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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 PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION Hearing date:_____ Hearing time:_____ Judge _____

I. Introduction.

Plaintiff Susanville Indian Rancheria ("Tribe") seeks a temporary restraining order and preliminary injunction to permit the Tribe to continue to offer pharmacy services as part of its tribal health clinic, known as the Lassen Indian Health Center ("LIHC"). Defendants are preparing to take action that would require the Tribe's pharmacy to shut down on February 15,

2007. If this program were to be shut down, even temporarily, the Tribe, LIHC's patients, and its pharmacy employees will suffer irreparable harm. By contrast, a restraining order and injunction will have no impact on Defendants, who bear no administrative responsibility for the operation of this program and who are not required to provide any additional funds for the Tribe's pharmacy services.

In fact, Defendants agreed to one 45 day extension of the status quo while they conducted their own internal review of the Tribe's final offer, and so have acknowledged that there is no harm from preserving the status quo while consideration of the merits is pending. Issuing the restraining order and injunction will also benefit the public interest, in that it will ensure the continued delivery of low-cost pharmacy services to an eligible population in an area in which the existing health care delivery system is already overburdened. Finally, since Defendants' action is based on a misreading of the express language of the applicable statute the Tribe is likely to succeed on the merits. The requested relief is necessary to preserve the status quo.

II. Standard for Issuing Temporary Restraining Order and Preliminary Injunction

A temporary restraining order and preliminary injunction is appropriate where, as here, plaintiff will suffer immediate, irreparable harm in the absence of such relief and legal remedies would be inadequate to mitigate this harm.[1] Preliminary injunctive relief is available to a party who demonstrates either "'a combination of probable success and the possibility of irreparable injury', or 'that serious questions are raised and the balance of hardship tips sharply in its

[1] *See Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987).

favor.'"[2] These are not two separate tests, but the extremes of a "single continuum" in which the critical element "is the relative hardship to the parties."[3]

The Tribe seeks prohibitory interim relief to preserve the status quo – allowing the Tribe to continue to run its pharmacy – while litigation on the merits is pending.[4] Even if the interim relief requested here could be construed as mandatory, the Tribe's request meets the "heightened scrutiny" required where, as here, "the facts and law clearly favor the moving party."[5]

III. The Tribe's Health Care Services Center and Pharmacy Program

The Tribe is a federally-recognized Indian tribe that provides health care services to eligible Indians in its service area in rural Northeastern California. *See* Declaration of Jim Mackay (hereafter "Mackay Decl.") at ¶¶2 & 4. These services have been provided pursuant to a series of contracts with the Indian Health Service ("IHS") since 1986. Mackay Decl., ¶4. Those contracts were authorized pursuant to Title I of the Indian Self-Determination and Educational Assistance Act ("ISDEAA"), 25 U.S.C. §§ 450 *et seq.*, which authorizes tribes to contract with the IHS to take over the operation of IHS programs in order to "permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. § 450a(b).

The Tribe built LIHC to deliver comprehensive health care needs to eligible beneficiaries located in the Tribe's service area. Mackay Decl., ¶4; *see also* Declaration of Retired Assistant Surgeon General Robert Marsland (hereafter "Marsland Decl."), ¶¶4-5. LIHC is critical to meet

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[2] *Wilson v. Watt*, 703 F.2d 395, 399 (9th Cir. 1983) (internal citations omitted).
[3] *Benda v. Grand Lodge of Intern. Ass'n of Machinists and Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978) (internal citations omitted).
[4] *See, e.g., Stanley v. University of Southern California*, 13 F.3d 1313, 1320 (9th Cir. 1994) (injunction "prohibitory" where it "preserves the status quo"); *Johnson v. Kay*, 860 F.2d 529, 541 (2d Cir.1988) (interim relief not mandatory where it "actually only required the [Defendant] to do what it should have done earlier").
[5] *Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993).

the needs of an underserved population in an area in which the existing health care delivery system is already overburdened. Marsland Decl., ¶5. One vital program at LIHC has been the provision of direct pharmacy services at the LIHC facility, allowing beneficiaries to obtain necessary prescription drugs at low cost in a unique continuum of care service environment, integrated with the other health services offered by LIHC. Mackay Decl., ¶¶5-6 Marsland Decl., ¶¶7-8. The benefits of such a continuum of care environment – which involves close links and coordination between the providers and pharmacist – is detailed in the Marsland Decl., ¶8.

The IHS has never provided the tribe with any direct funds to operate its pharmacy program, and the Tribe has, as a result, had to cobble together funds from various sources to operate the program. Mackay Decl., ¶¶6-7, Marsland Decl., ¶9.[6] The Tribe worked on fully funding its pharmacy for several years, but initial attempts to do so resulted in significant out of pocket costs to the Tribe, which in turn diverted substantial funds from other health programs to support the pharmacy. Mackay Decl., ¶7, Marsland Decl., ¶9 After years of operating the pharmacy at a loss, the Tribe had to close the program between January 2004 and June 2005 because it was unable to operate in a financially sound manner. *Id.*

After receiving many complaints from patients, the Tribe started operating the pharmacy again in June 2005, but still at a substantial loss. Mackay Decl., ¶8 After much investigation and analysis, the Tribe finally determined that the only way it could operate the pharmacy in a fiscally sound manner would be to charge a small co-pay and the acquisition cost of the drugs to those patients who could afford it (indigent and elderly patients are exempt). Mackay Decl., ¶ 9, Marsland Decl., ¶10. The Tribe provided a copy of its pharmacy policy to the IHS and implemented this policy in July 2006. Mackay Decl., ¶ 9.

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[6] In fact, the Tribe receives only about one-half the funds required from the IHS to carry out its health care programs. *See* Marsland Decl., ¶9.

In the spring of 2006 the Tribe and IHS began negotiating a self-governance Compact and Funding Agreement ("FA") pursuant to Title V of the ISDEAA, 25 U.S.C. §§ 458aaa (1) – (18). Mackay Decl., ¶10-11. The self-governance program gives tribes more control and autonomy over their health care programs. One key benefit of self-governance agreements is that they authorize tribes to unilaterally redesign programs and reallocate funds among the various programs authorized under a compact. *See* 25 U.S.C. § 458aaa-5(e). Among the programs that the Tribe requested be included in its CY 2007 FA is the pharmacy, which has been included for many years in the Tribe's Title I agreements. Mackay Decl., ¶10**.**

Even though IHS provides LIHC no direct funds for the pharmacy program, including it in the self-governance agreements results in significant advantages: (1) LIHC (and, ultimately, the beneficiaries whom it serves) can access lower cost pharmaceuticals through the Health Resources and Services Administration ("HRSA"); (2) the Tribe's pharmacy program receives coverage under the Federal Tort Claims Act; and (3) the Tribe can unilaterally reallocate other funds transferred by the IHS in the agreements to this program and redesign the program to better reflect needs. Mackay Decl., ¶6 Marsland Decl., ¶8. While nearly all provisions of the Compact and FA were ultimately negotiated to the satisfaction of the Tribe and IHS, on January 29, 2007, IHS formally communicated to the Tribe that it would not approve the pharmacy program because the program involves a co-pay feature.[7] Mackay Decl., ¶12.

The Tribe's current Annual Funding Agreement ("AFA"), negotiated under ISDEAA's Title I, expires on February 15, 2007. Mackay Decl., ¶¶11, 12. Defendants have indicated that they will take action to exclude pharmacy services from the programs to be authorized in the

[7] IHS' letter also rejected some language proposed by the Tribe for the Compact that sought to clarify that the provisions in the compact supercede the provisions in the FA. The Tribe is not appealing that portion of IHS' rejection. *See* IHS "Response to Final Offer" Letter, January 29, 2007 (hereinafter "Grim Letter"), attached as Exhibit D to Mackay Declaration, at p. 6.

Tribe's newly negotiated self governance Compact and FA unless the Tribe agrees to language that *prohibits* the Tribe from billing beneficiaries. Mackay Decl., ¶11. To allow the Tribe to continue to provide these critical services past February 15, 2007, Defendants must be restrained and enjoined from excluding the pharmacy services program from the programs authorized under the Tribe's FA and from demanding language in the FA that prohibits the Tribe from billing beneficiaries. Mackay Decl., ¶¶12, 18.

IV. The Balance of Harms Tips Sharply in the Tribe's Favor

a. The Tribe Will Suffer Immediate, Irreparable Harm if Defendants are Permitted to Exclude the Pharmacy Program

After February 15, 2007, unless pharmacy services are included in a self-governance Compact and FA that allows the co-pay feature, the Tribe will have to close the doors on its pharmacy (since without the co-pay feature the pharmacy is not financially viable). Marsland Decl., ¶13, Mackay Decl., ¶11. Losing the ability to provide its health care services in a unique, continuum of care environment, which presently includes the pharmacy, constitutes irreparable harm to the Tribe.[8] Closure of the pharmacy, even if only temporary, would also have significant and irreparable consequences on beneficiaries served by LIHC, including: loss of access to the low-cost pharmaceuticals that the Tribe procures through HRSA; loss of the ability to obtain pharmaceuticals in the same facility as the physicians who prescribe those medicines, accompanied by a loss of convenience, increased stress, and loss of assurance of effective and safe therapies provided by coordinated care. Mackay Decl., ¶14, Marsland Decl., ¶12-13.

LIHC and its beneficiaries know well the impacts of closing the pharmacy, based on their experience during the closure from May 2004 to June 2005, during which time LIHC received

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[8] *See, e.g., Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 908-09 (2nd Cir. 1990) (loss of ability to provide a unique product or service constitutes irreparable harm to goodwill); *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1186 (2nd Cir. 1995) ("constructive termination" of business franchise constitutes irreparable harm).

numerous complaints. Mackay Decl., ¶8. The adverse impacts that LIHC's beneficiaries will suffer is illustrated in the attached Declaration of Patricia LaMarr (hereinafter "LaMarr Decl."). The harm suffered by individuals like Ms. LaMarr cannot be measured solely in financial terms and constitutes the kind of irreparable harm that can only be remedied by injunctive relief. LaMarr Decl. , ¶7; Marsland Decl., ¶¶13, 17.[9]

Closure of the pharmacy program would also require the Tribe to lay off its pharmacy staff, who have specialized training and expertise. Mackay Decl., ¶15, Marsland Decl., ¶14. Losing these staff will result in significant harm to both those individuals and the Tribe. It would be difficult for these staff to find comparable work in a rural area like Susanville and possible that they would leave the area to find comparable work. Mackay Decl., ¶15 If the Tribe prevailed on the merits, it would be required to recruit, hire, and train new staff to fill these positions, and the Tribe's past experience demonstrates that filling such positions is difficult and may take many months, during which time the Tribe and its beneficiaries will continue to suffer. Mackay Decl., ¶15, Marsland Decl., ¶14**.** Money damages alone cannot remedy such harm.

b. Defendants will Suffer No Harm from Interim Relief

In contrast to the substantial and irreparable injury that the Tribe would suffer, Defendants would not suffer any injury as a result of a temporary restraining order or an injunction. The balance of harm thus tips sharply in the Tribe's favor. Including the pharmacy program in the Tribe's CY 2007 FA and allowing the Tribe to continue to bill beneficiaries will not require Defendants to provide any additional funding, since the total funding amount has

[9] *See, e.g., E.E.O.C. v. Chrysler Corp.*, 546 F.Supp. 54, 69-70 (E.D.Mich.1982), *aff'd*, 733 F.2d 1183 (6th Cir.1984) (finding that emotional distress and reduced sense of well-being constitute irreparable harm for injunction purposes).

already been negotiated and fixed. Marsland Decl., ¶15, Mackay Decl., ¶ 16[10] Further, inclusion of the pharmacy program will not result in any administrative burden on Defendants, since under ISDEAA's Title V, Defendants' oversight functions are limited, and do not involve any direct administration of the Tribal programs. Marsland Decl., ¶15, Marsland Decl., ¶16.

Any claim by Defendants that such an injunction would result in harm is belied by the fact that IHS has known since July 2006 about the LIHC pharmacy co-pay policy.. Mackay Decl., ¶9 . If indeed such a program would "result in significant danger or risk to the public health" – as Defendants' legal justification for their threatened actions states[11] – Defendants would have had authority to step in and reassume the Tribe's program.[12] Not only did Defendants continue to allow the Tribe to operate its pharmacy program with its co-pay policy in place, on December 31, 2006 they also agreed to an extension of the Tribe's Title I contract for 45 days. Mackay Decl., ¶¶ 11 &16. Defendants are also aware that many other tribes offer pharmacy services with a co-pay feature and Defendants have not chosen to take over any of those programs either. Mackay Decl., ¶ 17**.** In fact, Mr. Marsland notes (at ¶16):

> [T]ribal programs billing beneficiaries for services that are set forth in ISDEAA Contracts and Compacts under Titles I and V has for many years been a wide spread practice that, to the best of my knowledge, IHS personnel have been aware of for a long time. Before I retired in 1993, I was aware of this practice while I worked at IHS Headquarters and others around me knew about this practice as well.

Defendants cannot demonstrate harm from the operation of the Tribe's co-pay pharmaceutical program, for the simple reason that the alternative is not a free pharmaceutical program, but rather no direct service pharmaceutical program at all. In the letter notifying the

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[10] *See Wilson v. Watt*, 703 F.2d at 399 (balance of hardships tips "sharply" in favor of Alaska Natives for whom a General Assistance program was being terminated by Federal defendants, since the funds to be used were already appropriated and were unspent).

[11] *See* "Grim Letter"at p. 6, citing language from 25 U.S.C. § 458aaa-6(c)(1)(A)(iii).

[12] *See* 25 U.S.C. § 450m (authorizing IHS to reassume control of a program where there is a "violation of the rights or endangerment of the health, safety, or welfare of any persons").

Tribe that it intends to exclude the pharmacy program, IHS asserts that the Tribe's pharmacy program "will negatively impact numerous eligible [American Indians and Alaska Natives] and other beneficiaries by creating barriers to access to IHS-funded health services." Grim Letter. p. 5. Yet the IHS fails to explain how this co-pay program creates a "barrier" to access when the Tribe would not be able (nor obligated) to provide direct pharmacy services without the co-pay. It borders on the ridiculous to suggest that the Tribe's beneficiaries will somehow be better off having to trek across town to a non-integrated pharmacy to pay higher prices for their medicine than having to pay the co-pay for lower price medicine on the same site where the medication was prescribed.

c. Enjoining Defendants Will Also Serve the Public Interest

The Tribe's health care program is located in Northeastern California, which, as with most rural areas across the U.S., faces substantial obstacles in the provision of health care services. Marsland Decl., ¶17. The loss of any direct service program in the area shifts the burden to portions of that delivery system that are already overwhelmed. *Id.* The loss of an integrated direct service pharmacy also means a higher likelihood of problems from improper use or prescription of medication, which could result in other health problems as well as emergency room visits, further burdening the existing health care delivery system. *Id.* These problems and burdens have a higher likelihood of being avoided if the pharmacy services are offered in coordination with the direct care. *Id.* The requested injunctive relief would therefore serve the public interest.

V. The Tribe is Likely to Succeed on the Merits

In the Grim Letter the IHS wrongly argues that it is required to reject Susanville's final offer pursuant to 25 U.S.C. §458aaa-4(b)(2) because "a pharmacy program provided only upon receipt of a co-payment is not a program carried out under Federal law" and that the IHS cannot,

as a matter of law, contract under the ISDEAA with Tribes for such programs. *See* Grim Letter at 2. This position is fundamentally flawed because it is based on a misreading of the statute, confusing the *program* with the *manner* in which the program is operated. Pharmacy programs for Indian beneficiaries are programs carried out under federal law. While, under the statue, the IHS is expressly prohibited from charging for those services when carrying out such a program, Indian tribes are not so prohibited. *See* 25 U.S.C. §458aaa-14(c). When carrying out such a program under an ISDEAA agreement, tribes have the discretion to determine whether to charge beneficiaries for services. The IHS's position is wrong and the Tribe is likely to succeed on the merits.

As a preliminary matter, it is important to note that under Title V of the ISDEAA, the Secretary has the burden of demonstrating by "clear and convincing evidence" that the grounds for rejecting a tribe's final offer are valid and based on the final offer rejection criteria. 25 U.S.C. § 458aaa-6(d). The four criteria listed in § 458aaa-6(c)(1)(A) are the only grounds on which the Secretary may lawfully reject a tribe's final offer. *See* § 458aaa-6(c)(1)(A)(i)-(iv). This provision requires IHS to identify the criteria and make a "specific finding." 25 U.S.C. § 458aaa-6(c). 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."[13] These requirements are intended to implement Congress' overall policy in ISDEAA, and in particular in Title V, to limit federal authority over tribes and enhance tribes' self-governing autonomy in designing, implementing, and operating their programs.

[13] H.R. Rep. No. 106-477, at 24 (1999), *reprinted in* 2000 U.S.C.C.A.N. 573, 582 (copy attached at Appendix A).

As the basis for rejecting the Tribe's offer to include pharmacy services in its proposed FA, the IHS relies on the criterion at §458aaa-6(c)(1)(A)(iii), arguing that enforcement of Susanville's Pharmacy Policy "could jeopardize health care services to the eligible AI/ANs who are otherwise eligible for health care services" and thus Susanville could not "'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.'" Grim Letter, p. 6. Defendants apparently chose this criterion for rejecting inclusion of the Tribe's pharmacy services program because it is the only one that allows the IHS to reject a final offer because of the "manner" in which a tribe will conduct the program, which is what IHS objects to here. There is, however, no factual basis for IHS to argue that imposing a fee for pharmacy services would in any way create a "significant danger or risk to the public health." In fact, the exact contrary is true: without such a fee there would be no LIHC pharmacy program. Mackay Decl., ¶ 13-14. The Tribe's pharmacy does not pose a "significant danger or risk to the public health;" rather, it is the loss of such a program that would create potential public health problems. Marsland Decl., ¶17. In this case IHS has done exactly what Congress sought to prevent: offering conclusory statements that provide no determination of facts supporting the rejection.

IHS's legal analysis concerning the meaning of 25 U.S.C. §458aaa-14(c) (which prohibits IHS from charging beneficiaries) is equally flawed. Prior to 1984, legal authority existed for the IHS to charge Indians who had the ability to pay for such services. 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. [14]

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.[15]

This language was included in appropriations acts for FY 1995 and 1996, but was not repeated in any subsequent appropriations act.

In 2000, Congress once again addressed the issue of IHS's ability to charge beneficiaries in amendments to the ISDEAA when the Title V self-governance program was added. The new language reads:

> 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).

By the plain meaning of this language, Congress sought to prohibit the IHS from charging for services to IHS beneficiaries and from requiring an Indian tribe that provides such services to charge for the services. This language restricts federal authority but does not prohibit tribes from charging beneficiaries, nor does it prevent the IHS from allowing tribes to do so. Consequently, a tribe providing such services under an ISDEAA agreement is lawfully able to charge beneficiaries even though IHS cannot require it to do so.

Even if this language was ambiguous, which it is not, Congress also made it a statutory requirement of the ISDEAA that "Each provision of [the ISDEAA] and each provision of a

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[14] Pub. L. 98-473 (Oct. 12, 1984), 98 Stat. 1837 (copy attached at Appendix B).
[15] Pub. L. 103-138(Nov. 11, 1993), 107 Stat 1379 (copy attached at Appendix C).

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).[16] The ISDEAA further directs that:

> (a) Except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive orders, and regulations 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).

These statutory directives are clear: any ambiguities in § 458aaa-14(c) must be interpreted in a manner that facilitates inclusion of programs in Tribes' self-governance agreements and achievement of the Tribe's goal of providing pharmacy services to the beneficiaries in its service area. The IHS' rejection letter violates the spirit and letter of these provisions.

The IHS relies on *Nizhoni Smiles, Inc. v. IHS*, DAB No. CR450, Docket No. C96-029 (Dec. 19, 1996), to support its position that Title V prohibits the IHS from entering into an ISDEAA agreement with a tribe that intends to charge a fee for services that the IHS was required to provide free of charge. *Nizhoni Smiles* interpreted the FY 1996 appropriation language discussed above, language that has not been in effect since FY 1997. Relying on the case IHS argues that 25 U.S.C. §458aaa-14(c) is "similar to the previous prohibition [25 U.S.C. §

[16] This specific directive is analogous to the well-settled canons of construction requiring the Court to resolve such an ambiguity in favor of tribes. *See, e.g., Choate v. Trapp*, 224 U.S. 665, 675 (1912) ("The construction [of statutes], instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of [the Indians]."); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997).

1681] and continues to prohibit the IHS from billing eligible AI/ANs for health services provided under the ISDEAA." Grim Letter, p. 4.

IHS also relies on *Lorillard v. Pons*, 434 U.S. 575 (1978) to support its proposition that "Congress is aware of an administrative or judicial interpretation of a statute and that it intends to adopt that interpretation when it adopts a new law that incorporates sections of a prior law." Grim Letter, p. 5. In fact, the Supreme Court in *Pons* held that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation *when it re-enacts a statute without change* . . . ." 434 U.S. at 580 (emphasis added).

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 *amended* the previous language and gave IHS a new legislative directive that prohibits it from *requiring* a tribe to charge eligible beneficiaries. Consequently, the *Nizhoni Smiles* case is distinguishable because it concerned a previous statute that is no longer law and has been replaced by § 458aaa-14(c). Furthermore, IHS's reliance on the *Pons* case is misplaced because Congress did not reenact the previous statute but consciously altered its policy several times. When it enacted the new language, Congress was presumed to be aware of IHS' interpretation of the billing prohibition in *Nizhoni Smiles* and 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.[17] The reality is that if Congress wanted to prohibit tribes from charging beneficiaries

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[17] *See, e.g.,United States v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985) (Congress is presumed to act with deliberation when drafting statutes); *Botany Mills v. United States*, 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), *quoting United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (courts must assume, that when a statute is unambiguous, "Congress said what it meant and meant what it said.")

for care provided under an ISDEAA agreement, Congress could have (and would have) included such a prohibition in the statute. No such prohibition can be found anywhere in the ISDEAA.

VI. Conclusion

The attached Declarations of Jim Mackay, Retired Assistant Surgeon General Robert Marsland, and Patricia LaMarr demonstrate that the Tribe will suffer substantial and irreparable harm if the status quo is not preserved. By contrast, issuing a temporary restraining order and preliminary injunction will not result in any harm or burden on Defendants. The balance of harms thus tips sharply in the Tribe's favor. Further, preserving the status quo serves the public interest. Finally, the Tribe is likely to prevail on the merits, since Defendants' position is based on a misreading of the applicable statute, and the burden is on Defendants to demonstrate by "clear and convincing evidence" that their position is supported by the facts and the law.

Respectfully submitted this __ day of _____, 2007:

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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. _____ APPENDIX A TO PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Appendix A.

Excerpt from H.R. Rep. No. 106-477 (1999).

106TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT 106 477

TRIBAL SELF-GOVERNANCE AMENDMENTS OF 1999

NOVEMBER 17, 1999.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. YOUNG of Alaska, from the Committee on Resources, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 1167]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 1167) to amend the Indian Self-Determination and Education Assistance Act to provide for further self-governance by Indian tribes, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Tribal Self-Governance Amendments of 1999".

SEC. 2. FINDINGS.

Congress finds that—

(1) the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations;

(2) the United States recognizes a special government-to-government relationship with Indian tribes, including the right of the Indian tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian tribes;

(3) although progress has been made, the Federal bureaucracy, with its centralized rules and regulations, has eroded tribal self-governance and dominates tribal affairs;

(4) the Tribal Self-Governance Demonstration Project, established under title III of the Indian Self-Determination and Education Assistance Act (25 U.S.C.

records to enable HHS to meet its minimum legal record keeping requirements under the Federal Records Act.

(e) Redesign and Consolidation. An Indian tribe may redesign or consolidate programs, functions, services, or activities, (or portions thereof) and reallocate or redirect funds in any way the Indian tribe considers to be in the best interest of the Indian community being served.

(f) Retrocession. An Indian tribe may retrocede fully or partially back to the Secretary any program, function, service, or activity (or portion thereof) included in a Compact or funding agreement. A retrocession request becomes effective within the time frame specified in the Compact or funding agreement, one year from the date the request was made, the date the funding agreement expires, or any date mutually agreed to by the parties, whichever occurs first.

(g) Withdrawal. An Indian tribe that participates in self-governance through an inter-tribal consortium or tribal organization can withdraw from the consortium or organization. The withdrawal becomes effective within the timeframe set out in the tribe's authorizing resolution. If a timeframe is not specified, withdrawal becomes effective one year from the submission of the request or on the date the funding agreement expires, whichever occurs first. An alternative date can be agreed to by the parties, including the Secretary.

When an Indian tribe withdraws from an inter-tribal consortium or tribal organization and wishes to enter into a Title I contract or Title V agreement on its own, it is entitled to receive its share of funds supporting the program, function, service, or activity, (or portion thereof) that it will carry out under its new status. The funds must be removed from the funding agreement of the participating organization or inter-tribal consortium and included in the withdrawing tribe's agreement or contract. If the withdrawing tribe is to receive services directly from the Secretary, the tribe's share of funds must be removed from the funding agreement of the participating organization or inter-tribal consortium and retained by the Secretary to provide services. Finally, an Indian tribe that chooses to terminate its participation in the self-governance program may, at its option, carry out programs, functions, services, or activities, (or portions thereof) in a Title I contractor agreement or self-governance funding agreement and retain its mature contractor status.

(h) Nonduplication. This section provides that a tribe operating under a self-governance Compact may not contract under Title I agreement (a "638 contract") for the same programs.

Section 507. Provisions relating to the Secretary

This section sets out mandatory and non-mandatory provisions relating to the Secretary's obligations.

(a) Mandatory Provisions.

(1) Health Status Reports. To the extent that the data is not otherwise available to the Secretary, Compacts and funding agreements must include a provision requiring the Indian tribe to report data on health status and service delivery. The Secretary is to use this data in her annual reports to Congress. The Secretary is required to provide funding to the Indian tribe to compile such data. Reporting requirements can only impose minimal burdens on the

Indian tribe and may only be imposed if they are contained in regulations developed under negotiated rulemaking.

(2) Reassumption. Compacts and funding agreements must include a provision authorizing the Secretary to reassume a program, function, service, or activity, (or portion thereof) if the Secretary makes a finding of imminent endangerment of the public health caused by the Indian tribe's failure to carry out the Compact or funding agreement of gross mismanagement that causes a significant reduction in available funding. The Secretary is required to provide the Indian tribe with notice of a finding. The Indian tribe may take action to correct the problem identified in the notice. The Secretary has the burden at the hearing of demonstrating by clear and convincing evidence the validity of the grounds for reassumption. In cases where the Secretary finds imminent substantial and irreparable endangerment of the public health caused by the tribe's failure to carry out the Compact or funding agreement, the Secretary may immediately reassume the program but is required to provide the tribe with a hearing on the record within ten days after reassumption.

(b) Final Offer. If the parties cannot agree on the terms of a Compact or funding agreement, the Indian tribe may submit a final offer to the Secretary. The Secretary has 45 days to determine if the offer will be accepted or rejected. The 45 days can be extended by the Indian tribe. If the Secretary takes no action the offer is deemed accepted by the Secretary.

(c) Rejection of Final Offers. This provision describes the only circumstances under which the Secretary may reject an Indian tribe's final offer. A rejection requires written notice to the Indian tribe within 45 days of receipt with specific findings that clearly demonstrate or are supported by controlling legal authority that: (1) the amount of funds proposed exceeds the funding level that the Indian tribe is entitled to; (2) the program, function, service, or activity (or portion thereof) that is the subject of the offer is an inherent federal function that only can be carried out by the Secretary; (3) the applicant is not eligible to participate in self-governance; or (4) the Indian tribe cannot carry out the program, function, service or activity, (or portion thereof) without a significant danger or risk to the public health. The Committee believes the fourth provision appropriately balances the Secretary's trust responsibility to assure the delivery of health care services to Indian beneficiaries, with the equally important goal of fostering maximum tribal self-determination in the administration of health care programs transferred under Title V. The Committee has included the requirement of a "specific finding" is included to avoid rejections which merely state conclusory statements that offer no analysis and determination of facts supporting the rejection.

The Secretary must also offer assistance to the Indian tribe to overcome the stated objections, and must provide the Indian tribe with an opportunity to appeal the rejection and have a hearing on the record. In any hearing the Indian tribe has the right to engage in full discovery. The Indian tribe also has the option to proceed directly to federal district court under Section 110 the Indian Self-Determination and Education Assistance Act.

The Secretary may only reject those portions of a "final offer" that are supported by the findings and must agree to all severable portions of a "final offer" which do not justify a rejection. By entering into a partial Compact or funding agreement the Indian tribe does not waive its right to appeal the Secretary's decision for the rejected portions of the offer.

(d) Burden of Proof. The Secretary has the burden of demonstrating by clear and convincing evidence the validity of a rejection of a final offer in any hearing, appeal or civil action. A decision relating to an appeal within HHS is considered a final agency action if it was made by an administrative judge or by an official of HHS whose position is at a higher level than the level of the departmental agency in which the decision that is the subject of the appeal was made.

(e) Good Faith. The Secretary is required to negotiate in good faith and carry out his discretion under Title V in a manner that maximizes the implementation of self-governance.

(f) Savings. Any savings in the Department's administrative costs that result from the transfer of programs, functions, services, or activities, (or portions thereof) to Indian tribes in self-governance agreements that are not otherwise transferred to Indian tribes under Title V must be made available to Indian tribes for inclusion in their Compacts or funding agreements. We have consistently indicated that self governance should achieve reductions in federal bureaucracy and create resultant cost savings. This subsection makes clear that such savings are for the benefit of the Indian tribes. Savings are not to be utilized for other agency purposes, but rather are to be provided as additional funds or services to all tribes, inter-tribal consortia, and tribal organizations in a fair and equitable manner.

(g) Trust Responsibility. The Secretary is prohibited from waiving, modifying or diminishing the trust responsibilities or other responsibilities as reflected in treaties, executive orders or other laws and court decisions of the United States to Indian tribes and individual Indians. The Committee reaffirms that the protection of the federal trust responsibility to Indian tribes and individuals is a key element of self-governance. The ultimate and legal responsibility for the management and preservation of trust resources resides with the United States as Trustee. The Committee believes that health care is a trust resource consistent with federal court decisions. This subsection continues the practice of permitting substantial tribal management of its trust resources provided that tribal activities do not replace the trustee's specific legal responsibilities. Section 506(a)(2) (reassumption) with its concept of imminent endangerment of the public health provides guidance in defining the Secretary's trust obligation in the health context.

(h) Decisionmaker. Final agency action is a decision by either an official from the Department at any higher organizational level than the initial decision maker or an administrative law judge. Subparagraph (h)(2) is included to assure that the persons deciding an administrative appeal are not the same individuals who made the initial decision to reject a tribe's "final offer."

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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. _____ APPENDIX B TO PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Appendix B.

Excerpt from Pub. L. 98-473 (Oct. 12, 1984).

PL 98-473, October 12, 1984, 98 Stat 1837
(Publication page references are not available for this document.)

UNITED STATES PUBLIC LAWS
98th Congress - Second Session
Convening January 23, 1984

DATA SUPPLIED BY THE U.S. DEPARTMENT OF JUSTICE. (SEE SCOPE)
Additions and Deletions are not identified in this document.
PL 98-473 (HJRes 648)
October 12, 1984

Joint Resolution making continuing appropriations for the fiscal year 1985, and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of the Government for the fiscal year 1985, and for other purposes, namely:

SEC. 101. (a) Such sums as may be necessary for programs, or activities provided for in the Agriculture, Rural Development and Related Agencies Appropriation Act, 1985 (H.R. 5743), to the extent and in the manner provided for in the conference report and joint explanatory statement of the Committee of Conference (House Report Numbered 98-1071), filed in the House of Representatives on September 25, 1984, as if such Act had been enacted into law.

(b) Such sums as may be necessary for programs, projects, or activities provided for in the District of Columbia Appropriation Act, 1985 (H.R. 5899), to the extent and in the manner provided for in the conference report and joint explanatory statement of the Committee of Conference (House Report Numbered 98-1088), filed in the House of Representatives on September 26, 1984, as if such Act had been enacted into law.

(c) Such amounts as may be necessary for programs, projects or activities provided for in the Department of the Interior and Agencies Appropriations Act, 1985, at a rate of operations and to the extent and in the manner provided as follow, to be effective as if it had been enacted into law as the regular appropriation Act:

An Act making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1985, and for other purposes.

TITLE I -- DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
MANAGEMENT OF LANDS AND RESOURCES

For expenses necessary for protection, use, improvement, development, disposal, cadastral surveying, classification, and performance of other functions, including maintenance of facilities, as authorized by law, in the management of lands and their resources under the jurisdiction of the Bureau of Land Management, including the general administration of the Bureau of Land Management, $393,849,000.

CONSTRUCTION AND ACCESS

For acquisition of lands and interests herein, and construction of buildings, recreation facilities, roads, trails, and appurtenant facilities, $1,228,000, to remain available until expended.

PL 98-473, October 12, 1984, 98 Stat 1837
(Publication page references are not available for this document.)

INDIAN HEALTH FACILITIES

For construction, major repair, improvement, and equipment of health and related auxiliary facilities, including quarters for personnel; preparation of plans, specifications, and drawings; acquisition of sites, purchase and erection of portable buildings, purchases of trailers and for provision of domestic and community sanitation facilities for Indians, as authorized by section 7 of the Act of August 5, 1954 (42 U.S.C. 2004a), the Indian Self-Determination Act "25 USC 450 note" and the Indian Health Care Improvement Act, "25 USC 1601 note" $62,892,000, to remain available until expended.

ADMINISTRATIVE PROVISIONS, HEALTH SERVICES ADMINISTRATION

Appropriations in this Act to the Health Services Administration available for salaries and expenses, shall be available for services as authorized by 5 U.S.C. 3109 but at rates not to exceed the per diem equivalent to the rate for GS-18, and for uniforms or allowances therefor as authorized by law (5 U.S.C. 5901-5902), and for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of those functions or activities: Provided, That none of the funds appropriated under this Act to the Indian Health Service shall be available for the initial lease of permanent structures without advance provision therefor in appropriations Acts: Provided further, That non-Indian patients may be extended health care at all Indian Health Service facilities, if such care can be extended without impairing the ability of the Indian Health Service to fulfill its responsibility to provide health care to Indians served by such facilities and subject to such reasonable charges as the Secretary of Health and Human Services shall prescribe, the proceeds of which shall be deposited in the fund established by sections 401 and 402 of the Indian Health Care Improvement Act: "43 USC 1395f, 1395n, 1395qq and note, 1396j and note, 1396d" Provided further, That funds appropriated to the Indian Health Service in this Act, except those used for administrative and program direction purposes, shall not be subject to limitations directed at curtailing Federal travel and transportation: Provided further, "25 USC 1681" That with 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: Provided further, "25 USC 1682" That hereafter the Indian Health Service may seek subrogation of claims including but not limited to auto accident claims, including no-fault claims, personal injury, disease, or disability claims, and workman's compensation claims except as otherwise limited by the fourth proviso of this section: Provided further, "25 USC 1635" That hereafter, nothwithstanding any other law, an Indian tribe may acquire and expend funds, other than funds appropriated to the Service, for major renovation and modernization, including planning and design for such renovation and modernization of Service facilities, including facilities operated pursuant to contract under the Indian Self-Determination and Education Assistance Act (Public Law 93-638), "25 USC 450 note" subject to the following conditions.

(1) the implementation of such project shall not require or obligate the Service to provide any additional staff or equipment;

(2) the project shall be subject to the approval of the Area Director of the Service area office involved;

(3) the tribe shall have full authority to administer the project, but shall do so in accordance with applicable rules and regulations of the Secretary governing construction or renovation of Service health facilities; and

(4) no project of renovation or modernization shall be authorized herein if it would require the diversion of Service funds from meeting the needs of projects having a higher priority on the current health facilities priority system.

DEPARTMENT OF EDUCATION
OFFICE OF ELEMENTARY AND SECONDARY EDUCATION
INDIAN EDUCATION

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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. _____ APPENDIX C TO PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Appendix C.

Excerpt from Pub. L. 103-138 (1993).

UNITED STATES PUBLIC LAWS
103rd Congress - First Session
Convening January 5, 1993

Additions and Deletions are not identified in this document.
PL 103-138 (HR 2520)
November 11, 1993
DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES APPROPRIATIONS ACT, 1994

An Act making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1994, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior and related agencies for the fiscal year ending September 30, 1994, and for other purposes, namely:

TITLE I--DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
MANAGEMENT OF LANDS AND RESOURCES

For expenses necessary for protection, use, improvement, development, disposal, cadastral surveying, classification, and performance of other functions, including maintenance of facilities, as authorized by law, in the management of lands and their resources under the jurisdiction of the Bureau of Land Management, including the general administration of the Bureau of Land Management, $599,860,000, of which the following amounts shall remain available until expended: $1,462,000 to be derived from the special receipt account established by section 4 of the Land and Water Conservation Fund Act of 1965, as amended (16 U.S.C. 460l-6a(i)), and $69,418,000 for the Automated Land and Mineral Record System Project: Provided, That appropriations herein made shall not be available for the destruction of healthy, unadopted, wild horses and burros in the care of the Bureau of Land Management or its contractors; and in addition, $15,300,000 for Mining Law Administration program operations to remain available through September 30, 1994, to be reduced by amounts collected by the Bureau of Land Management and credited to this appropriation from annual mining claim fees so as to result in a final fiscal year 1994 appropriation estimated at not more than $599,860,000: Provided further, That in addition to funds otherwise available, not to exceed $5,000,000 from annual mining claim fees shall be credited to this account for the costs of administering the mining claim fee program, and shall remain available until expended.

FIRE PROTECTION

For necessary expenses for fire management, emergency rehabilitation, fire presuppression and preparedness, and other ***1380** related emergency actions by the Department of the Interior, $117,143,000, to remain available until expended.

EMERGENCY DEPARTMENT OF THE INTERIOR FIREFIGHTING FUND

For emergency rehabilitation, severity presuppression, and wildfire suppression activities of the Department of the Interior, $116,674,000, to remain available until expended: Provided, That such funds also are available for repayment of advances to other appropriation accounts from which funds were previously transferred for such purposes: Provided further, That notwithstanding any other provision of law, persons hired pursuant to 43 U.S.C. 1469 may be

tract medical care shall remain available for obligation until September 30, 1995: Provided further, That of the funds provided, not less than $11,526,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act, as amended: Provided further, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: Provided further, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall be available for two fiscal years after the fiscal year in which they were collected, for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): Provided further, That of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act: Provided further, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 1995: Provided further, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act, as amended, shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended.

INDIAN HEALTH FACILITIES

For construction, repair, maintenance, improvement, and equipment of health and related auxiliary facilities, including quarters for personnel; preparation of plans, specifications, and drawings; acquisition of sites, purchase and erection of modular buildings, and purchases of trailers; and for provision of domestic and community ***1409** sanitation facilities for Indians, as authorized by section 7 of the Act of August 5, 1954 (42 U.S.C. 2004a), the Indian Self-Determination Act and the Indian Health Care Improvement Act, and for expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles III and XXVII and section 208 of the Public Health Service Act with respect to environmental health and facilities support activities of the Indian Health Service, $296,982,000, to remain available until expended: Provided, That notwithstanding any other provision of law, funds appropriated for the planning, design, construction or renovation of health facilities for the benefit of an Indian tribe or tribes may be used to purchase land for sites to construct, improve, or enlarge health or related facilities: Provided further, That of the funds provided herein, $300,000 is available to initiate planning and design for the replacement facility at Winnebago, Nebraska upon approval of a program justification document by the Assistant Secretary for Health.

ADMINISTRATIVE PROVISIONS, INDIAN HEALTH SERVICE

<< 25 USCA § 1681 >>

Appropriations in this Act to the Indian Health Service shall be available for services as authorized by 5 U.S.C. 3109 but at rates not to exceed the per diem rate equivalent to the maximum rate payable for senior-level positions under 5 U.S.C. 5376; hire of passenger motor vehicles and aircraft; purchase of medical equipment; purchase of reprints; purchase, renovation and erection of modular buildings and renovation of existing facilities; payments for telephone service in private residences in the field, when authorized under regulations approved by the Secretary; and for uniforms or allowances therefor as authorized by law (5 U.S.C. 5901-5902); and for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of those functions or activities: Provided, That in accordance with the provisions of the Indian Health Care Improvement Act, non-Indian patients may be extended health care at all tribally administered or Indian Health Service facilities, subject to charges, and the proceeds along with funds recovered under the Federal Medical Care Recovery Act (42 U.S.C. 2651-53) shall be credited to the account of the facility providing the service and shall be available without fiscal year limitation: Provided further, That notwithstanding any other law or regulation, funds transferred from the Department of Housing and Urban Development to the Indian Health Service shall be administered under Public Law 86-121 (the Indian Sanitation Facilities Act) and

Public Law 93-638, as amended: Provided further, That funds appropriated to the Indian Health Service in this Act, except those used for administrative and program direction purposes, shall not be subject to limitations directed at curtailing Federal travel and transportation: Provided further, That the 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: Provided further, That, notwithstanding any other provision of law, funds previously or herein made available to a tribe or tribal organization through a contract, grant or agreement authorized by Title I of the Indian Self-Determination ***1410** and Education Assistance Act of 1975 (88 Stat. 2203; 25 U.S.C. 450), may be deobligated and reobligated to a self-governance funding agreement under Title III of the Indian Self-Determination and Education Assistance Act of 1975 and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: Provided further, That none of the funds made available to the Indian Health Service in this Act shall be used to implement the final rule published in the Federal Register on September 16, 1987, by the Department of Health and Human Services, relating to eligibility for the health care services of the Indian Health Service until the Indian Health Service has submitted a budget request reflecting the increased costs associated with the proposed final rule, and such request has been included in an appropriations Act and enacted into law: Provided further, That funds made available in this Act are to be apportioned to the Indian Health Service as appropriated in this Act, and accounted for in the appropriation structure set forth in this Act: Provided further, That the appropriation structure for the Indian Health Service may not be altered without the advance approval of the House and Senate Committees on Appropriations.

DEPARTMENT OF EDUCATION
OFFICE OF ELEMENTARY AND SECONDARY EDUCATION
INDIAN EDUCATION

For necessary expenses to carry out, to the extent not otherwise provided, the Indian Education Act of 1988, $83,500,000, of which $60,304,000 shall be for subpart 1, $19,161,000 shall be for subparts 2 and 3, and $200,000 shall be for collection and analyses of data on Indian education: Provided, That $1,735,000 available pursuant to section 5323 of the Act shall remain available for obligation until September 30, 1995.

OTHER RELATED AGENCIES
OFFICE OF NAVAJO AND HOPI INDIAN RELOCATION
SALARIES AND EXPENSES

For necessary expenses of the Office of Navajo and Hopi Indian Relocation as authorized by Public Law 93-531, $26,936,000, to remain available until expended: Provided, That funds provided in this or any other appropriations Act are to be used to relocate eligible individuals and groups including evictees from District 6, Hopi-partitioned lands residents, those in significantly substandard housing, and all others certified as eligible and not included in the preceding categories: Provided further, That none of the funds contained in this or any other Act may be used by the Office of Navajo and Hopi Indian Relocation to evict any single Navajo or Navajo family who, as of November 30, 1985, was physically domiciled on the lands partitioned to the Hopi Tribe unless a new or replacement home is provided for such household: Provided further, That no relocatee will be provided with more than one new or replacement home: Provided further, That the Office shall relocate any certified eligible relocatees who have selected and received an approved homesite on the Navajo reservation or selected ***1411** a replacement residence off the Navajo reservation or on the land acquired pursuant to 25 U.S.C. 640d-10.

INSTITUTE OF AMERICAN INDIAN AND ALASKA NATIVE CULTURE AND ARTS DEVELOPMENT
PAYMENT TO THE INSTITUTE

For payment to the Institute of American Indian and Alaska Native Culture and Arts Development, as authorized by Public Law 99-498, as amended (20 U.S.C. 56, Part A), $12,563,000, of which not to exceed $350,000 for Federal matching contributions, to remain available until expended, shall be paid to the Institute endowment fund: Provided,