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THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Gila River Indian Community, a federally-recognized Indian tribe, Plaintiff, vs. Sylvia Matthews Burwell, Secretary, United States Department of Health and Human Service, and Yvette Roubideaux, Acting Director, United States Indian Health Service, Defendants.	Case No. CV-14-00943-DGC **MEMORANDUM OF LAW IN OPPOSITION TO PARTIAL MOTION TO DISMISS**

I. INTRODUCTION

Defendants' partial motion to dismiss rests on several flawed premises. Defendants seek to dismiss the Gila River Indian Community's (the "Community") entire breach of trust/breach of fiduciary duty claim, yet Defendants only address one of the Community's two theories of liability for that claim. Defendants advance no argument that the Community has not properly alleged a breach of Defendants' duty to provide information and technical assistance to the Community, and this alone defeats

Defendants' motion. Even with respect to the theory of liability for breach of fiduciary duty that Defendants do address, Defendants wrongly assume that federal statutes must state verbatim the fiduciary duties imposed on the United States, and that the trust obligation at issue must relate to management of Indian property. With respect to Defendants' motion to dismiss the so-called "claim for reimbursement," The Community has brought no such particular claim. Rather, the Community sought reimbursement as part of its Final Offer under the Indian Self-Determination and Education Assistance Act ("ISDEAA"). In this action, the Community seeks approval of that Final Offer, which would result in the requested reimbursement. While this Court has not addressed this approach, the U.S. District Court for the District of Columbia has specifically approved it. For these reasons, and the others discussed below, the Community respectfully requests that the Court deny Defendants' motion.

II. FACTUAL BACKGROUND

A. Pursuant to Its Trust Duties, IHS Provides Health Care to American Indians Directly or Under Contracts With Tribes.

In the United States, government-sponsored health care is the exception to the rule. One such exception relates to health care obligations owed to certain American Indians and Alaska Natives. *See* Am. Compl. ¶ 14. The reason an exception to the rule is made for American Indians and Alaska Natives is the unique relationship between the indigenous people of North America and the United States government. Am. Compl. ¶ 18; 25 U.S.C. § 1602. From a historical perspective, this relationship is one of colonizer and colonized. As a result of the United States' colonial ambitions, American courts -- beginning with opinions rendered by Chief Justice John Marshall -- have imposed a trust duty on the United States with respect to Indian tribes and Indian people. *United States v. Mitchell ("Mitchell II")*, 463 U.S. 206, 225-26 (1983) (collecting Supreme Court precedent regarding existence of trust obligations including *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831) (Marshall, C.J.)). Pursuant at least in part to this trust duty, the United States has historically provided health care to American Indian people because of their status as Indians. Am. Compl. ¶ 18.

In 1955, the Indian Health Services ("IHS") was formed and tasked with overseeing the United States' provision of health care to American Indians. Am. Compl. ¶ 18. Initially, IHS operated health care facilities directly, a practice which continues in some circumstances today. *See* Am. Compl. ¶ 26. In 1975, Congress enacted the ISDEAA, expressly allowing Indian tribes to enter into contracts with IHS to assume control over certain functions and programs. ISDEAA, Pub. L. No. 93-638, 88 Stat. 2203 (1975). Under the ISDEAA, a tribe can enter into a self-governance contract with the federal government for a tribal organization to "plan, conduct, and administer programs." 25 U.S.C. § 450f(a)(1). In 2000, the ISDEAA was amended to allow Indian tribes broader flexibility in the assumption of health care functions through a self-governance "compact" with IHS. Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, Sec. 504, 114 Stat. 715 (codified at 25 U.S.C. § 458aaa-3). Self-governance compacts govern the general terms of the relationship between Indian tribes and IHS, but funding is provided through annual funding agreements. 25 U.S.C. §§ 450j(c)(2); 458aaa-4.

The ISDEAA includes a detailed scheme of statutory requirements for self-governance compacts. For example, the amount of funding an Indian tribe receives from the federal government to operate a program *must be at least* the amount that the appropriate Secretary[1] would have provided for the operation of the program. 25 U.S.C. § 450j-1(a). Moreover, with respect to health care, the ISDEAA requires that an annual funding agreement provide, as determined by the Indian tribe, "full" tribal share funding for all programs, services, functions, and activities ("PSFAs") that are being carried out by the tribe. 25 U.S.C. § 458aaa-4(b)(1). Compacts and funding agreements may be awarded to an inter-tribal consortium, and any one tribe may withdraw its share of any PSFA included in a compact or funding agreement. 25 U.S.C. § 458aaa-5(g). This

[1] Some federal programs are provided by the Department of the Interior whereas others, such as the Contract Health Services ("CHS") program at issue in this litigation, are provided by the Department of Health and Human Services.

allocation of funding between tribes in an inter-tribal consortium is a term that must be included in a funding agreement at an Indian tribe's election. 25 U.S.C. § 458aaa-5(a). Furthermore, any savings for IHS that are created by a tribe carrying out PSFAs under a compact must be passed on to that tribe. 25 U.S.C. § 458aaa-6(f).

The ISDEAA specifically discusses the trust duties owed by the United States to American Indians. In the Act, Congress specifically states that the ISDEAA does not authorize or require "the termination of any existing trust responsibility of the United States with respect to the Indian people." 25 U.S.C. § 450n. Another federal statute, the Indian Health Care Improvement Act ("IHCIA"), also explicitly mentions the trust duties owed by the United States to Indians. The IHCIA's congressional findings note that federal "health services to . . . Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people." 25 U.S.C. § 1601(1). In the IHCIA, Congress also listed a series of declarations regarding Indian health care policy, and noted that such policy was "in fulfillment of [the United States'] special trust responsibilities and legal obligations to Indians." 25 U.S.C. § 1602. In fact, IHS and Defendant Roubideaux have repeatedly acknowledged and confirmed the solemn trust and fiduciary responsibilities IHS owes to Indian tribes by repeatedly trumpeting these duties in numerous public statements and on the IHS website. *See* Am. Compl. ¶ 29.

B. The Community Contracts With IHS to Provide Health Care to Gila River and Ak-Chin Members.

In 1995, the Community and IHS entered into a self-governance contract, under which the Community assumed operation of an IHS health care facility in Sacaton, Arizona. Am. Compl. ¶¶ 30, 32. Sacaton is within the borders of the Gila River Indian Reservation. Am. Compl. ¶ 31. The Gila River Indian Reservation is located on lands in both Pinal and Maricopa Counties. *Id.* Sacaton is in Pinal County. *Id.* Also in Pinal and Maricopa Counties is the Ak-Chin Indian Community ("Ak-Chin") Reservation. *Id.* The Ak-Chin Reservation is adjacent to the Gila River Indian Reservation to the south. *Id.* In 2002, the Community and IHS superseded the 1995 contract with a self-governance

compact (the "Compact"). Am. Compl. ¶ 47. The Compact states that any PSFAs that are the responsibility of the Community will be identified in funding agreements. Am. Compl. ¶ 48. Since 1995, each of the annual funding agreements between IHS and the Community has specifically stated that funds are provided to serve the Community and Ak-Chin. Am. Compl. ¶ 43. Beginning in about 1998, funding agreements have also stated that in addition to the Community and Ak-Chin, funds are provided to serve "other eligible Indians" or "other eligible persons" within the Community contract health service "catchment area." Am. Compl. ¶¶ 43-44.

The reference in the funding agreements to "eligibility" is significant because IHS has different eligibility requirements for different types of services. Contract health services are services provided by health care providers outside of an IHS-funded program. Am. Compl. ¶ 26. When a patient needs treatment that cannot be provided directly by IHS or a tribally-operated program, that patient is referred to an outside provider and CHS funds are used to pay that provider. *Id.* CHS funding is separate and distinct from the Community's other resources under the annual funding agreements with IHS. Am. Compl. ¶ 43. Unlike other programs, CHS eligibility under IHS regulations is dependent on membership in a specific tribe. To be eligible, one must reside within a "contract health service delivery area" ("CHSDA"). 42 C.F.R. § 136.23(a)(1)-(2). A CHSDA is defined as "the geographic area within which contract health services will be made available by the IHS *to members of an identified Indian community* who reside in the area." 42 C.F.R. § 136.21(d) (emphasis added). The CHSDA for the Community is Maricopa and Pinal Counties. *See* Notice of Geographic Composition of the Contract Health Service Delivery Areas (CHSDA), 72 Fed. Reg. 34262 (June 21, 2007). The regulations further state that for persons residing within a CHSDA but not on their tribe's reservation to be eligible, those persons must be "members of the tribe or tribes located on that reservation or for which the reservation was established" or "[m]aintain close economic and social ties with that tribe or tribes." 42 C.F.R. § 136.23(a)(2)(i)-(ii). Therefore, under the plain language of the funding agreements, the Community is

obligated to provide CHS care, and to expend CHS funds, for the Community and Ak-Chin members, and may provide care for others that both live within the Maricopa and Pinal Counties *and* maintain close economic and social ties with the Community.

C. The Community Provides Unfunded CHS Care to Tohono O'odham Members.

Although only Gila River and Ak-Chin are expressly mentioned in the Community's annual funding agreements with IHS, the Community has historically also provided direct care to members of the Tohono O'odham Nation and members of other federally recognized tribes following the IHS's "open door policy." Am. Compl. ¶ 34. The Tohono O'odham Reservation is not adjacent to the Community or Ak-Chin, and instead is located further south in Pima County with small portions of the Reservation in the southernmost parts of Pinal and Maricopa Counties. Am. Compl. ¶ 31. Tohono O'odham does not operate its own health care facilities; instead, members receive care from the IHS's Tucson Office (and Tucson receives funding for that care). *See* Am. Compl. ¶¶ 40-41. Some Tohono O'odham members receive direct care from the Community and have also received CHS care paid for by the Community. Am. Compl. ¶ 34. Tohono O'odham members previously received CHS from the Community's health care facilities when they were operated by IHS. Am. Compl. ¶ 34. However, IHS transferred funds from the Tucson Office to the Phoenix Office to pay for this care – transfers which were not incorporated into the Community's annual funding agreements. Am. Compl. ¶ 36. The CHSDA for Tohono O'odham is Pima, Pinal, and Maricopa Counties. Am. Compl. ¶ 37. Therefore, under the IHS's eligibility regulations, Tohono O'odham members living in Pinal and Maricopa Counties are not eligible to receive CHS from the Community, but are eligible to receive CHS from the Tucson Office.

Even though Tohono O'odham members are not eligible for CHS from the Community, when the Community inquired about funding for Tohono O'odham members, IHS assured the Community funding was included in the annual funding agreements. Am. Compl. ¶ 36. Eventually, as CHS funding became increasingly scarce and IHS began rationing care, the Community analyzed the costs of providing services to

Tohono O'odham members and realized it needed an additional $963,114 in Fiscal Year 2014 to continue providing CHS to Tohono O'odham members. Am. Compl. ¶¶ 51, 53. In order to continue providing care to Tohono O'odham members, in 2013 the Community negotiated for an additional $500,000 to partially fund CHS for Tohono O'odham members residing in certain communities in Pinal and Maricopa Counties. Am. Compl. ¶ 52. Prior to this amendment to the Fiscal Year 2013 Funding Agreement, Tohono O'odham members have *never* been identified in any funding agreement between the Community and IHS as being eligible for CHS funds. Am. Compl. ¶ 39.

D. The Community Seeks Recurring Funding From IHS for CHS Care to Tohono O'odham Members but Is Denied.

Also in 2013, IHS and the Community began negotiating a funding agreement for fiscal year 2014. Based on IHS's insistence that funding for CHS care for Tohono O'odham members was already included in the Community's funding, the Community asked IHS to provide evidence of what proportion of funds under the proposed Fiscal Year 2014 Funding Agreement was allocated to CHS care for Tohono O'odham members. Am. Compl. ¶ 54. IHS refused to provide any information whatsoever. *Id.* As a result, the Community submitted a "Final Offer" to IHS pursuant to 25 U.S.C. § 458aaa-6(b). Am. Compl. ¶ 56. The Final Offer sought an amendment to the Funding Agreement that specifically addressed the Tohono O'odham allocation issue. Am. Compl. ¶56, Ex. A. The amendment would have required IHS to provide supporting data or evidence demonstrating what portion of funds under the 2014 Funding Agreement was attributable to provision of CHS care to Tohono O'odham members in the Community's CHSDA and requiring itemization of such funding in the future. *Id.* The amendment would have required the same data for prior years' funding agreements (fiscal years 1996-2013). *Id.* In the event that no such data or evidence could be provided, the amendment would have required IHS to include an additional $963,114 of recurring funding for the provision of CHS care to Tohono O'odham members living in certain Pinal and Maricopa County communities. *Id.* In the event IHS could provide no data or evidence to back its claims that funding for CHS to Tohono O'odham members had been

historically included in the Community's funding (or in the event that the data showed the Community spent more money on CHS for Tohono O'odham members than had been provided if such data did exist), the amendment also would have required that the Community be reimbursed for excess amounts expended for CHS for Tohono O'odham members. *Id.*

E. IHS Refuses to Provide Any Technical Assistance or Information As Required by Statute and Its Own Regulations.

As soon as the Community submitted its Final Offer, under IHS's own regulations, Defendants were required to "share all relevant information" with, and provide technical assistance to, the Community. Am. Compl. ¶ 57 (citing 42 C.F.R. § 137.144). Once again, IHS shared no information with the Tribe. *See* Am. Compl. ¶ 62. On January 7, 2014, IHS rejected the Community's Final Offer. Am. Compl. ¶ 58, Ex. B. Upon rejecting a Final Offer, IHS was required by federal law to provide "technical assistance" to the Community and to share all relevant information with the Community. 25 U.S.C. § 458aaa-6(c)(1)(B); 42 C.F.R. § 137.144. IHS did neither. *See* Am. Compl. ¶¶ 62-63. IHS did neither despite the fact that the Community specifically asked IHS to provide information evidencing the allocation of funding for CHS care between Tohono O'odham and Ak-Chin and the Community. Am. Compl. ¶ 59. IHS did neither despite the fact that discovery in this case has revealed that IHS in fact possessed information relevant to the issues posed by the Final Offer and deliberately chose to withhold that information from the Community. Am. Compl. ¶¶ 62-63. The Community then requested an "informal conference" on its Final Offer and requests for information pursuant to 42 C.F.R. § 137.421 and 25 U.S.C. § 458aaa-6; the conference was held on March 6, 2014 and not surprisingly, IHS rejected the Community's claims on March 14, 2014. Am. Compl. ¶¶ 60-61. This litigation ensued.

III. STANDARD OF REVIEW

Defendants' motion is brought under both Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). A Rule 12(b)(1) motion challenges the jurisdiction of the Court and may be "facial" or "factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039

(9th Cir. 2004). Defendants indicate they are mounting a facial challenge with respect to the breach of fiduciary duty claim, and a factual challenge with respect to the "reimbursement claim." Defs.' Mot. Dismiss at 6. In a facial attack, the standard is the same as under Rule 12(b)(6). *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Under Rule 12(b)(6), to "survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In a factual attack, the court may review evidence beyond the complaint and need not presume the truthfulness of the allegations. *Safe Air for Everyone*, 373 F.3d at 1039. However, a court may not engage in jurisdictional fact-finding when the jurisdictional issues and substantive merits are "intertwined." *Id.*

IV. ARGUMENT

A. The Community Has Stated a Breach of Fiduciary Duty Claim.

It is indisputable that, as a general matter, "a trust relationship exists between the United States and Indian Nations." *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 921 (9th Cir. 2008). To state a cognizable claim for breach of trust or breach of fiduciary duty, "a Tribe must identify a substantive source of law that establishes a specific fiduciary or other duties, and allege that the Government has failed to faithfully perform those duties." *United States v. Navajo Nation ("Navajo I")*, 537 U.S. 488, 506 (2003). Once a substantive source of law is identified, the "undisputed existence of a general trust relationship between the United States and the Indian people can reinforce the conclusion that the relevant statute or regulation imposes fiduciary duties." *Id.* (internal quotations marks omitted). Moreover, once a substantive source of law is identified, courts may look to the common law to define the contours of the fiduciary duties owed by the United States. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2325 (2011) (citing *United States v. Navajo Nation ("Navajo II")*, 556 U.S. 287, 301 (2009)). As discussed below, there are at least two reasons why the Court should deny Defendants' motion to dismiss the breach of fiduciary duty claim.

1. Defendants Owed Specific Statutory and Regulatory Duties to the Community to Provide Information and Technical Assistance.

Defendants' motion to dismiss the Community's breach of trust/breach of fiduciary duty claim focuses narrowly on a single clause in one paragraph of the Amended Complaint. Specifically, Defendants urge dismissal of the Community's entire breach of fiduciary duty claim based on their argument that the allegation that IHS has a duty to provide "full funding and adequate resources, process, and structure for the Community's tribally operated health programs and facilities" is not actionable. Defs.' Mot. Dismiss at 7 (citing Am. Compl. ¶ 81). Paragraph 81 and its allegations of breach of fiduciary duty, however, go beyond this one statement. Paragraph 81 alleges that:

> The ISDEAA, 25 U.S.C. § 450n, 25 U.S.C. § 458aaa-4, 25 U.S.C. § 458aaa-5, 25 U.S.C. § 458aaa-6(c)(1)(B), 25 U.S.C. § 458aaa-6(f), and its regulations, 42 CFR § 137.144; the IHCIA, 25 U.S.C. §§ 1601, 1602; and the ISDEAA Compacts between IHS and the Community impose specific fiduciary duties on the United States, IHS, and HHS to provide full funding and adequate resources, processes, and structure for the Community's tribally operated health programs and facilities, and *to provide information related thereto upon request by the Community*. The existence of these specific fiduciary duties is buttressed by the general trust relationship between the United States and the Community as evidenced by IHS's and Dr. Roubideaux repeated mention of such a relationship.

(emphasis added). Thus, the Community's breach of fiduciary duty claim includes the claim that Defendants breached their duty to provide information related to tribally operated health programs and facilities – a claim that Defendants fail to even address in their motion to dismiss.

This particular duty is supported by the specific substantive sources of law identified by the Community in its Amended Complaint. ISDEAA regulations expressly and unequivocally require IHS to share with the Community any information relevant to its Final Offer. 42 C.F.R. § 137.144. The ISDEAA and its regulations also expressly and unequivocally require IHS to offer the Community technical assistance to avoid rejection, or overcome rejection, of its Final Offer. 25 U.S.C. § 458aaa-6(c)(1)(B); 42 C.F.R. § 137.144. The ISDEAA also requires IHS to allocate resources among tribes participating in an inter-tribal consortium so that they may withdraw and include that allocation as a

term of a funding agreement at a tribe's request. 25 U.S.C. § 458aaa-5(a), (g). The 2002 Compact also requires IHS to provide relevant information and "information reasonably needed" to the Community. Am. Comp. ¶ 47.

Based on the foregoing alone, the Community has identified substantive sources of law that establish specific fiduciary duties on the part of IHS. Moreover, the Community has alleged breach of those duties. Specifically, the Community has alleged that the IHS possessed relevant information which it could have used to provide technical assistance to the Community to understand how funding in its annual funding agreements was calculated, but IHS chose to provide neither relevant information nor technical assistance to the Community. Am. Compl. ¶¶ 62-63. The Community has also alleged that it requested a statement of allocation of the funding from IHS between tribal populations (particularly because Ak-Chin has expressed interest in withdrawing from the Community's Compact), and has been denied. Am. Compl. ¶¶ 54, 62, 65. Based on these allegations alone, the Community has stated a claim.

Moreover, because the Community was able to identify substantive sources of law imposing specific duties on IHS, the general trust relationship (which is specifically mentioned in the ISDEAA, 25 U.S.C. § 450n, and the IHCIA, 25 U.S.C. §§ 1601, 1602, which Defendants do not deny exists, and which Defendants have repeatedly invoked, Am. Comp. ¶ 29), "reinforces" the conclusion that 25 U.S.C. § 458aaa-6(c)(1)(B) and 42 C.F.R. § 137.144 impose fiduciary duties. *See Navajo I*, 537 U.S. at 506. By focusing on alternative allegations and urging dismissal of an entire cause of action as a result, Defendants are attempting to throw the baby out with the bathwater in an impermissible fashion. *Cf. Amadeo v. Principal Mut. Life Ins. Co.*, 290 F.3d 1152, 1159 (9th Cir. 2002) ("The dismissal of alternative claims in a pending suit does not adjudicate the entire cause of action."). Defendants advance no argument regarding their duties to provide information and technical assistance, and their motion fails on the breach of fiduciary duty claim for this reason alone.

2. Other Duties Owed By Defendants Are Sufficient to State a Claim for Breach of Fiduciary Duty.

Even if Defendants' motion was read as merely a motion to partially dismiss the breach of fiduciary claim, the motion fails. In addition to the substantive sources of law discussed above, the Amended Complaint also cites 25 U.S.C. § 458aaa-4 and 25 U.S.C. § 458aaa-6(f) in support of the breach of fiduciary duty claim. Section 458aaa-4 requires that an Indian tribe be provided "full" tribal share funding for the PSFAs it carries out.[2] Section 458aaa-6(f) requires that the savings to the federal government that a tribe's performance of PSFAs creates be passed onto the tribe. Furthermore, as Defendants acknowledge, the ISDEAA requires that funding be, at a minimum, the "secretarial amount"—the amount of funding the Secretary would have spent to operate the PSFAs at issue. Defs.' Mot. Dismiss at 2 (citing 25 U.S.C. § 450j-1(a)(1)); *see also* 25 U.SC. § 458aaa-4(g). The Community alleges that these statutes together with the other substantive sources of law discussed above, including the 2002 Compact and the general trust duty recognized in both the ISDEAA and IHCIA, impose fiduciary duties on IHS to provide full funding and adequate resources, processes, and structure for the Community's tribally operated health programs and facilities. Am. Compl. ¶ 81.

In essence, Defendants argue that these statutes do not state verbatim that IHS is required to "provide full funding and adequate resources, processes, and structure. . . ." This argument is overly semantic. The Community is not required to plead its legal theory with exhaustive precision and specificity. *Cf. Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 346-47 (2014) (reversing summary judgment against police officer-whistleblowers who failed to expressly invoke 42 U.S.C. §1983 in their due process claims against the city). Moreover, Defendants' assumed premise – that a statute must state verbatim the precise fiduciary duty alleged – is mistaken. As noted by the Court of

[2] "Tribal share" means "an Indian tribe's portion of all funds and resources that support secretarial programs, services, functions, and activities (or portions thereof) that are not required by the Secretary for performance of inherent Federal functions." 25 U.S.C. § 458aaa(a)(8).

Federal Claims in rejecting a similar argument by the United States, "if the government's fiduciary duties are limited to the plain dictates of the statutes, themselves, such duties are not really 'fiduciary' duties at all." *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 738 (2011) (citing *Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996)). In fact, as described by the court in that case, several of the seminal Supreme Court cases in this area implied additional duties beyond the mere statutory dictates. *Id.* at 735-36 (discussing *Mitchell II* and *United States v. White Mountain Apache*, 537 U.S. 465 (2003)). As noted recently by the Supreme Court, "[o]nce federal law imposes [fiduciary] duties, the common law 'could play a role'" in establishing the scope of those duties. *Jicarilla Apache Nation*, 131 S. Ct. at 2325. *See also Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) ("[T]hat the government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations . . . does not mean that the failure [of Congress] to specify the precise nature of the fiduciary obligation or to enumerate the trustee's duties absolves the government of its responsibilities.").

Rather than identifying statutes that impose verbatim the fiduciary duties alleged, the Community is only required to identify a substantive source of law imposing a duty on IHS, and allege its breach (which is in turn informed by common law principles). The Community has more than complied with these requirements. The factual basis of the Community's claims is that it has been performing a function that is actually the responsibility of the IHS Tucson Office—providing CHS care for Tohono O'odham members living off the Tohono O'odham Reservation in Pinal and Maricopa Counties. *E.g.*, Am. Compl. ¶¶ 34, 53, 66. As discussed above, sections of the ISDEAA impose specific fiduciary duties on IHS to provide the full amount of funding IHS would have spent to operate PSFAs, full "tribal share" funding, and to reimburse Indian tribes for savings created for IHS. The Compact also imposes a duty on IHS to reimburse the Community for savings it creates for IHS. Am. Compl. ¶ 50. Furthermore, the general trust responsibilities of IHS and the common law inform the scope of these duties. These common law duties include a duty of loyalty, which includes a duty of fair dealing and

communication of all material facts. Restatement (Second) of Trusts § 170 (1959). By refusing to pay the Community for CHS funds the Community provides Tohono O'odham members (when providing CHS for Tohono O'odham members is the responsibility of the Tucson Office), IHS is breaching these duties.

The statutes cited by the Community are specific substantive sources of law that distinguish the cases relied on by IHS. *Lincoln* was not an ISDEAA case, and therefore did not involve the comprehensive ISDEAA statutory and regulatory scheme at issue here. In fact, the Court in *Lincoln* specifically noted that had Congress imposed such a statutory scheme, the analysis would be entirely different. *See Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes . . . ."). The ISDEAA cases cited by Defendants— *Hammitte*, *Samish Indian Nation*, *Quechan Tribe of the Fort Yuma Indian Reservation*, and *Arizona v. United States* (Defs.' Mot. Dismiss at 9-11)— are all distinguishable because they all merely stand for the proposition that the general statements in the ISDEAA and IHCIA regarding the United States' trust responsibility are insufficient for a breach of trust claim.[3] None of these cases, however, discuss the actual specific sources of law relied on by the Community—25 U.S.C. § 458aaa-4, 25 U.S.C. § 458aaa-6, the Compact, and related regulations. The Community is not relying solely on general policy statements regarding the trust responsibility. Instead, the Community has identified specific substantive sources of law, and in accord with Supreme Court precedent, relies on general statements regarding the trust responsibility to reinforce and buttress the existence of fiduciary duties imposed by these specific

[3] The general policy statements, however, are not without significance. In particular, Defendants suggest that because the ISDEAA is a "self-determination" statute, their duties are lessened. The self-determination nature of some statutes has cut against a finding of a specific fiduciary duty on behalf of the government. *E.g.*, *Navajo I*, 537 U.S. at 508. However, in the case of the ISDEAA, Congress specifically and expressly stated that the Act should not be read to terminate the United States' trust responsibility. 25 U.S.C. § 450n(2). The Court should decline Defendants' invitation to do precisely that.

substantive sources of law. The Community has pled a breach of fiduciary duty claim sufficient to invoke jurisdiction, and the motion to dismiss that claim should be denied.

3. Management of Tribal Property is Not Required.

Defendants also argue that "this case does not involve federal fiduciary obligations in managing Indian property or trust assets." Defs.' Mot. Dismiss at 8. Certainly many cases of government malfeasance involve the mismanagement of Indian property. *See, e.g., Mitchell II*, 463 U.S. at 219-28 (discussing mismanagement of timber resources). However, the law imposes no requirement that "Indian property or trust assets" be at issue. To state a claim, the Community needs only to identify a substance source of law imposing fiduciary duties and allege a breach. *Navajo I*, 537 U.S. at 506; *see also Skokomish Indian Tribe v. United States*, 410 F.3d 506, 511 (9th Cir. 2005) (noting that treaty violations, without any management of trust assets, could be breach of fiduciary duty and transferring case to Court of Federal Claims). As discussed above, the Community has done so and nothing more is required.[4]

B. The Community's Prayer for Relief Properly Seeks Approval of Its Proposed Amendment.

In addition to seeking dismissal of the breach of fiduciary duty claim, Defendants seek dismissal of what they have dubbed a "claim for reimbursement." In fact, the Community has not brought the "claim for reimbursement" that Defendants urge the Court to dismiss. The Community has alleged three causes of action in the Amended Complaint—a violation of the ISDEAA based on the failure to approve an amendment to the Fiscal Year 2014 Funding Agreement, a violation of the ISDEAA based on IHS's failure to sever the Fiscal Year 2014 Funding Agreement, and a breach of trust/ breach of fiduciary duty claim. None of these is a "claim for reimbursement." In short, Defendants

[4] Curiously, the last paragraph of Defendants' argument regarding the breach of fiduciary duty claim suggests the ISDEAA and CDA are the exclusive remedies that the Community may seek. There is no authority for such a proposition. The Community has adequately pled a breach of fiduciary duty claim and there is no reason that such a claim may not be pursued as an alternative to ISDEAA or CDA claims.

have taken the liberty of inventing a cause of action not pled in the Amended Complaint and then seeking to dismiss it. The Court should reject this straw man argument.

To support their motion to dismiss an un-pled cause of action, Defendants identify a single paragraph in the Amended Complaint (paragraph 69) and one clause of a single paragraph in the Prayer for Relief (paragraph 3(3)) with which they take issue (and which they evidently seek to have stricken)). Paragraph 69 cites § 458aaa-6(f)—discussed above—which entitles the Community to any savings that its performance of IHS's functions provided to IHS. This statute forms part of one alternative basis for the Community's breach of fiduciary duty/breach of trust claim, and for the reasons discussed above, that claim should not be dismissed. Furthermore, the Prayer for Relief is entirely proper—it merely seeks approval of its proposed amendment. In fact, Paragraph 3 begins by expressly stating that for relief the Community is seeking "[i]njunctive and declaratory relief compelling IHS to approve the Community's proposed 2014 Funding Agreement amendment." Am. Comp. Prayer for Relief ¶ 3. In its Final Offer, Gila River proposed amending the Fiscal Year 2014 Funding Agreement to make it whole for prior year deficiencies (in the event that IHS could not provide evidence that the Community had been paid for CHS care for Tohono O'odham members in these years). *See* Am. Compl. ¶ 56, Ex. A. Evidently, the assumption underlying Defendants' motion to dismiss is that the Community must seek to be made whole through the Contract Disputes Act rather than through a proposed amendment to a funding agreement. The law is to the contrary.

IHS made this very same argument in a recent District of Columbia case, and the court rejected it. *Seneca Nation of Indians v. U.S. Dept. of Health & Human Servs.*, 945 F. Supp. 2d 135 (D.D.C. 2013). In *Seneca Nation*, an Indian tribe had received insufficient funds from IHS because patient visits to its facility in New York had been misattributed to other tribes' facilities because those tribes' CHSDAs had towns with the same names as towns in New York. *Id.* at 138. The tribe submitted a Final Offer which was ignored by IHS, and IHS attempted to avoid having the Final Offer become part of

the contract by default by arguing that the Final Offer was really a "claim" under the Contract Disputes Act. *Id.* at 147. The basis of IHS's argument was that the tribe's proposed amendment for fiscal year 2011 improperly sought to include funds for fiscal year 2010, which had already passed. *Id.* at 148. The *Seneca Nation* court rejected the argument, noting that the ISDEAA specifically contemplated proposed amendments for an increase in funding. *Id.* at 149. The court also noted that under IHS's own regulations, decisions related to amendments are expressly exempt from the IHS's CDA procedures. *Id.* at 149 n.9 (discussing 25 C.F.R. § 900.215(b) and 25 C.F.R. § 900.150(c)). *Seneca Nation* concluded that a distinction exists between a "claim" and "amendment," in part, because a "claim" is to recover for breach of existing contract terms whereas an "amendment" is to change the terms of a contract. *Id.* at 149.

It is premature to dismiss the Community's claims before the terms of its contract are construed— the Community has alleged that those terms do not include providing CHS to Tohono O'odham members. Am. Compl. ¶¶ 39, 43-46. This is an inference the Court must draw in favor of the Community notwithstanding the jurisdictional posturing of this portion of the motion to dismiss because it is "intertwined" with the merits of the Community's claims. *See Safe Air for Everyone*, 373 F.3d at 1039-1040. Therefore, the Court must accept as true for the moment that such terms have not been included and the Final Offer was an offer to change the terms of the agreement by recognizing that the Community has been operating a federal program for the benefit of Tohono O'odham members and by compensating the Community according. The Community is currently pursuing administrative remedies to recover past CHS expenditures for Tohono O'odham members in the alternative. However, under *Seneca Nation*, that does not preclude the Community from also pursuing a claim on alternative grounds to force an award of an amendment to its Fiscal Year 2014 Funding Agreement**.**

V. CONCLUSION

For all of the foregoing reasons, Plaintiff the Community respectfully requests that the Court deny Defendants' partial motion to dismiss.

Dated this 24th day December, 2014.

Respectfully submitted,

GILA RIVER INDIAN COMMUNITY

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-and-

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CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2014, I electronically transmitted the foregoing document to the Clerk's Office of the United States District Court for the District of Arizona using the CM/EMF system for filing and transmission to CM/ECF registrants.

s/ *Thomas L. Murphy*