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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gila River Indian Community,
Plaintiff,

vs.

Sylvia Matthews Burwell, Secretary,
United States Department of Health and
Human Services; Yvette Roubideaux,
Acting Director, United States Indian
Health Services,

Defendants.

CV-14-00943-PHX-DGC

**REPLY IN SUPPORT OF MOTION TO
DISMISS PLAINTIFF'S BREACH OF
TRUST CLAIM AND
REIMBURSEMENT CLAIM**

NOW COME, Defendants Sylvia Matthews Burwell, in her official capacity as Secretary, United States Department of Health and Human Services, and Yvette Roubideaux, in her official capacity as Acting Director, United States Indian Health Service ("Defendants"), by and through their undersigned attorneys, and submit this reply in support of their motion to dismiss Plaintiff's breach of trust claim and reimbursement claim for expenditures for fiscal years 1996 through 2013.

I. Factual Inaccuracies in Plaintiff's Opposition

Because the present motion includes a facial challenge to this Court's jurisdiction over Gila River Indian Community (the "Community"), this Court must accept the Community's well-pled factual allegations as to that portion of Defendants' motion. *Safe*

1 *Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). However, even under
2 this standard, there are several alleged “facts” asserted by the Community in its
3 opposition that were not pled at all in its complaint, have no support, or are directly
4 contradicted by the material this Court can consider in ruling upon this motion – namely
5 the documents attached to or incorporated into the complaint. The Court need not accept
6 these claims by the Community as true, and in fact should reject these contentions when
7 ruling upon this motion. This Court is not so restricted in considering the Community’s
8 allegations when it comes to Defendants’ factual challenge to this Court’s jurisdiction
9 over the Community’s claim for reimbursement. *Id.*; *Faubion v. United States*, 2010 WL
10 148215, at *2 (D. Ariz. Jan. 12, 2010).

11 First, the Community claims that IHS never offered technical assistance to the
12 Community in connection with the “Final Offer” it submitted. (*See* Opposition p. 7; First
13 Amended Complaint (“FAC”) ¶ 63). However, the denial letter from IHS shows that the
14 Community’s claims that IHS never offered technical assistance are simply untrue.¹ The
15 last page of the denial letter specifically offers to provide the Community with technical
16 assistance to overcome the objections to the letter and instructs the Community as to who
17 to contact to request such assistance. (FAC, Exhibit B).²

20 ¹ The Community has attached and incorporated the denial letter from IHS
21 rejecting the Community’s “Final Offer”, and the letter forms the basis of much of the
22 Community’s claims (see FAC ¶ 58, Exhibit B). *United States v. Ritchie*, 342 F.3d 903,
23 908 (9th Cir. 2003); *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160 (9th Cir.
24 2012); Fed. R. Civ. P. 10(c).

25 ² Similarly, the Community’s arguments that IHS’s letter never offered technical
26 assistance are also undercut by the portion of the denial letter which explains that the
27 paragraphs included in the Community’s “Final Offer” were never shown to the
28 negotiating team prior to the Community making its “Final Offer.” (FAC, Exhibit B).
The Community’s failure to present those terms to the negotiating team at all would make
it impossible for IHS to offer technical assistance to the Community during the
negotiations with respect to those terms. This is just one example of many instances
where IHS sought to work with the Community to address the matters at issue in this
case, but where the Community rejected such offers and instead sought to rush this matter
to Court.

1 Second, the Community acknowledges that IHS transferred funds from the Tucson
2 Area Office to the Phoenix Area Office to supplement the Sacaton Service Unit's
3 coverage of Contract Health Services ("CHS") for Tohono O'odham Nation members
4 ("T.O. members"). (*See* Opposition p. 6, ln. 17-18; FAC ¶ 36). However, the
5 Community asserts in conclusory fashion that it did not receive the benefit of these funds
6 when it took over responsibility for the service unit in 1995. (*See* Opposition p. 6, ln.
7 19). Aside from being untrue, the Community never made such an allegation in its FAC
8 and has no support for this contention in its opposition. (*See generally* FAC). The
9 Community's FAC only alleges that no funding agreement delineated this funding for
10 T.O. members for the Community. (FAC ¶ 36). In that same paragraph, the FAC also
11 admits that IHS informed the Community on several occasions that this funding had been
12 included. (*Id.*).

13 Third, on page six of its opposition, the Community makes additional unsupported
14 assertions about the CHS eligibility of T.O. members. The Community starts with the
15 accurate assertion that the Contract Health Service Delivery Area for T.O. members is
16 Maricopa, Pima, and Pinal Counties. (*See* Opposition p. 6; FAC ¶ 37). However,
17 without any support, the Community claims that T.O. members living in Pinal and
18 Maricopa Counties are not eligible for CHS in the Gila River Service Unit even though
19 the service unit is within Pinal and Maricopa Counties. (*See* Opposition p. 6, ln. 21-23).
20 The Community's own acknowledgment that it negotiated additional funds to provide
21 CHS for T.O. members living in Pinal and Maricopa Counties undercuts its averment.
22 (*See* Opposition p. 7, ln. 3-5; FAC ¶ 51).

23 Therefore, this Court should not give the Community carte blanche to make claims
24 that are unsupported by the allegations in its FAC or that are directly contradicted by the
25 documents the Community incorporated into the Complaint. With these factual
26 clarifications in mind, Defendants will now address the specific legal arguments asserted
27 by the Community in its opposition.
28

II. Breach of Fiduciary Duty

A. *The District Court's Jurisdiction over Claims is Limited to Breach of Contract Claims When Damages are Sought.*

The Community claims that there is no reason or authority that it cannot pursue a breach of trust claim as an alternative to its ISDEAA rejection claim or its CDA claims currently pending with IHS. (See Opposition at n.4). However, the United States' sovereign immunity bars such a claim in this Court. "It is elementary that the United States, as sovereign, is immune from suit save as it consents to be sued ..., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (citation and internal quotation marks omitted). Waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *Id.*

The provisions of the ISDEAA do not provide for monetary recovery for breach of trust. Rather, the ISDEAA provides the district court with jurisdiction over civil actions for injunctive relief and for "money damages arising under contracts." See 25 U.S.C. § 450m-1(a); *Demontiney v. U.S. ex rel. Dep't of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 806 (9th Cir. 2001). Thus, the government's waiver of sovereign immunity in district court relating to contracts under the ISDEAA is limited to contract damages under the CDA and does not include independent claims of breach of trust. *Id.* §§ 450m-1(a); 450m-1(d); see *Demontiney*, 255 F.3d at 806, 808 ("§ 450m-1 waives sovereign immunity in district court for contract actions pertaining to disputes arising from self-determination contracts"); see also *Samish Indian Nation v. United States*, 419 F.3d 1355, 1367-68 (Fed. Cir. 2005) (finding that the ISDEAA did not "convert the underlying statutory programs into entitlements fairly analogized to a trust corpus"). Because the Community's third cause of action is a breach of trust claim seeking monetary damages, not a breach of contract claim, the ISDEAA does not grant this Court jurisdiction over the

1 claim. The only court in which the Community could potentially pursue such a claim
2 would be in the Court of Federal Claims.³

3 Although the Community pled its claim for breach of trust as one ostensibly
4 seeking declaratory relief, it is in reality one for damages equating to “full funding and
5 adequate resources” and so does not avoid this jurisdictional bar. (See Opposition at p.
6 12; *see also* Opposition p. 13 (focusing on the requirement to provide full funding to tribe
7 and provide reimbursement to the tribe for moneys it allegedly spent)).⁴ The only result
8 of a determination that IHS has breached an alleged responsibility to provide “full
9 funding and adequate resources” to the Community would be for the payment of damages
10 to the Community as a result of that failure. *See Rowe v. United States*, 633 F.2d 799,
11 802 (9th Cir. 1980) (“the Court of Claims’ jurisdiction cannot be avoided by a complaint
12 that appears to seek only equitable relief when ‘the real effort of the complaining party is
13

14 ³ Defendants do not admit that the Community could meet the requirements to
15 demonstrate jurisdiction in the Court of Federal Claims under the Tucker Act. The
16 Community cites *United States v. Navajo Nation*, 537 U.S. 488 (2003) (*Navajo I*) – a
17 case concerning jurisdiction in the Court of Federal Claims under the Tucker Act and
18 Indian Tucker Act. The Community claims that under *Navajo I* it need only cite a
19 substantive source of law and allege a breach. However, the Community ignores the
20 second part of the test from *Navajo I*, that the alleged rights creating source of substantive
21 law “can fairly be interpreted as mandating compensation by the Federal Government for
22 damages sustained.” *Navajo I*, 537 U.S. 503, 506. While Defendants do not concede that
23 the statutes cited by the Community meet even the first hurdle under *Navajo I*, the
24 Community has not, and cannot, show that the provisions of the ISDEAA it cites are
25 money mandating. Thus, even if the ISDEAA waived the United States’ sovereign
26 immunity for claims for damages other than CDA claims, which it has not, the
27 Community has failed to meet its burden to demonstrate its claim meets the complete
28 requirements under *Navajo I* for there to be jurisdiction. *In re Dynamic Random Access
Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984-85 (9th Cir. 2008) (burden is on the
party asserting jurisdiction to demonstrate that jurisdiction exists).

⁴ It is not clear whether the Community is seeking damages for its breach of trust
claim premised on IHS’s alleged failure to offer technical assistance, which IHS is
disputing. To the extent the Community is seeking monetary relief for that claim, the
same proscriptions discussed herein would apply. However, if all the Community seeks
is a mandatory injunction that IHS provides such technical assistance, it appears that the
Court would have jurisdiction over the claim as the ISDEAA authorizes the Court to
provide for such injunctive relief. That said, the claim should be in the form of a claim
for a mandatory injunction based on an alleged violation of the ISDEAA, relief provided
for under 25 U.S.C. § 450m-1, and not in the form of an amorphous breach of trust
claim.

1 to obtain money (in excess of \$10,000) from the federal government.”); *McKeel v.*
2 *Islamic Republic of Iran*, 722 F.2d 582, 590-91 (9th Cir.1983) (“The district court is
3 prohibited from evading the preclusive effect of the Tucker Act or infringing upon the
4 exclusive province of the Court of Claims by issuing injunctions or declaring judgments
5 which are designed to serve as res judicata in the Court of Claims to affect a monetary
6 recovery in a subsequent suit.”). Thus, because the Community’s third cause of action is
7 one for damages as a result of an alleged breach of trust this Court lacks jurisdiction over
8 that claim.

9 *B. The Community Has Failed to Distinguish the Cases Cited by Defendants*
10 *and Has Ignored the Complete Requirements of Navajo I.*

11 Aside from this explicit limitation on this Court’s jurisdiction, the Community
12 failed to distinguish the cases cited in Defendants’ opening memorandum, which hold
13 that the ISDEAA does not create actionable breach of trust claims. (See Docket 30, pp.
14 9-11). Most importantly, the Community fails to sufficiently explain why this Court
15 should not apply the Federal Circuit’s opinion in *Samish Indian Nation v. United States*,
16 419 F.3d 1355 (Fed. Cir. 2005). In *Samish*, the Court recognized that a tribe that had
17 contracted under the ISDEAA would have a breach of contract claim (implicitly under 25
18 U.S.C. § 450m-1, as that is the statutory provision that provides for a cause of action),
19 but the Court declined to recognize a breach of trust action under the ISDEAA on the
20 same basis. 419 F.3d at 1367-68.

21 Moreover, as explained in Note 4 with respect to the Community’s ability to bring
22 a claim in the Court of Federal Claims, the Community misreads the Supreme Court’s
23 opinion in *Navajo I* and asserts that it can bring a breach of trust claim under the
24 ISDEAA by merely citing a statute and alleging its breach. (See Opposition p. 15). The
25 Community ignores the second step in the *Navajo I* analysis, which requires that the
26 alleged rights creating source of substantive law “can fairly be interpreted as mandating
27 compensation by the Federal Government for damages sustained.” *Navajo I*, 537 U.S.
28 503, 506. Thus, the Community has not, and cannot, meet its burden to demonstrate its

1 claim meets the complete requirements under *Navajo I* for there to be jurisdiction over a
2 breach of trust claim – even if the doctrine of sovereign immunity did not bar it in this
3 Court as discussed in Section I.A. above. *In re DRAM*, 546 F.3d at 984-85 (burden is on
4 the party asserting jurisdiction to demonstrate that jurisdiction exists).

5 *C. The Community’s Claim that a Trust Corpus is Unnecessary is Unfounded*

6 The Community goes on to make the argument that a trust corpus is not necessary
7 to create a breach of trust claim under the ISDEAA. However, the primary case it cites in
8 support of this unfounded contention is *Navajo I*, 537 U.S. 488, which itself involved a
9 trust corpus. The other case it cites, *Skokomish Indian Tribe v. United States*, 410 F.3d
10 506, 511 (9th Cir. 2005), involved a claim of breach of fiduciary duty as a result of an
11 alleged violation of a treaty, not a statutory framework such as the ISDEAA. Moreover,
12 in *Skokomish Indian Tribe*, the Ninth Circuit only stated that there could potentially be
13 jurisdiction over such a claim in the Court of Federal Claims (notably not in the district
14 courts), and transferred the case to the Court of Federal Claims for such a determination.
15 410 F.3d at 511. However the Court of Federal Claims never reached that issue
16 (although the issue was presented and argued in the United States’ briefs (*see* 1:11-cv-
17 658-FMA (Fed. Cl.) (*see* Docket 26-1 pp. 37-44)), because the court dismissed the
18 transferred claims for a lack of jurisdiction on other grounds under 28 U.S.C. § 1500.

19 Further contravening its own argument, the other sections in the Community’s
20 opposition addressing its breach of trust claim contain citations to several cases that also
21 rely on the existence of a trust corpus in finding jurisdiction over a breach of trust claim.
22 *See, e.g., Cobell v. Norton*, 240 F.3d 1081, 1088 (D.C. Cir. 2001) (cited by the
23 Community at p. 13 of opposition); *Jicarilla Apache Nation v. United States*, 100 Fed.
24 Cl. 726, 738 (2011) (cited by the Community at p. 13 of opposition). For example, the
25 Court in *Jicarilla* noted that the statutes in question gave the United States control and
26 discretion with respect to management and investment of trust funds for the tribes.
27 *Jicarilla Apache Nation*, 100 Fed. Cl. at 731-732.

1 For all of these reasons, this Court should dismiss the Community's breach of trust
2 claim for "full funding and adequate resources."⁵

3 **III. The Community's Claim for Reimbursement Should be Dismissed No Matter**
4 **How the Community Couches its Claim.**

5 In the Community's response, the Community contends that it has not brought a
6 standalone claim for reimbursement for expenditures under its prior year funding
7 agreements. Instead, when faced with the jurisdictional hurdle the CDA exhaustion
8 requirements present, and presumably to try and avoid the statute of limitations bar that is
9 looming for many of those claims, the Community attempts to recast its claim for
10 reimbursement as one to revisit prior year funding agreements through an amendment to
11 the fiscal year 2014 funding agreement. (Opposition pp. 16, ln. 15-19, 17, ln. 17-21).
12 The Community's attempt to now recast its "Final Offer" into a proposed amendment of
13 all prior funding agreements with IHS misses the mark and cannot create jurisdiction
14 where it would not otherwise exist. This belated attempt to recast its claim is directly
15 contrary to its own allegations, *see* FAC ¶¶ 72-73, which state that the "Final Offer" was
16 a proposal to amend the fiscal year 2014 funding agreement.

17 As pointed out by IHS in its response to the Community's "Final Offer", such a
18 claim is governed by the Contract Disputes Act, and is not the proper subject of a
19 proposal to include in a proposed funding agreement for another year.⁶ (*See* FAC,
20 Exhibit B, at p. 6, ¶ 5). As explained below, the Community's mischaracterization of the

21
22 ⁵ Again, to the extent the Community is seeking injunctive relief for IHS's alleged
23 failure to offer technical assistance (which IHS denies it failed to offer) – specifically an
24 order requiring IHS to provide technical assistance – it appears that 25 U.S.C. § 450m-1
25 would provide jurisdiction over such a claim for injunctive relief on the basis of an
alleged violation of the ISDEAA (but not as a breach of trust claim). However, to the
extent the Community seeks to use that claim as a basis for damages it too should be
dismissed.

26 ⁶ In an abundance of caution, in addition to rejecting the claim as it should have
27 been brought as a claim under the CDA procedures, IHS also addressed this particular
28 provision of the "Final Offer" in its rejection letter in the event the Community could
bring the reimbursement claim in that manner rejecting the provision under 25 U.S.C.
§§ 458aaa-6(c)(1)(A)(i) and 4(d)(2)(E). (*See* FAC, Exhibit B, at p. 6, ¶ 5).

1 *Seneca Nation* case does not change this conclusion. In fact, acknowledging that these
2 claims were properly brought as CDA claims, the Community submitted CDA claims for
3 these very same years with IHS (*See* Docket 30-1, Exhibit A), and those claims are
4 currently pending with IHS. (*Id.*, Exhibits B & C). A party may not avoid the limitations
5 of the CDA where a claim is in essence a cloaked contract claim. *See Sw. Marine, Inc. v.*
6 *United States*, 926 F. Supp. 142, 146 (N.D. Cal. 1995). Section 405m-1 provides that the
7 exclusive remedy in federal Court under the ISDEAA for monetary damages are suits
8 subject to the Contract Disputes Act. *See Demontiney*, 255 F.3d at 806. *See also Goel v.*
9 *Shah*, No. C 13-3586 SBA, 2014 WL 2154005, at *6 (N.D. Cal. May 22, 2014) (“When
10 applicable, ‘the CDA provides the exclusive mechanism for dispute resolution.’”) (quoting
11 *Dalton v. Sherwood Van Lines, Inc.*, 50 F.3d 1014, 1017 (Fed. Cir. 1995)).
12 There is no other grant of jurisdiction over such claims in this Court. *See Sw. Marine,*
13 *Inc.*, 926 F. Supp. at 146. Thus, the CDA claim process is the sole avenue for the
14 Community’s reimbursement claim. The Community cannot seek to bring both a CDA
15 claim for reimbursement and lump its reimbursement claims into a proposed “Final
16 Offer.”

17 The Community relies on *Seneca Nation of Indians v. U.S. Dep’t of Health &*
18 *Human Servs.*, 945 F. Supp. 2d 135 (D.D.C. 2013), for the proposition that a tribe can
19 properly seek a provision in a funding agreement that relates to funding for numerous
20 prior fiscal years. (*See* Opposition pp. 16-17). The Community’s reliance is misplaced.
21 *Seneca Nation* involved a situation where IHS failed to respond within the statutorily
22 mandated time to respond before a Final Offer was deemed accepted by IHS. In that
23 instance, courts have noted the lack of discretion they have in keeping proposed
24 provisions out of the proposed contracts, even where those provisions would be properly
25 rejected by IHS. *See Seneca Nation*, 945 F. Supp. 2d at 152; *Maniilaq Ass’n v. Burwell*,
26 No. 13-CV-380 (TFH), 2014 WL 5558336, at *11 (D.D.C. Nov. 3, 2014) (“The
27 defendant states, and the Court agrees, that ‘[d]etermining that a final offer is ‘deemed
28

1 approved' is a harsh penalty....' But that is the choice that Congress has made."); *see*
2 *also Southcentral Found. v. Roubideaux*, No. 3:13-CV-00164-SLG, 2013 WL 5773793,
3 at *6 (D. Alaska Oct. 23, 2013) (distinguishing *Seneca Nation* because it was a case
4 where IHS was deemed to accept a proposal because it failed to respond at all). While
5 the Community claims that the amendment at issue in *Seneca Nation* was to the 2011
6 funding agreement that also included funds for fiscal year 2010, (*see* Opposition p. 17, In.
7 2-4), it in fact concerned submissions of proposed amendments to each of the funding
8 agreements in effect for prior years. *See* 945 F. Supp. 2d at 148, 152. Thus, unlike
9 *Seneca Nation*, here the Community is impermissibly seeking to include 18 years of
10 funding in its fiscal year 2014 funding agreement through its "Final Offer." Another key
11 distinction between *Seneca Nation* and this case is that the former only involved fiscal
12 years within the six-year statute of limitations that applies to claims against the United
13 States. *See* 41 U.S.C. § 7103(a). Here the Community seeks to use the "Final Offer"
14 procedure to sidestep that bar and essentially bring claims extending back for 18 years.

15 Another fact that distinguishes this case from *Seneca Nation* is that *Seneca Nation*
16 involved a Self-Determination Contract that was still in effect at the time the amendments
17 at issue were sought. Here, the Self-Determination Contract was long ago terminated and
18 the Community entered into a Self-Governance Compact commencing with the 2003
19 fiscal year. (FAC ¶¶ 2, 32, 47). Moreover, unlike the Self-Determination Contract at
20 issue in *Seneca Nation*, the Compact here does not include the same permissive
21 modification language that allows for additional funding. *Compare Seneca Nation*, 945
22 F. Supp. 2d at 148-149, *with* GRIC-IHS-000374 (excerpt of Compact covering
23 amendments). Thus, even if this Court agreed with the holding of the Court in *Seneca*
24 *Nation*, there is no provision in the Self-Governance Compact here that would trump 25
25 C.F.R. § 900.218. *See* 945 F. Supp. 2d at 149. As pointed out by the Court in *Seneca*
26 *Nation*, if IHS wished to challenge the inclusion of prior year funding allegedly owed in
27 the fiscal year 2014 "Final Offer", IHS should have done so prior to the statutory time to
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1 respond. *Id.* at 149. Here, IHS did so. The request to include prior year funding in the
2 2014 funding agreement is not a proper request for amendment and should have been
3 brought as a CDA claim which, tellingly, the Community has already filed. Accordingly
4 this Court should dismiss the Community's claim for reimbursement for prior contract
5 years in whatever form the Community now asserts it.

6 **IV. Conclusion**

7 For the foregoing reasons and those set forth in Defendants' opening
8 memorandum, this Court should dismiss the Community's breach of trust claim and
9 claim for reimbursement for fiscal years 1996 through 2013 for lack of subject matter
10 jurisdiction.

11 Respectfully submitted this January 12, 2015.

12
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15
16 /s Adam R. Smart
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17 Assistant U.S. Attorney
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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2015, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant(s):

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