHS on December 15, 2006 by letter. *See* Joint Stipulated Exhibit C, Tribe's Final Offer Transmittal Letter, and Joint Stipulated Exhibit D, Tribe's Final Offer of Title V Self-Governance Compact and Funding Agreement. The Tribe's "final offer" included pharmacy services in the proposed FA and did not include an express statement that the Tribe would not charge eligible beneficiaries for pharmacy services. If the IHS rejects such a final offer, it must provide timely written notification to the Tribe "that contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority" that his decision is based on one of four statutory criteria. 25 U.S.C. § 458aaa-6(c)(1)(A).

Defendant Charles W. Grim, by letter dated January 29, 2007, provided the written notification to Tribal Chairman Stacy Dixon, rejecting the Tribe's final offer. *See* Joint Stipulated Exhibit E, Letter from Dr. Charles W. Grim to Chairman Stacy Dixon, January 29, 2007 (hereinafter "Grim Letter"). While the Grim Letter spends four and a half pages explaining why the IHS believes it cannot execute the Compact and FA because of the Tribe's co-pay policy, the only statutory rejection criterion that the letter identified was that, because of this

policy, the Tribe purportedly would not be able to carry out the pharmacy program "in a manner that would not result in significant danger or risk to the public health." 25 U.S.C. §458aaa-6(c)(1)(A)(iii). The entire basis offered by Dr. Grim for relying on this criterion was a single sentence that read: "[E]nforcement of Susanville's pharmacy policy could jeopardize health care services to the eligible AI/ANs who are otherwise eligible for health care services." Grim Letter at 6. This letter was in fact the first and only mention to the Tribe during the entire negotiating process that the IHS had any concern that the Tribe's Pharmacy Policy presented any significant risk or harm to the public health. Mackay Decl. at ¶ 12. As a result of IHS' refusal to enter into the Title V Compact and FA, the Tribe filed the present action, and now asks the Court to grant summary judgment in favor of the Tribe.

II. Standard for Summary Judgment

Summary judgment is proper when it is shown that there exists "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). There are no genuine issues as to any material facts in this case. The case before the Court involves actions flowing directly from Defendants' interpretation of a statute and is therefore purely a matter of law. Summary judgment is therefore appropriate.[1]

Summary judgment is appropriate where the party against whom summary judgment is sought "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "[T]he inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

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[1] *Delbon Radiology v. Turlock Diagnostic Ctr.*, 839 F.Supp. 1388, 1391 (E.D. Cal. 1993). *Accord Edwards v. Aguillard*, 482 U.S. 578, 594-96 (1987) (holding that summary judgment is appropriate where the issue involves legal interpretation of statute).

242, 252 (1986). In this case, Defendants bear the burden of proof to demonstrate by "clear and convincing evidence" that their decision was lawful and valid. 25 U.S.C. §458aaa-6(d), §458aaa-17.

Further, the more implausible the claim or defense asserted by the nonmoving party, the higher its burden to avoid summary judgment.[2] If, as described below, the undisputed facts make Defendants' claim implausible, Defendants must present "more persuasive evidence than would otherwise be necessary" in order to defeat a summary judgment motion. *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir.1987), *cert. denied*, 484 U.S. 1006 (1988).

III. Background: ISDEAA and Title V

Since this case turns on IHS' incorrect interpretation of the applicable provisions of ISDEAA. we begin with a brief background on the statute and, specifically, Title V.

a. ISDEAA Title V Authorizes Substantial Flexibility for Tribes in Assuming Operation and Control of IHS Programs

The concept of ISDEAA is simple and straightforward: Indian tribes should be permitted to assume operation of programs for the benefit of Indian people that were being carried out by the federal government. Title I, first enacted in 1974, authorizes tribes to contract with Interior and HHS to operate certain of those agencies' programs. Under the Title I contracting process, the federal agencies still maintain a degree of control over the design of the contracted programs and the allocation of funds among those programs. Decades of experience made clear, however, that Title I lacked the flexibility needed for tribes to fully break away from the cumbersome federal bureaucracy.[3]

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[2] *See U.S. ex rel. Anderson v. N. Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir.1995).

[3] *See* H.R. Rep. No. 106-477, at 63-64 (November 17, 1999), *reprinted in* 2000 U.S.C.A.A.N. 573, 596-597.

Congress enacted Title V self-governance compacting (like that under Titles III and IV) in 2000 to permit tribes to take more control over Indian Health Service programs and enable them to "more efficiently and more innovatively" run those programs than they would be run under federal control. H.R. Rep. No. 106-477, at 66 (November 17, 1999), *reprinted in* 2000 U.S.C.A.A.N. 573, 600. Congress intended for Title V to bolster the Congressional policy of strengthening and promoting tribal governments because they will benefit from the "flexibility inherent in the program that enables [tribes] to tailor the programs to local needs" and thus provide direct accountability to their members. Sen. Rep. No. 106-221, at 3 (November 9, 1999). Congress' intentions in Title V were summarized by Representative George Miller:

> [Under Title I], [a]ll Indian tribes have enjoyed *similar but lesser right* to contract and operate individual IHS programs and functions . . . [Title V] give[s] 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 (November 17, 1999), *reprinted in* 2000 U.S.C.A.A.N. 573, 599-600 (emphasis added).

The flexibility intended by Congress is set out in a number of Title V's provisions, perhaps nowhere more clearly than in Section 506(e), which provides as follows:

> An Indian tribe may redesign or consolidate programs, services, functions and activities (or portions thereof) included in a funding agreement under section 505 and reallocate or redirect funds for such programs, services, functions and activities (or portions thereof) in any manner which the Indian tribe deems to be in the best interest of the health and welfare of the Indian community being served, only if the redesign or consolidation does not have the effect of denying eligibility for services to populations groups otherwise eligible to be served under applicable Federal law.

25 U.S.C. § 458aaa-5(e).

Congress also sought to ensure that the Indian Health Service facilitated this flexibility by requiring the Secretary of Health and Human Services "to interpret all Federal laws . . . in a

manner that will facilitate – (1) the inclusion of programs, services, functions and activities (or portions thereof) and funds associated therewith, in the agreements entered into under this section; (2) the implementation of compacts and funding agreements entered into under this title; and (3) the achievement of tribal health goals and objectives." 25 U.S.C. § 458aaa-11(a).

Finally, and of particular relevance to this case, Congress included a prohibition against the IHS charging beneficiaries for services provided by the IHS. Several years earlier, Congress had imposed restrictions on the IHS against charging beneficiaries for services, but had not renewed those restrictions after FY 1996.[4] In the Title V amendments enacted in 2000, Congress took this issue up again, using different language than it had previously employed:

> The Indian Health Service under [the ISDEAA] shall neither bill nor charge those Indians who may have the economic means to pay for services, *nor require any Indian tribe to do so.*

25 U.S.C. § 458aaa-14(c) (emphasis added). The emphasized language added a new concept – specifically prohibiting IHS from requiring Indian tribes to charge beneficiaries. This concept is, of course, consistent with the overriding goal of Title V: to limit the federal role and authority over how tribes choose to operate their programs. Of critical importance, and consistent with

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[4] Beginning in 1984, Congress began to prohibit the IHS from collecting fees from Indian beneficiaries who were able to pay in service units which did not already have such a billing policy. From FY 1984 to FY 1993, the following language was in effect:

> [W]ith the exception of service units which currently have a billing policy, the Indian Health Service shall not initiate any further action to bill Indians in order to collect from third-party payers nor to charge those Indians who may have the economic means to pay unless and until such time as Congress has agreed upon a specific policy to do so and has directed the IHS to implement such a policy.

Pub. L. 98-473 (Oct. 12, 1984), 98 Stat. 1837 (copy attached at Appendix A). In FY 1994, the language became more restrictive:

> [T]he Indian Health Service shall neither bill nor charge those Indians who may have the economic means to pay unless and until such time as Congress has agreed upon a specific policy to do so and has directed the Indian Health Service to implement such a policy.

Pub. L. 103-138 (Nov. 11, 1993), 107 Stat 1379 (copy attached at Appendix B). This language was included in appropriations acts for FY 1995 and 1996, but was not repeated in any subsequent appropriations act.

this same goal, Congress did not use language that would prohibit tribes from charging for services should the *tribe* determine it was appropriate to do so under its operation of the program.

By amending ISDEAA to create the self-governance program under Title V, Congress sought to ensure participating tribes the maximum flexibility possible to design and implement programs and services in a manner that the tribes deem is most responsive to the health care needs of their communities.

b. The Title V Compacting Process Protects Tribes By Limiting Grounds for Rejecting a Tribe's Compact Proposal to Four Specified Criteria

A critical part of the new approach under Title V was the compacting process, including a significant narrowing of the grounds that the Secretary could rely on to refuse to compact with tribes. The criteria for rejecting a tribe's "final offer" of a Compact and Funding Agreement under Title V at § 458aaa-6(c)(1)(A) are different than the criteria for declining a tribal contract proposal under Title I at § 450f(a)(2). These criteria are also not interchangeable, as the Grim Letter suggests by its heavy reliance on an ALJ decision that involved a Title I declination. Central to Title V is the requirement that the Secretary, when he decides to reject a final offer, "shall provide – a timely written notification to the Indian tribe that contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority" that his decision is based on one of the four criteria set out in 25 U.S.C. § 458aaa-6(c)(1)(A).

Congress' intent is clear on the face of the statute: if the Secretary rejects a final offer, the Secretary must specify one of the four listed factors as the grounds for rejection. Congress did not include any broad, catch-all language that would permit the Secretary to specify a factor for denial that does not fall within one of the four listed. The plain meaning of the statutory

language is clear and is therefore controlling.[5] The intent and meaning of this clear statutory provision is underscored by the legislative history and is echoed in IHS' own regulations.[6] Thus, if the IHS decision is based on a criterion that is not one of the four specified by the statute, the agency's action is inconsistent with the statute and with its own regulations, and it must be overturned.[7]

Moreover, the statutory language requires more than just a conclusory assertion that the Secretary is basing his decision on one of these four factors: the "timely written notification" provided by the Secretary must make a "*specific finding* that clearly demonstrates, or that is supported by a controlling legal authority" that one of the four criteria is present. 25 U.S.C. § 458aaa-6(c)(1)(A) (emphasis added). Congress included the "specific finding" requirement in the rejection criteria "to avoid rejections which merely state conclusory statements that offer no analysis and determination of facts supporting the rejection."[8] Moreover, to underscore that more than a mere conclusory assertion was required, Congress added the "clearly demonstrates" language to impose a high *evidentiary* standard on the Secretary at this stage of the process.[9] Thus, even before there is a legal challenge (in court or through the administrative appeals

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[5] *BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176, 183 (2004) (courts presume "'that [the] legislature says in a statute what it means and means in a statute what it says there'") (citations omitted).

[6] *See* H.R. Rep. No. 106-477, at 24 (November 17, 1999), *reprinted in* 2000 U.S.C.C.A.N. 573, 581 ("This provision describes the *only* circumstances under which the Secretary may reject an Indian tribe's final offer"); 42 C.F.R. §137.140 ("The Secretary may reject an Indian Tribe's final offer *for one of the following reasons*: [listing the statutory criteria]"); §137.141 ("The Secretary *must* reject a final offer by providing written notice to the Indian Tribe *based on the criteria in §137.140...*") (emphases added).

[7] *See, e.g., Shepard v. Merit Systems Protection Board*, 652 F.2d 1040, 1043 (D.C.Cir.1981).

[8] H.R. Rep. No. 106-477, at 24 (November 17, 1999), *reprinted in* 2000 U.S.C.C.A.N. 573, 582.

[9] *See* 140 Cong. Rec. S14677-78 (daily ed. Oct. 7, 1994) (statement of Sen. McCain); Sen. Rep. No. 103-374, at 6 (September 26, 1994); 61 Fed. Reg. 32497 (June 24, 1996) (discussion of evidentiary burden intended by use of the "clearly demonstrates" standard when Congress added this language to Title I).

process), a high evidentiary burden is placed on the Secretary to put forward in writing a specific finding that supports his reliance on one of the listed criteria.

Congress also added an additional layer of protection for tribes when there is an appeal or lawsuit brought to challenge a Secretarial rejection. Congress placed the burden of defending the legality of the decision on the Secretary (rather than putting the burden on the tribe to prove it was unlawful). Further, when defending his decision, the Secretary must meet the substantial "clear and convincing evidence" burden of proof to establish the validity of asserting the specific criterion asserted for rejecting the Tribe's final offer. 25 U.S.C. §458aaa-6(d), §458aaa-17. Nor is the Secretary's decision is entitled to any judicial deference.[10] Finally, Congress also provided that "[e]ach provision of this title and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe." 25 U.S.C. § 458aaa-11(f).

In sum, Congress imposed the following substantial and two-tiered burden on the Secretary in this case: the Secretary must (1) provide written notification that "contains a specific finding that clearly demonstrates" that one of the four criteria is present demonstrate; and (2) when defending the decision on appeal or in court, the Secretary must prove by "clear and convincing evidence" that his written notification contained such a specific finding clearly demonstrating the presence of the statutory criteria.

The focus for inquiry in this case is therefore the Grim Letter itself: the Secretary must demonstrate by clear and convincing evidence that this letter – which is the "written notification" required by the statute – contains a specific finding that clearly demonstrates that the Tribe cannot carry out the PFSAs in its Compact "in a manner that would not result in significant

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[10] *Shoshone-Bannock Tribe of the Fort Hall Reservation v. Shalala,* 988 F. Supp. 1306, 1313-1318(D. Or. 1997).

danger or risk to the public health." Under the ISDEAA, judgment against the Secretary is appropriate as a matter of law where, as here, the written notification itself fails to provide the statutorily mandated finding. Defendants may not, at this point, come forward with other evidence or other grounds to justify their decision.

IV. Defendants Fail to Make the Required Specific Finding that Clearly Demonstrates the Presence of any Title V Rejection Criterion

Summary judgment against Defendants is appropriate as a matter of law because the Grim Letter does not meet the legal standard set out in Title V of the ISDEAA. The Grim Letter cites to only one of the four statutory criteria, and then only in a conclusory manner. The Grim Letter fails to provide a "specific finding" that "clearly demonstrates" the presence of the statutory rejection criteria cited in the Letter. Moreover, under the facts of this case, it is highly implausible that Defendants could demonstrate ("clearly" or otherwise) that the Tribe's co-pay policy presents a significant risk or danger to the public health. For these reasons, summary judgment in favor of the Tribe is appropriate.

a. The Grim Letter Does Not Contain a "Specific Finding"

The Grim Letter does not contain the required specific finding clearly demonstrating that one of the four statutory rejection criteria is present. Rather, in what appears to be an afterthought to four and a half pages of legal argument not tied to any of the four statutory rejection criteria, the Grim Letter finally addresses one of those statutory criteria, stating in its entirety as follows:

> Furthermore, enforcement of Susanville's Pharmacy Policy could jeopardize health care services to the eligible AI/ANs who are otherwise eligible for health care services. Therefore, the proposed language is rejected on the grounds that Susanville "cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in a significant danger or risk to the public health."

Grim Letter at p. 6 (internal citations omitted).

This statement is not a "specific finding," since it neither refers nor cites to any evidence to support such a broad assertion.[11] The requirement of a "specific finding" means that the IHS must provide more than simply a summary conclusion.[12] Nor does the IHS' statement "clearly demonstrate" anything, thereby failing to meet the evidentiary standard intended by Congress to require the agency to do more than make summary statements.[13] Rather, the IHS has provided nothing more than a conclusory statement based on vague speculation ("could jeopardize") – directly at odds with what Congress intended in requiring a "specific finding that clearly demonstrates" presence of significant risk. 25 U.S.C. § 458aaa-6(c)(1)(A). On its face, this statement fails to meet the statutory requirement, and since this is the only part of the Grim Letter that references one of the four statutory criteria, the Grim Letter is a rejection that is in violation of the law and the Tribe is entitled to summary judgment in its favor.

Such speculation would not meet the "specific finding that clearly demonstrates" requirement even if Defendants had only to meet the normal, preponderance of the evidence standard of proof. Yet, in this case, Defendants have the higher burden of "demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer (or a provision thereof) made under subsection (b)." 25 U.S.C. §458aaa-6(d). "Clear and convincing evidence"

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[11] *See, e.g.,* Black's Law Dictionary (7th ed. 1999) (defining "specific" as "explicit" and "finding" as "a determination by a judge, jury or administrative agency of a fact supported by the evidence in the record").

[12] *See, e.g., Thomas v. County of Los Angeles,* 978 F.2d 504, 509 (9th Cir. 1992) (overturning preliminary injunction against county law enforcement because district court's "general conclusion that there is a 'direct link between departmental policy makers . . . and the injuries suffered by defendants'" was not supported by "specific findings"); *McLaughlin v. C.I.R.,* 832 F.2d 986, 988 (7th Cir. 1987) (reversing imposition of maximum sanction for bringing frivolous suit in Tax Court because court did not make sufficiently "specific findings" to support maximum sanction, even though "the record tends to support Tax Court's determination that McLaughlin's suit was groundless and likely to result in defeat"); *Ries v. Thiesse,* 61 F.3d 631, 632 (8th Cir. 1995) (reversing bankruptcy court decision because court's conclusion that bankruptcy debtor had abandoned certain property claimed under a state "homestead exemption" was not supported by "specific findings" showing connection between facts and statutory language).

[13] *See* 140 Cong. Rec. S14678 (daily ed. Oct. 7, 1994) (statement of Sen. McCain on amendment to Title I declination standard). *See* 140 Cong. Rec. H11142 (daily ed. Oct. 6, 1994) (statement of Rep. Richardson) (same).

requires demonstrating that the position put forward is "highly probable." 2 McCormick on Evid. § 340 (6th ed. 2006) (defining "clear and convincing" as "highly probable").[14]

Summary judgment is therefore appropriate where, as here, the party against whom summary judgment is sought "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (finding summary judgment appropriate against a plaintiff who alleged that her husband died as a result of asbestos exposure because plaintiff had not put forward any evidence that her husband had been exposed to defendants' product). As the *Celotex* decision noted, "[a] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." 477 U.S. at 323. Moreover, in a case like the one before the Court, where the nonmoving party has the burden of proof at trial, the *Celotex* "showing" need not even be made by putting forward evidence, but can be simply made through the *argument* that there is an "absence of evidence to support plaintiff's claim."[15] Further, in response, the non-moving party may not merely theorize a "plausible scenario" in support of its claims, but must come forward with evidence.[16] Here, of course, both the facts and the law demonstrate that there is an absence

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[14] *See also U.S. v. Nunez-Garcia*, 262 F. Supp.2d 1073, 1079 (C.D. Cal. 2003) ("clear, unequivocal, and convincing evidence . . . does not leave the issue in doubt.") (internal citations omitted). The Supreme Court has applied the "clear and convincing" standard "to protect particularly important individual interests in various cases." *Addington v. Texas*, 441 U.S. 418, 424 (1979) (involuntary commitment to a mental institution). *See, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Woodby v. INS*, 385 U.S. 276, 285 (1966) (deportation); *Chaunt v. U.S.*, 364 U.S. 350, 353 (1960) (denaturalization). Congress' choice of the "clear and convincing" standard demonstrates the importance Congress placed on preserving fundamental fairness in the compacting process between tribes and IHS, as rejection of a tribe's final offer would deprive it of a valuable statutory right under the ISDEAA.

[15] *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (upholding grant of summary judgment because plaintiff in civil rights action against law enforcement failed to adduce any evidence to support his fabrication of evidence claim).

[16] *Swanson v. Leggett & Platt, Inc.*, 154 F.3d 730, 733 (7th Cir. 1998). *Accord Al-Zubaidy v. TEK Indus., Inc.*, 406 F.3d 1030, 1036 (8th Cir. 2005) ("Evidence, not contentions, avoids summary judgment").

of evidence to support Defendants' assertion that their rejection of the Tribe's "final offer" was appropriately based on the "significant danger or risk to the public health" criterion.

Thus, in light of the Grim Letter's conclusory speculation on this point, there is no factual dispute. Defendants were required to make their specific findings known in the rejection of the final offer. They did not make any specific findings. Defendants may not, at this stage, come forward with evidence that purports to demonstrate that the Tribe's co-pay policy presents a significant risk or danger to the public health. Such evidence, if it existed, should have been referenced in the Grim Letter. There was no such reference. Defendants cannot now bring forward points or evidence not cited in the Grim Letter, since the Court "can uphold an agency's decision only on the basis of the reasoning in that decision."[17] An agency is required to defend its actions on the basis that they were originally taken, and it cannot rely on "some new basis that is developed in litigation to justify the decision."[18]

b. It is Factually Implausible for Defendants to Demonstrate that the Tribe's Program Presents a "Significant Risk"

Moreover, under these circumstances, there is simply no basis for IHS to meet its burden of demonstrating that imposing a fee for pharmacy services would in any way create a "significant danger or risk to the public health." When the non-moving party's claims are factually implausible, that party must come forward with more persuasive evidence than would

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[17] *De la Fuente v. F.D.I.C.*, 332 F.3d 1208, 1219 (9th Cir. 2003); *accord Northwest Envt'l Defense Center v. Bonneville Power Admin.*, 477 F.3d 668, 688 (9th Cir. 2007) (agency is bound by reasoning in its administrative decision and may not marshal "other reasons for its decision" before the court).

[18] *National Oil Seed Processors Ass'n v. Browner*, 924 F. Supp. 1193, 1204 (D.D.C. 1996), *citing Motor Vehicle Mfr. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 50 (1983).

otherwise be required.[19] Defendants' position that the Tribe's program presents a significant danger or risk to public health is factually implausible and is directly contradicted by case law defining the scope of "significant risk" in other contexts.

While the phrase "significant danger or risk" is not defined in ISDEAA, courts and other agencies have considered this same phrase in other contexts and have held that demonstrating "significant risk" requires evidence and a particularized inquiry that would demonstrate the presence of such risk or danger. For example, when courts apply the "significant risk" to public health test in the context of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, the analysis requires individualized inquiry and findings of fact. In *School Bd. of Nassau County v. Arline,* the Supreme Court held that in determining whether a teacher with tuberculosis was qualified to perform her job with this condition, the court must examine "significant risk" to public health by "individualized inquiry and [by making] appropriate findings of fact" based on "reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm").[20]

Following the *Arline* standard, the Ninth Circuit in *Chalk v. U.S. Dist. Court Cent. Dist. of California* ordered that a preliminary injunction be granted to a teacher who had been transferred out of the classroom because he was diagnosed with AIDS, noting that application of the "significant risk" standard "requires, in most cases, an individualized inquiry and appropriate

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[19] *U.S. ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995); *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1470 (9th Cir. 1987).

[20] 480 U.S. 273, 287-88 (1987).

findings of fact," and finding that the lower court had not properly determined that the teacher posed a "significant risk" to the public health.[21] Even in those circuits with a less strict standard than the Ninth and First Circuits concerning "significant risk" in this context, the courts still require "evidence" that the asserted risk "has a sound theoretical basis."[22]

The courts have rejected speculative or undemonstrated risk as not meeting the "significant risk" requirement in other contexts as well. In *Chemical Mfrs. Ass'n v. E.P.A.*, the D.C. Circuit rejected EPA's model for determining whether sufficient concentrations of a toxic chemical will be present to result in "significant risk" on the grounds that "the assumptions used in the model bear no rational relationship to the known properties" of the chemical.[23] In *Pearson v. Shalala*, the court rejected as "arbitrary and capricious" Food and Drug Administration's reliance on undefined criterion – "significant scientific agreement" – when the agency adopted certain labeling requirements on nutritional supplement labels to avoid what it identified as a "significant risk" to the public health, noting that the agency's refusal to define the criteria it is applying "is equivalent to simply saying no without explanation."[24]

The conclusory speculation in the Grim Letter regarding "significant risk" fails to meet the standard for demonstrating such risk in any context. The Grim Letter makes no particularized inquiry. It cites to no evidence in support of this speculation. It makes no finding of fact. Defendants have completely failed to make any showing to support the finding of significant risk or danger to the public health.

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[21] 840 F.2d 701, 705 (9th Cir. 1988). *Accord Abbott v. Bragdon*, 107 F.3d 934, 947-48 (1st Cir.1997) (affirming summary judgment in favor of HIV-positive plaintiff seeking dental treatment and rejecting as "speculative" the evidence presented by defendant concerning possible transmission of HIV to dentists), *aff'd in part, vacated and remanded in part*, 524 U.S. 624 (1998).

[22] *Onishea v. Hopper*, 171 F.3d 1289, 1297-99 (11th Cir. 1999) (discussing cases).

[23] 28 F.3d 1259, 1264 (D.C. Cir. 1994).

[24] 164 F.3d 650, 660 (D.C. Cir. 1999).

Further, and even more illustrative of the lack of substance of Defendants' position, the facts of this case cannot plausibly bear out any finding of such risk. The IHS knew as early as May 2006 that the Tribe was charging beneficiaries for pharmacy services, and took no steps to prevent the Tribe from doing so – nor did IHS even mention to the Tribe, when it did state concerns about the program, that it presented any danger or risk to the public health. Mackay Decl. at ¶¶11-12. IHS never mentioned to the Tribe any concern about risk or danger to public health until Dr. Grim's letter in January 2007. Moreover, the Tribe has stated that if it cannot carry out the pharmacy program in a fiscally sound manner that it will close the pharmacy. Mackay Decl. at ¶ 9. Closing the pharmacy is within the Tribe's discretion under ISDEAA Title V, because the Tribe does not receive any direct funding from IHS to carry out this program in its Agreement and because the Tribe has authority to redesign and consolidate programs, and to redirect funds "in any manner which the Indian tribe deems to be in the best interest of the health and welfare of the Indian community being served." 25 U.S.C. §458aaa-5(e). In reality, in this case the choice presented is clear: it is between a pharmacy program that provides low-cost pharmaceuticals in a continuum of care environment or no pharmacy program at all. Mackay Decl. at ¶ 19; Marsland Decl. at ¶ 12. Without such a direct services program available at LIHC, beneficiaries would have to go to the local drug store and pay full price for their medicines, which IHS' counsel conceded during the TRO hearing. IHS' speculation as to "significant risk" is thus based on an illusion, since there is neither infrastructure nor funding to provide such services in the manner that the Tribe has been able to – in a full service, lower-cost, continuum of care health services environment. *See* Marsland Decl. at ¶ 12. Given the "implausibility" for Defendants to argue that the existence of a pharmacy with a co-pay is more of a risk than no

pharmacy at all, particularly under their higher burden of proof, summary judgment is appropriate. *U.S. ex rel. Anderson v. N. Telecom, Inc.*, 52 F.3d at 815.

V. Defendants' Reliance on Other Grounds for Rejecting the Tribe's Offer Violates the Statute and Must Fail as a Matter of Law

Since the only statutory criteria for rejection referenced by the Grim Letter was the "significant danger or risk to the public health" factor, and since that reference is insufficient as a matter of law to meet Defendants' burden here, the Court should enter summary judgment for the Tribe. The four and a half pages of legal analysis in the Grim Letter, untethered to any of the statutory rejection criteria set out at 25 U.S.C. §458aaa-6(c)(1)(A), are simply inapposite and should not be considered by the Court. Defendants have essentially sought to create an extra-statutory fifth rejection criteria. Doing so is impermissible.[25] Moreover, the IHS' own regulations also require that a rejection be based on one of the four statutory criteria. 42 C.F.R. §137.140, 141. Since these other grounds for rejection are not based on one of the four listed criteria, the rejection is contrary to law. For these reasons alone, the Court should find the Grim Letter's rejection unlawful and grant summary judgment to the Tribe.

Moreover, even if reliance on grounds outside the four statutory criteria were appropriate – which it is not – the arguments put forward in the Grim Letter are themselves contrary to law and provide no foundation for the IHS to reject the Tribe's final proposal regarding pharmacy services. We now turn to the other points raised by the Grim Letter.

a. Congress Prohibited Only IHS from Charging Eligible Beneficiaries, Not Tribes

The IHS' arguments all derive from the same fundamentally flawed premise: that the statutory prohibition against *IHS* billing Indians, 25 U.S.C. § 458aaa-14(c), also prohibits tribes

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[25] *See* H.R. Rep. No. 106-477, at 24 (November 17, 1999), *reprinted in* 2000 U.S.C.C.A.N. 573, 581 ("This provision describes the *only* circumstances under which the Secretary may reject an Indian tribe's final offer").

from so billing. The language IHS relies upon reads, in its entirety, as follows: "**Obligations of the United States** – The Indian Health Service under this subchapter shall neither bill nor charge those Indians who may have the economic means to pay for service, nor *require* any Indian tribe to do so." *Id* (emphasis added). The plain language of this section includes no prohibition against tribes charging for services. If Congress intended such a prohibition, it could have stated so expressly, as it did with regard to the IHS. Or, it could have used the word "permit," "authorize," or "allow" instead of the word "require." Congress, therefore, has already spoken. Congress could have prohibited tribes from charging co-pays in this section involving such a prohibition, but did not. Since Congress did not prohibit them from charging, tribes retain the discretion to charge eligible beneficiaries.

Defendants may not rewrite statutory language based on what IHS thinks Congress should have done. Since Defendants' case ultimately rests on attempting to add a prohibition where the statute has none, it must fail. Defendants' situation here is remarkably similar to that found *Brown v. Gardner,* in which the Court rejected the Veterans Administration's attempt to add a "fault" requirement to a liability statute "[d]espite the absence from the statutory language of so much as a word about fault on the part of the VA."[26] As with the VA in *Brown,* Defendants here have asserted contradictory positions regarding §458aaa-14(c): they acknowledge – as they must – that the plain language of this section contains no prohibition against tribes charging beneficiaries, and yet also assert the untenable argument that this silence somehow unambiguously supports their assertion. Grim Letter at p. 3; Defendants' T.R.O. Opp. at p. 9; 17. Of course, the reason for such illogical contortions is that interpretation of any ambiguity in ISDEAA – as with the statute at issue in *Brown, see* 513 U.S. at 117-18 – requires

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[26] 513 U.S. 115, 117-18 (1994).

application of a canon of construction that does not favor the agency. 25 U.S.C. §§ 458aaa-11(f) ("any ambiguity shall be resolved in favor of the Indian tribe").

In an attempt to rationalize the purportedly unambiguous nature of this prohibition, Defendants have relied variously on several canons of statutory construction, canons whose very purpose is to assist in interpreting *ambiguous* statutory language.[27] Moreover, even there were any ambiguity necessitating canons of statutory construction, those canons undermine rather than support Defendants' position.

First, Defendants' interpretation violates the "preeminent canon of statutory interpretation": that courts should "'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'"[28] Defendants' interpretation attempts to rewrite § 458aaa-14(c) to add a prohibition against tribes that is not found in the language Congress used. Agencies, however, may not rewrite a statute so that it reads the way the agency believes Congress meant it to read.[29]

Second, courts "should avoid an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress."[30] When Congress enacted 25 U.S.C. § 458aaa-14(c) in 2000, it specifically added the final clause, "nor require any Indian tribe to do so."[31] Defendants' reading would render the last clause of 25 U.S.C. §

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[27] *See, e.g., Fortis, Inc. v. U.S.*, 420 F.Supp.2d 166, 181 (S.D.N.Y., 2004) (noting that the reenactment doctrine – the canon Defendants most heavily rely on here – "is best understood as a tool for interpreting a statute and understanding its legislative history if the statute is otherwise ambiguous").

[28] *BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176, 183 (2004) (citations omitted).

[29] *See, e.g., Brown*, 513 U.S. at 117-18 (refusing to add a "fault" liability requirement where such term is lacking in statute); *accord U.S. v. LSL Biotechnologies*, 379 F.3d 672, 679 (9th Cir. 2004) (refusing to adopt government's interpretation of the statute at issue because "[w]e are not willing to rewrite a statute under the pretense of interpreting it").

[30] *Beisler v. C.I.R.*, 814 F.2d 1304, 1307 (9th Cir. 1987).

[31] See language of prior enactments at note 4, *supra*.

458aaa-14(c) ("nor require any Indian tribe to do so") redundant, since under their interpretation the first clause alone would prohibit IHS from either permitting or requiring tribes to charge for services. Such a reading is improper.[32] The only reading that gives meaning to this clause is the plain meaning of the language used: that IHS alone is prohibited from charging beneficiaries, and that as a corollary the IHS cannot *require* tribes to charge for services.

Third, the fact that Congress does not state that tribes are prohibited from billing should not be construed to mean that Congress assumed that a prohibition on billing was therefore understood.[33] If Congress did not specifically include language to address this issue, such silence should not be imputed to mean something contrary or in addition to the plain language of the statute.

Fourth, Defendants' reliance on the doctrine of "longstanding agency practice" is misplaced. IHS has not adopted any regulation regarding the language in the Title V amendments, and their internal policy is therefore not entitled to deference.[34] Defendants' basis for this argument is an ALJ's decision in *Nizhoni Smiles v. IHS,* DAB No. CR450, Docket No. C-96-029 (Dec. 19, 1996), which interpreted language from a 1996 appropriations act in light of Title I, not the Title V amendments at issue here. Moreover, Defendants attempt to use this doctrine to obtain *Chevron*-type deference to the agency's interpretation, deference expressly pre-empted by the ISDEAA-mandated canons of construction, which require that "any ambiguity

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[32] *See Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307-08 (1961) (rejecting an interpretation of one subpart of statute where that interpretation would render the immediately following subpart "a mere redundancy").

[33] *See Zuber v. Allen*, 396 U.S. 168, 185 (1969) ("Legislative silence is a poor beacon to follow in discerning the proper statutory route"); *Brown,* 513 U.S. at 121 ("As we have recently made clear, congressional silence 'lacks persuasive significance' ") (citations omitted).

[34] *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

shall be resolved in favor of the Indian tribe" and that the Secretary must interpret the statute broadly to favor the inclusion of PSFAs.[35]

Finally, the canon of construction upon which Defendants most heavily rely – the "reenactment doctrine" set out in *Lorillard v. Pons*[36] – is inapposite. This doctrine is applicable only where Congress has re-enacted a statute "without change," 434 U.S. at 580, which is not the case here. In this case, Congress did not simply re-enact the statutory provision prohibiting IHS from charging beneficiaries, but rather, after a period of several years where no statutory language prohibiting the IHS to bill beneficiaries was in place, it *rewrote* the previous language and gave IHS a new legislative directive that prohibits it from *requiring* a tribe to charge eligible beneficiaries. *See* note 4, *supra.* Consequently, there can be no reenactment doctrine presumption based on *Nizhoni Smiles* because that case concerned a previous statute that is no longer law and has been replaced by 25 U.S.C. § 458aaa-14(c). Moreover, even if Congress should be presumed to have been aware of IHS' interpretation of the billing prohibition in *Nizhoni Smiles*, what that presumption indicates is Congress deliberately chose the exacting (and different) language in § 458aaa-14(c) to give tribes the discretion to charge while explicitly prohibiting the IHS from doing so or forcing tribes to do so.[37]

In fact, however, Defendants' reliance on the reenactment doctrine is incorrect because the criteria for applying this presumption – evidence of Congressional awareness of the agency interpretation it is purportedly adopting – are not present. *See Lorillard,* 434 U.S. at 580-81

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[35] 25 U.S.C. §§ 458aaa-11(f), 458aaa-11(a)(1).

[36] 434 U.S. 575, 580-83 (1978).

[37] *See U.S. v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985) (Congress is presumed to act with deliberation when drafting statutes); *Botany Mills v. U.S.*, 278 U.S. 282, 289 (1929) ("[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."). *See also CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001) (courts must assume, that when a statute is unambiguous, "Congress said what it meant and meant what it said.")

(judicial interpretations underlying the issue were "well established" and "Congress exhibited both a detailed knowledge of the [relevant] provisions and their judicial interpretation"); *Brown,* 513 U.S. at 121 (rejecting VA's reenactment doctrine argument in significant part because "the record of congressional discussion preceding reenactment makes no reference to the VA regulation, and there is no other evidence to suggest that Congress was even aware of the VA's interpretive position").

25 U.S.C. § 458aaa-14(c) does not contain the prohibition against tribal billing that Defendants try to read into it. The plain language of the statute is clear, and Congress' lack of a prohibition on tribal discretion to bill beneficiaries should not be read to include a hidden, unwritten meaning that Defendants "believe" represents Congress' true intent. *See* Defendants' T.R.O. Opp. at p. 8. Moreover, even if the language were ambiguous – which it is not – the applicable canons of construction would compel an interpretation recognizing the Tribe's flexibility and discretion to charge Indian beneficiaries for pharmacy services.

b. Other Arguments Put Forward By Defendants Also Must Fail

Defendants also point to other, inapplicable statutory provisions to make the argument – unsupported by ISDEAA – that IHS may reject a tribal program involving co-pays because the IHS cannot charge such co-pays. These arguments, too, are contrary to law and should be rejected by the Court.

The Grim Letter, for example, asserts that §§ 458aaa-4(b)(1) and (2) require a tribe to administer a program in the same *manner* that the IHS is authorized to administer the program. *See* Grim Letter at 2. Defendants' reliance on these provisions is misplaced. Section 458aaa-4(b)(1) authorizes tribes to plan, conduct, consolidate, administer and receive full tribal share funding for programs operated by the IHS, "without regard to the agency or office of [IHS]"

where such programs are performed. This provision makes no reference to the manner in which the program is operated. Similarly, the words "administered by the DHHS through the IHS and all local . . . functions so administered" in § 458aaa-4(b)(2) do not address the manner in which a program is carried out by IHS, but are used to distinguish between (1) IHS programs and (2) programs of *other* DHHS agencies "with respect to which Indian tribes or Indians are primary or significant beneficiaries" but which Congress did not intend to include in Title V.

Congress' intent is evident on this point because it simultaneously enacted a Title VI of the ISDEAA, along with Title V, in the Tribal Self-Governance Amendments of 2000 (set out at 25 U.S.C. § 450f note).[38] Title VI authorizes the Department of Health and Human Services (DHHS) to conduct a study to determine the feasibility of including programs administered by other DHHS agencies within the scope of the tribal self-governance authority.[39] The testimony from IHS witnesses before the Senate Indian Affairs Committee corroborates that the intent of § 458aaa-14(b)(2) was to limit the programs that tribes could compact to IHS programs, not the manner in which those programs were administered.[40] This section does not provide any authority for IHS to reject a tribal program based on the *manner* in which the tribe plans to carry out the program.

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[38] *See* Pub.L. No. 106-260 (Aug. 18, 2000), 114 Stat. 711, 731; *discussed in* Felix S. Cohen, *Cohen's Handbook of Federal Indian Law*, §22.02[3], at 1349-50 (2005 ed.).

[39] Title VI requires the Secretary to "conduct a study to determine the feasibility of a tribal self-governance demonstration project for appropriate programs, services, functions, and activities (or portions thereof) of the agency," Pub. L. No. 106-260, § 602(a), 114 Stat. 711, 731 (2000), and defines the term "agency" to mean "any agency or other organizational unit of the Department of Health and Human Services, *other than the Indian Health Service*." *Id.* at § 601(b)(1).

[40] *See* Hearing on S. 979 Before the Senate Comm. on Indian Affairs, 106th Congress, 1st Sess., at 93-96 (prepared statement of Michael Lincoln, Deputy Director, Indian Health Service) ("Last year, Title VI was added to H.R. 1833 to address the Administration's concerns about moving too quickly to include non-IHS PFSAs without first determining whether other Department of Health and Human Services (HHS) programs should be brought within the scope of this self-governance legislation").

Defendants have also suggested in prior filings and oral argument that the language in 25 U.S.C. § 458aaa-5(e) supports their rejection. This section, which is the broad authorization for tribes to redesign and consolidate compacted programs, states that a tribe's redesign or consolidation may not "have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law." Defendants suggest that the Tribe's co-pay policy in some manner is a denial of eligibility.

This argument should be rejected outright, because it was not part of the reasoning included in the agency's decision in the Grim Letter. *De la Fuente,* 332 F.3d at 1219. But Defendants' reliance on this language fails on substantive grounds as well. A co-pay policy is not an eligibility criterion. IHS suggests that the co-pay policy might deny otherwise eligible individuals access (without providing any proof of such an assertion); even if this were so, which it is not, the IHS' own regulations make clear that access is distinct from eligibility. *See* 42 C.F.R. §§136.11, 12; *accord Lincoln v. Vigil,* 508 U.S. 182, 198-199 (1993) (distinguishing between denial of access and of eligibility). But most damning to IHS' reliance on this language are the facts associated with the program at issue here. The IHS provides the Tribe with no specific funds for this direct pharmacy program and provides no pharmacy service in the Susanville area which eligible Indian beneficiaries could alternatively access. As IHS' counsel conceded during the TRO hearing, if the Tribe did not provide this program, beneficiaries would have to purchase drugs elsewhere at higher costs.

VI. The Tribe is Entitled to Injunctive and Mandamus Relief To Protect its Rights Under Title V

As a matter of equity, when a statute expressly provides for injunctive and mandamus relief, a plaintiff is entitled to such relief upon a showing that defendants seek to unlawfully

impose certain burdens in violation of the statute, with no further requirement to balance the traditional equities.[41] In ISDEAA, Congress has already balanced the equities and determined that an injunction should issue if Defendants are attempting to impose restrictions contrary to the Tribe's statutory rights.[42] In an ISDEAA case involving Title I, the U.S. District Court for New Mexico expressly held that where a tribal organization sought an injunction pursuant to 25 U.S.C. § 450m-1(a), "[t]he specific mandamus relief authorized by ISDA relieves [the plaintiff tribal organization] of proving the usual equitable elements including irreparable injury and absence of an adequate remedy at law."[43]

Thus, the Tribe is entitled to the injunctive and mandamus relief requested without a balancing of any equities because it is entitled to summary judgment on the merits as a matter of law.

Conclusion

Defendants' rejection of the Tribe's final proposal is inconsistent with both the letter and the spirit of Title V of the ISDEAA. Defendants' reliance on the "significant danger or risk to public health" rejection criterion must fail because it is so implausible based on the acknowledged facts of this case. Defendants' reliance on the prohibition against IHS charging beneficiaries likewise must fail, because that prohibition is not a prohibition on the Tribe

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[41] *See, e.g., Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 869 (9th Cir. 1983) (issuing preliminary injunction against imposition of tax, and finding that "[t]he standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief") (citing *Atchison, Topeka and Santa Fe Railway v. Lennen*, 640 F.2d 255, 259-61 (10th Cir.1981)). *Accord U.S. v. Estate Preservation Services*, 38 F.Supp.2d 846, 850 (E.D. Cal. 1998) (issuing preliminary injunction without balancing harms "[b]ecause [the statute in question] expressly authorizes the issuance of an injunction, the traditional requirements for equitable relief need not be satisfied"); *aff'd* 202 F.3d 1093, 1098 (9th Cir. 2000).

[42] *See, e.g., Burlington N. R.R. Co. v. Bair*, 957 F.2d 599, 601 (8th Cir.1992) ("[I]t is not the role of the courts to balance the equities between the parties" where Congress has already done so in applicable statute).

[43] *Crownpoint Institution of Technology v. Gale Norton*, Civ. No. 04-531 JP/DJS, Findings of Fact and Conclusions of Law (attached as Appendix A) at 26, ¶ 30.

exercising its discretion under Title V to "redesign or consolidate programs, services, functions and activities . . . in any manner in which the Indian tribe deems to be in the best interest of the health and welfare of the Indian community being served." The Tribe has made such a determination in establishing and implementing its pharmacy program, and the Tribe should be permitted to operate that program under the ISDEAA without the unlawful limitations Defendants seek to impose.

Dated: May 21, 2007:

/s/ Timothy Carr Seward
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