Andrew W. Baldwin (Wy. Bar No. 5-2114) (andy@bcrattorneys.com)
Berthenia S. Crocker (Wy. Bar No. 5-1821) (berthenia@bcrattorneys.com)
Kelly A. Rudd (Wy. Bar No. 6-3928) (rudd@bcrattorneys.com)
Janet E. Millard (Wy. Bar No. 5-1884) (janet@bcrattorneys.com)
Mandi A. Vuinovich (Wy. Bar No. 7-5295) (mj@bcrattorneys.com)
Baldwin, Crocker & Rudd, P.C.
P.O. Box 1229
Lander, WY 82520
(307) 332-3385

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

NORTHERN ARAPAHO TRIBE, on its own behalf and on behalf of its members, Plaintiff, v. SYLVIA BURWELL, Secretary of the United States Department of Health & Human Services, and JACOB J. LEW, Secretary of the United States Department of Treasury, Defendants.	)	Civil Action No. 14-CV-247

NORTHERN ARAPAHO TRIBE'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION.

To address severe health conditions and help fulfill trust and treaty obligations, Congress enacted the Affordable Care Act (ACA) with "Special Rules for Indians" and permanently reauthorized the Indian Health Care Improvement Act (IHCIA). Congress recognizes that "the unmet needs of the American Indian people are severe and the health status of the Indians is far below that of the general population of the United States," 25 U.S.C. §1601(5). Congress seeks

"to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy," 25 U.S.C. §1602(1).

Defendants' regulations implementing the ACA block important health care benefits for working-class Native Americans, driving them away from the option to purchase insurance (from either their employer or the exchange), away from benefits Congress created for them, and backwards toward reliance on a severely underfunded Indian Health Service (IHS). The ACA was meant to remedy unconscionable health conditions and that goal, and the Act's specific benefits, should not be frustrated by regulatory fiat.

"Special Rules for Indians" in the ACA include an exemption from the "individual mandate" to purchase health insurance and a Cost-Sharing Exemption, §1402(d), for working class Native Americans that Congress created to fund out-of-pocket insurance co-payments.[1] By regulation, Defendants have blocked Native Americans from accessing the §1402(d) Cost-Sharing benefit – a Native American who is employed by a Tribe/Large Employer is only eligible for Large Employer group coverage, which does *not* provide either the important §1401 Premium Tax Credits or the §1402(d) Cost-Sharing Exemption for Indians. The regulations effectively *disqualify* a Native American employee from obtaining an individual policy on the health insurance exchange and unlawfully obstruct the intent of Congress to provide these benefits.[2]

---

[1] *See* Affordable Care Act (ACA) §1401 *et seq.* (hereafter §1401 Premium Tax Credits), 26 U.S.C. §36B; ACA §1402(d); 42 U.S.C. §18071 ("Special Rules for Indians") (hereafter §1402(d) Cost-Sharing Exemption).

[2] The unlawful effect of these regulations is described in NAT's Complaint, Doc. #1, and Opening Brief in Support of Motion for Preliminary Injunction, Doc. #9. NAT incorporates by reference herein all factual material it has presented to the Court. *See* Docs # 1, 9 and 16.

The Northern Arapaho Tribe (NAT or Tribe) seeks declaratory and injunctive relief that strikes down the unlawful effect of these regulations and allows tribal members access to much-needed health benefits as intended by Congress. Defendants argue that (1) the Anti-Injunction Act (AIA) deprives the Court of jurisdiction to hear NAT's claims; and (2) the Complaint fails to state a claim because (a) challenges to the regulations have been waived, and (b) the regulations are consistent with the ACA. For reasons set forth below, Defendants' arguments miss the mark.

II. THE ANTI-INJUNCTION ACT DOES NOT BAR SUIT TO PROTECT HEALTH INSURANCE BENEFITS FOR INDIANS.

By regulation, Defendants deem the Tribe to be a Large Employer. As a result, NAT has two choices: (A) offer a qualified group insurance policy to its employees, which *blocks* tribal member employees from the benefits intended by Congress for Indians;[3] or (B) pay penalties. The Tribe has sought two distinct forms of relief: (1) striking the regulations as invalid; and (2) reforming the effect of the regulations so that, in any event, tribal members may access the benefits intended by Congress. Neither relief is barred by the AIA.

First, if the Court strikes down the regulations in full, tribal members may obtain access to health benefits intended by Congress and the Tribe will not face penalties for non-compliance.[4] The AIA does not bar suits of this sort, where the relief sought would avoid the imposition of penalties, not taxes.

Second, if the Court enjoins the enforcement of regulations blocking tribal members from

[3] Decl. of Deeg, Doc. #16-4, ¶¶7 and 10 (tribal member employees "blocked" from these benefits if the Tribe is treated as a Large Employer).

[4] The Tribe's prayer for relief asks the Court to prevent Defendants from "levying any penalties against NAT for not complying with the Large Employer mandate," Complaint, Doc. #1, p. 16.

accessing §1402(d) benefits under the ACA, tribal members will be allowed to access those health care benefits regardless of whether the Tribe is otherwise deemed to be a Large Employer.[5] In other words, the Tribe would be required to offer a group plan, but tribal members who exercise their right to decline the plan would remain eligible for the unique Native American health care benefits intended by Congress. In that event, no penalty or "tax" of any kind is implicated because the Tribe would comply with the Large Employer mandate. As shown below, when no penalty or "tax" is contested, the AIA does not bar the claim.

(A) Defendants Rely on Their Own Premise.

Defendants argue that Large Employer penalties under the ACA are actually taxes and that, therefore, Congress intended the AIA to bar NAT's challenge to the regulations. But Defendants argue from their own premise – that their regulations are valid under the ACA. If the regulations are not valid under the ACA, as the Tribe urges, no "tax" provision of the ACA could apply to bar the claim. Only by embracing the Defendants' premise as true can the Court proceed to analyze whether the ACA Large Employer mandate imposes a "tax" under the AIA. Applying the AIA in this way as a jurisdictional bar necessarily entails a ruling on the merits of the Tribe's claim that the regulation conflicts with the ACA.

(B) The AIA Does Not Bar Challenges to Penalties Imposed on Large Employers.

The payment for failing to comply with the Large Employer mandate is not a tax, but a penalty, making the AIA wholly inapplicable. "[A] tax is a pecuniary burden laid upon

[5] The Tribe's prayer for relief also asks the Court to issue an injunction allowing tribal "members to continue accessing health insurance coverage available to Native Americans on the [insurance] exchange," Complaint, Doc. #1, p. 16, and to "[d]eclare unlawful any rule or regulation that would make tribal members employed by NAT ineligible for individual policies available on the exchange," with §1401 or §1402(d) benefits, Complaint, Doc. #1, p. 17.

individuals or property for the purpose of supporting the Government." *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (internal citations omitted). By contrast, a penalty imports the notion of a punishment for an act or omission. *Id.* "The two words [tax vs. penalty] are not interchangeable . . . and if an exaction [is] clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *United States v. LaFranca*, 282 U.S. 568, 572 (1931). Therefore, even if Congress places the payment in the Internal Revenue Code and Defendants refer to it as a "tax," it is not a tax if, as is true here, it exists to punish non-compliant conduct. The penalties at issue are triggered only if employers fail to comply with the Large Employer mandate. Compliance with the mandate avoids the payment obligation. Consequently, the payments are penalties, not revenue generating taxes subject to the AIA.

The leading Circuit Court case addressing whether the AIA bars challenges to the Large Employer mandate concluded that it does not. In *Liberty Univ., Inc. v. Lew*, 733 F.3d 72 (4th Cir.), cert. denied sub nom, *Liberty Univ. v. Lew*, 134 S.Ct. 683 (2013), the Fourth Circuit ruled that the AIA did not bar pre-enforcement challenges to the Large Employer mandate. *Liberty*, 733 F.3d 72 at 87-89.

The Fourth Circuit relied on authority established in *National Federation of Independent Businesses v. Sebelius*, 132 S.Ct. 2566 (2012) (*NFIB*) to affirm that employer mandate exactions are not a "tax" for the purposes of the AIA. The "Supreme Court made clear that the AIA does not apply to every exaction that functions as a tax or even to every exaction that passes muster as a tax for constitutional purposes. Rather, the AIA applies only where Congress intends it to." *Liberty*, 733 F.3d at 87, citing *NFIB*, 132 S.Ct. at 2583.

Liberty made a particular effort to examine how Congress characterized the exaction set forth in the Large Employer mandate:

> . . . the Act [ACA] twice refers to the employer mandate exaction as a "tax." *See* 26 U.S.C. §4980H(b)(2), (c)(7) . . . the Act does not consistently characterize the exaction as a tax. Rather, the Act initially identifies the employer mandate exaction as an "assessable payment." *See id.* §4980H(a). The Act then proceeds to characterize the exaction as an "assessable payment" six more times. *See id.* §4980H(b)(1), (c)(2)(D)(i)(I), (d)(1), (d)(2), (d)(3). Additionally, the Act once refers to the exaction as an "assessable penalt[y]." *See id.* §4980H(c)(2)(D). Further, on one of the two occasions in which the Act refers to the employer mandate exaction as a "tax," it does so in a tax-specific context, where the use of another word would create confusion. . . . Because Congress initially and primarily refers to the exaction as an "assessable payment" and not a "tax," the statutory text suggests that Congress did not intend the exaction to be treated as a tax for purposes of the AIA.

Liberty, 733 F.3d 72 at 88.

The Court added that:

> Furthermore, Congress did not otherwise indicate that the employer mandate exaction qualifies as a tax for AIA purposes, though of course it could have done so. As the Supreme Court pointed out in *NFIB*, 26 U.S.C. §6671(a) provides that the "penalties and liabilities" found in subchapter 68B of the Internal Revenue Code are "treated as taxes" for purposes of the AIA. *See NFIB,* 132 S.Ct. at 2583. The employer mandate, like the individual mandate, is not included in subchapter 68B, and no other provision indicates that we are to treat its "assessable payment" as a tax. *See id.* (making the same point with regard to the individual mandate).

Liberty, 733 F.3d 72 at 88.

Finally, the Court concluded that:

> The Supreme Court has expressly held that a person subject to the individual mandate can bring a *pre*-enforcement suit challenging that provision. But, under the Secretary's theory, an employer subject to the employer mandate could bring only a *post*-enforcement suit challenging that provision. It seems highly unlikely that Congress meant to signal – with two isolated references to the term "tax" – that the mandates should be treated differently for purposes of the AIA's applicability. Tellingly, the Government has pointed to no rationale supporting such differential treatment.

Liberty, 733 F.3d 72 at 88-89.

The Seventh Circuit agrees with the conclusion reached in *Liberty*. *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013) *cert. denied sub nom. Burwell v. Korte*, 134 S.Ct. 2903 (2014) held that the AIA does not bar suits regarding penalties under 26 U.S.C. §4980D, which is the "contraceptive coverage mandate" applicable to Large Employers. The Court explained that §4980D was:

> . . . meant to penalize employers for noncompliance with the various mandates in the Affordable Care Act and its implementing regulations. The sheer size of the required payment fairly screams "penalty." Any failure to provide the mandated minimum coverage – no matter how significant the deviation – costs the employer a whopping $100 per day per employee. *See* 26 U.S.C. §4980D(b). Exacting such a high price for noncompliance suggests that the congressional objective is punitive.

Korte, 735 F.3d at 670 (7th Cir. 2013) (internal citations omitted).

In addition to finding that the exaction found in 26 U.S.C. §4980D was not a tax for the purposes of the AIA, the Court found parallel reasoning for the penalties found in §4980H:

> Together, these aspects of the regulatory scheme all point in the same direction: Section 4980D is a penalty for noncompliance with the regulatory mandates on employer-based health care plans. *It is not a tax for purposes of the Anti-Injunction Act. By parallel reasoning the same is true of the alternative payment in § 4980H.* This conclusion comports with the Supreme Court's decision in *NFIB*, which held that the Affordable Care Act's "shared responsibility payment" for noncompliance with the individual insurance mandate is not a tax for purposes of the Anti-Injunction Act. 132 S.Ct. at 2582-84. Here, as in *NFIB*, the Anti-Injunction Act does not block a decision on the merits.

Id., 735 F.3d at 671 (emphasis added).

(C) The AIA Does Not Bar Actions Where a Tax Refund Would Not Provide Relief.

Even if the Large Employer penalties were a "tax," where a party seeks relief other than a mere tax refund, the AIA does not bar the action. *South Carolina v. Regan*, 465 U.S. 367 (1984).

In *South Carolina*, individuals faced tax liability for interest earned on State-issued bearer bonds, but the State itself did not. As a result, a tax refund process would not allow the State to challenge the federal law at issue there. In finding that the AIA did not bar the State's suit, the Court stated, "[i]n sum, the [AIA's] purpose and the circumstances of its enactment indicate that Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." *Id.* at 378.

To be sure, the Tribe has brought suit *in part* to avoid penalties under the ACA,[6] but NAT has also brought suit to protect health insurance benefits for tribal members[7] (*see* discussion below). While a tax refund might allow NAT to recover its payments, it would not protect the interests of the Tribe or its members in accessing special health care benefits for Indians (and in no event are individual tribal members subject to a tax or penalty which could be re-funded).

In *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), cert. granted, 134 S.Ct. 678 (2013) and aff'd sub nom. *Burwell v. Hobby Lobby Stores, Inc*., 134 S.Ct. 2751 (2014), the Tenth Circuit built on Justice Robert's reasoning in *NFIB*. The Circuit Court said that ". . . the AIA does not apply to every lawsuit tangentially related to taxes. . . ." *Hobby Lobby*, 723 F.3d at 1127, and concluded that the AIA did not bar suit by a private employer. Hobby Lobby Stores challenged that portion of the Large Employer mandate requiring it to offer birth control as part of its group insurance policy for employees. *Id.* The stores were not challenging the ability of the IRS to collect taxes – rather, they sought to enjoin enforcement of a

[6] Complaint, Doc. #1, p. 16.

[7] Complaint, Doc. #1, pp. 16-17.

birth control coverage regulation. *Id.* Similarly, NAT is not challenging the authority of the IRS to collect taxes – rather, the Tribe challenges the authority of the IRS to promulgate regulations that block access to health care benefits for tribal members and obstruct Congressional efforts to address unconscionable health conditions in Indian country and fulfill treaty promises.[8]

King v. Burwell, 759 F.3d 358 (4th Cir. 2014), *cert. granted*, 135 S.Ct. 475, involves a statute parallel to the AIA (26 U.S.C. 7422(a)) that prohibits suits for recovery of taxes until a claim for refund has been filed with the Secretary of the Treasury. The Fourth Circuit Court said:

> Moreover, the plaintiffs are not seeking a tax refund; they ask for no monetary relief, alleging instead claims for declaratory and injunctive relief. . . . It is clear, then, that the alternative forms of relief suggested by the defendants would not afford the plaintiffs the complete relief they seek. This is simply not a typical tax refund action in which an individual taxpayer complains of the manner in which a tax was assessed or collected and seeks reimbursement for wrongly paid sums. The plaintiffs here challenge the legality of a final agency action, which is consistent with the APA's underlying purpose of "remov[ing] obstacles to judicial review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 904. . . (1988). . . . We therefore hold that the plaintiffs' suit is not barred under the APA.

Id. at 366-67. The same is true in the case at bar.

(D) *Halbig* is Inapposite.

Defendants rely on *Halbig v. Sebelius*, 27 F.Supp.3d 1 (D.D.C. 2014), which said the AIA prevented employers from challenging an IRS regulation allowing tax credits for individuals enrolled in the federally-sponsored health insurance exchange (plaintiffs argued that tax credits are only available on state-sponsored exchanges). As to the rule for employers, *Halbig* is directly contrary to the weight of authority provided by the Fourth and Seventh

[8] *See* 1868 Treaty with the Northern Cheyenne and Northern Arapaho Tribes, 15 Stat. 655 (May 10, 1868) (Article 7).

Circuits in *Liberty* and *Korte*, discussed above.

Furthermore, the *Halbig* court said that although it thought the AIA barred employers from challenging these IRS regulations, the AIA did not prevent *individuals* from doing so.[9] *Halbig*, 27 F.Supp.3d at 9.[10] The District Court in *Halbig* pointed out that "[individual] plaintiffs here bring a pre-enforcement challenge to a final agency rule, rather than individualized adjudications of tax liability. . . . Any administrative challenge would be futile, as the Secretary of the Treasury can be expected to deny plaintiffs' complaint as contrary to the issued IRS regulation." *Id.* at 12. The D.C. Circuit in *Halbig* made the same point: the individuals there could not obtain relief from the regulations through a tax refund process. "It is not clear that [individual plaintiff] Klemencic could obtain any prospective relief through a refund action, let alone that which he seeks under his APA claim, namely, a declaration that the IRS Rule is invalid and an injunction barring its implementation." *Halbig*, 758 F.3d 390 at 398. Unlike the private employers in *Halbig*, the Tribe is a government appearing on its own behalf and as *parens patriae* to protect the interests of its tribal members in obtaining health care benefits intended by Congress (*see* discussion below). The relief sought by the Tribe for its members is clearly not available in a tax refund suit. *See* 26 U.S.C. §4980H(e)(3) (relief limited to repayment of an "assessable payment" penalty made in error by Large Employers). Even under

[9] Because suit by the individual plaintiffs was not barred, the employer plaintiffs had little incentive to appeal this aspect of the *Halbig* ruling – in either event, the employer plaintiffs were ensured that the merits of their legal challenge was heard by the court.

[10] The D.C. Circuit Court reversed and remanded on the merits, but not on whether the AIA barred the individual claims. *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014). The Circuit Court granted rehearing *en banc*, then held the case in abeyance for a ruling by the Supreme Court in *King v. Burwell*, which is still pending. *Halbig v. Burwell*, 114 AFTR2d 2014-6576 (2014).

Halbig, the Tribe's claims on behalf of its members may proceed.

(E) The AIA Does Not Bar the Tribe's Claims in *Parens Patriae* to Protect Access to Health Benefits.

The NAT filed suit on its own behalf and as *parens patriae* on behalf of its tribal members, challenging regulations which block ACA §1401 and §1402(d) health care benefits for tribal members intended by Congress.[11] These benefits and the regulations which block them *do not assess or levy taxes* on tribal members. Defendants' Motion to Dismiss fails entirely to address these claims to protect access to health insurance benefits.

Courts have long recognized that Tribes have *parens patriae* standing to safeguard the interests of tribal members.[12] Tribes may bring suit as *parens patriae* for the purpose of protecting the health and well-being of their tribal members,[13] a core function of tribal

---

[11] The Complaint is brought by the Tribe "on its own behalf and on behalf of its members," Doc. #1, p. 1 ("This suit is filed to prevent the loss of health care assistance provided by Congress for Tribes and tribal members," para. 1). The Tribe seeks, among other relief, an injunction allowing its members to continue accessing health insurance coverage available to Native Americans on the insurance exchange. Doc. #1 (prayer for relief), p. 16.

[12] *See, e.g., Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1137 (8th Cir. 1974) (tribe sued as *parens patriae* to collect monetary damages on behalf of its members); *Berrey v. Asarco Inc*., 439 F.3d 636, 641, FN 1 (10th Cir. 2006) (tribe bought claim as *parens patriae* under the common law trust doctrine alleging environmental contamination on tribal lands); *Quapaw Tribe of Oklahoma v. Blue Tee Corp*., 653 F.Supp.2d 1166, 1179-80 (N.D. Okla. 2009) (tribes, similar to other governmental entities, have standing to sue to protect sovereign interests) (citing *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation,* 425 U.S. 463 (1976) (tribe had standing, apart from the claims of individual tribal members, to challenge state motor vehicle tax); *Prairie Band of Potawatomi Indians v. Pierce,* 253 F.3d 1234, 1241 (10th Cir. 2001) (tribe had standing to sue State to prevent interference with or infringement on tribal right to self-government); *Delorme v. United States,* 354 F.3d 810 (8th Cir. 2004) (tribe can have standing to sue to protect its own interests or, in appropriate situations, the interests of its members through a *parens patriae* action).

[13] *See, e.g., Quapaw Tribe of Oklahoma v. Blue Tee Corp.,* 653 F.Supp.2d 1166, 1183 (N.D. Okla. 2009) (tribe asserted claims on behalf of its member for alleged harm to health and well-being resulting from mining activities); *Navajo Nation v. Dist. Court for Utah Cnty., Fourth*

government. The NAT, like other Tribes in the United States, has a unique relationship with its members that engenders a sovereign interest in protecting their health and well-being. This interest flows from the NAT's inherent sovereign authority and not from a delegation of federal government authority.[14]

The Tribe brings this case on behalf of Rebecca Bishop and other similarly situated Northern Arapaho tribal members (Doc. #1, ¶5). Mrs. Bishop is a member and employee of the NAT (Decl. of Bishop, Doc. #16-2, Ex. 8). She is 62 years old and experiences significant health problems, including among others, rheumatoid arthritis and diabetes. *Id.* Throughout the past year, Mrs. Bishop benefitted from an exchange health insurance plan that was largely subsidized by her tribal employer and the §1402(d) Cost Sharing benefit. *Id.* Because the NAT has been deemed a Large Employer, Mrs. Bishop may no longer access these benefits and her monthly premium for health coverage is estimated to significantly increase (Decl. of Deeg, Doc. #16-2, Ex. 10). She will be unable to afford the plan, let alone necessary medications that help her manage her health issues, stay on the job, and continue to support her family (Decl. of Bishop, Doc. #16-2, Ex. 8). She and over 90% of tribal member employees[15] are directly harmed

---

Judicial Dist., State of Utah, 831 F.2d 929 (10th Cir. 1987) (custody proceeding of Navajo child); *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587, 589 (10th Cir. 1985) (tribe opposed non-Indian couple adoption of Indian child subject to Indian Child Welfare Act requirements).

[14] *Talton v. Mayes*, 163 U.S. 376, 382-384 (1896) (tribal authority does not arise from federal power or the Constitution); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (tribes are separate sovereigns that pre-existed the Constitution); *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002) (sovereign authority of tribes is not derived from the United States).

[15] *See* Conrad Decl., Exhibit 2, Doc. #9-2, ¶9 ("Indian employees with policies on the exchange, and who are below 300 percent of the poverty rate (about 90 percent of our employees), are exempt from payment of deductibles and co-payments [under §1402(d)]. Without this significant benefit, most could not afford to keep these insurance policies and would return to relying on the extremely limited services provided by IHS. The same is true for

as a result of the Tribe being deemed a Large Employer through Defendants' *ultra vires* regulations. Mrs. Bishop is not affected by any tax implication that may arise in connection with the Large Employer mandate. These cost-sharing benefits are available to individuals, not to the Tribe itself.

The AIA is wholly inapplicable to an in *parens patriae* suit on behalf of Mrs. Bishop and other similarly situated Northern Arapaho tribal members. Defendants' Motion to Dismiss fails to address this key focus of the Tribe's Complaint and should be denied.

III. NAT HAS PRESENTED VIABLE CLAIMS ON WHICH RELIEF CAN BE GRANTED.

(A) The Tribe's Challenges to the Regulation Are Not Waived.

(1) Defendants Omitted Portions of the Rancheria Comments in the Federal Register. Defendants seek dismissal on the ground that no tribe objected to the application of the Large Employer mandate to tribes during the rule-making process. Defendants assert that the only comment offered by a tribe during the process was that of Elk Valley Rancheria and that the substance of the comment does not support the theory advanced by NAT. Doc. #27 at 11-12, fn. 10. However, Defendants presented to the Court only a portion of the Elk Valley Rancheria comment as one which *accepted* the notion that tribes would be subject to the Large Employer mandate.[16] Examination of the actual comments submitted by the Rancheria show a wholly different picture.

The Elk Valley Rancheria comment was submitted to the IRS on October 23, 2013, and

---

employees who are below 400 percent of the poverty rate, and who therefore receive premium tax credits [under §1402].")

[16] *See* Federal Register, Vol. 79, No. 46, 13220 at 13222 (March 10, 2014).

raises, among other issues, whether and how §1402 Cost Sharing benefits apply to Native American employees of Large Employers, including tribes. *See* Reg-132455-11 Miller, 2013, WL 6508315 (2013) (comment letter from Elk Valley Rancheria), attached hereto as Plaintiff's Exhibit 11.

As an initial matter, the Rancheria states that the "Tribe could be penalized if the information collected under the Proposed Rule does not contemplate the *unique circumstances* related to employing members of federally recognized Indian tribes" (emphasis added), Ex. 11, pp. 1-2. The Rancheria reminds the IRS that employers in Indian country may employ work forces comprised predominately of tribal members. *Id.* at 2. The Rancheria also notes there will likely be confusion as a result of individual tribal members being exempt from the individual mandate but counted among employee totals in order to determine compliance with the Large Employer mandate. *Id.*

Of particular importance to the present case, the Rancheria asserts that "employers will be subject to undue IRS scrutiny or penalties *where an unusually high percentage of employees purchase coverage on an exchange and receive reduced cost-sharing under Section 1402,*" (emphasis added). *Id.* It is clear from this comment that the Rancheria believed its tribal members could be employed by the Tribe (or any Large Employer) and still receive the §1402(d) benefits which Defendants' regulation in fact prohibits. Although directly alerted to it, Defendants failed to address the Rancheria's comment on this critical point. Defendants' Federal Register notice obscured their plan to *block* the §1402(d) benefit by application of the Large Employer mandate to tribes. Defendants should not be permitted to ignore and mischaracterize the Rancheria's express understanding of the proposed regulation in the Federal

Register and then claim that no tribe objected to Defendants' actual agenda.

Maintaining §1402(d) Cost Sharing benefits for tribal members employed by the tribe was a key concern of the Rancheria. This is also the centerpiece of the NAT's Complaint. *See* Doc. #1, ¶¶1-3, 19-24, 32-33, 40-44, 47, 52, 58. The Rancheria's comments put Defendants on notice of the key issues in the suit at bar. Defendants never addressed those issues in the rulemaking process and should not now be allowed to insulate that process from judicial scrutiny.

Furthermore, the Rancheria states that "[t]ribal members may find that it is in their financial interest to forego employer offered coverage and instead rely on the Tribal Member exemption from the individual mandate." Ex. 11 at p. 2. In this connection, the Rancheria asserts that "Tribal Member employees can avoid cost-sharing [that is, they can keep §1402 Cost Sharing *benefits*] by purchasing coverage on the exchanges when their household income is between one hundred percent and three hundred percent of the poverty line. This benefit offered to Tribal Members increases the likelihood that some Tribal Member employees will forego employer offered coverage and instead purchase coverage on an exchange." *Id.* This is precisely one of the key problems the NAT raises in its Complaint. *See* Doc. #1, ¶¶40-43, 45-52.[17] Again, the Rancheria's comments put Defendants on fair notice of these concerns.

The U.S. District Court for Wyoming has affirmed that "so long as the agency is informed of a particular position and has a chance to address that particular position, *any* party may challenge the action based upon such position whether or not they actually submitted a

[17] *See also* Decl. of Clifford, Doc. #16-1, ¶6 (tribal members "simply will not be able to afford [a Large Employer group plan]") and Decl. of Conrad, Doc. #9-2, ¶9 (same).

comment asserting that position . . . 'a plaintiff, *or another,* must bring sufficient attention to an issue to stimulate the agency's attention and consideration of the issue during the . . . comment process'." *Wyoming Lodging & Rest. Ass'n. v. U.S. Dep't of Interior*, 398 F.Supp.2d 1197, 1210 (D.Wyo. 2005) (emphasis added) (citing *Benton County v. U.S. Dept. of Energy*, 256 F.Supp.2d 1195, 1198-99 (E.D. Wash. 2003).

Other courts in the Tenth Circuit have voiced similar reasoning. For example, the Western District of Oklahoma has noted that the "identity of the person or entity that raised a particular issue during the administrative process is not controlling. Rather, if an issue was brought to the attention of the [agency] during the public comment period, that issue may be challenged in judicial proceedings, by the original objector or any another person." *Sierra Club, Inc. v. Bostick*, 2013 WL 6858685 at 7 (W.D. Okla. Dec. 30, 2013) (internal cites omitted).

The Oklahoma Court similarly observed that "[i]f the agency is presented an opportunity to consider an issue, regardless of the proponent during administrative proceedings, the agency will have had the requisite opportunity, regardless of who voiced the issue. Accordingly, to find waiver of an issue, the Court must first determine whether that issue was presented to the [agency] during the public comment period." *Id. See also, Wilderness Workshop v. U.S. Bureau of Land Mgmt*., 2008 WL 6490406, at 3 (D.Colo. May 1, 2008).

The Tenth Circuit Court has cited *Wyoming Lodging* with approval, noting that claims brought to an agency's attention, including third-party comments, are a means by which the agency is put on notice. *Forest Guardians v. U.S. Forest Serv*., 495 F.3d 1162, 1170 (10th Cir. 2007).

The underlying purpose of the rule throughout the Tenth Circuit is that claims are not

waived if the agency had a "fair opportunity" to address issues raised. The Elk Valley Rancheria presented comments raising the very same concerns central to the NAT Complaint. Defendants mischaracterize the Rancheria's comments in the Federal Register and their argument should be rejected.

(2) Defendants Failed to Comply with Notice and Consultation Policies. It is not entirely surprising that the Rancheria misunderstood Defendants' intended effects of the Large Employer regulations. Defendants failed to provide adequate notice of these effects and failed to comply with Executive Order 13175 of 2000 or with the Treasury Department's own Tribal Consultation Policy.

The United States government recognizes the unique relationship between Indian tribal governments and the United States as established through the Constitution, treaties and statutes, among other foundations. Executive Order 13175 of 2000, FR Vol. 65, No. 218, 67249, was issued by President Clinton on November 6, 2000. The Order provides that agencies "shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the federal government and Indian tribal governments." Executive Order 13175, Sec. 3. Particularly relevant to the case at bar, the Order affirms that:

> To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless: [among other requirements,] the agency . . . in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides . . . a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met.

Executive Order 13175, Sec. 5.

In December 2014, the Treasury Department's Tribal Consultation Policy was published in furtherance of Executive Order 13175 and affirms that the Department "will endeavor to consult with Tribal Governments prior to issuing regulations, published guidance, and Policies with Tribal Implications." (FR Vol. 79, No. 232, Dec. 3, 2014, 71816.)[18]

There is no indication in the Federal Register that Defendants provided the required tribal impact statement called for the Executive Order 13175. The purpose of the tribal impact statement is to ensure that tribal rights are respected early on in the notification and consultation process instead of rendered an afterthought, as is the case at bar.

Defendants now rely solely on their publication in the Federal Register as sufficient notice of the hidden impact on §1402(d) Cost-Sharing benefits resulting from the challenged regulations. However, such reliance directly contravenes the principles established in Executive Order 13175 and the Treasury Department's Tribal Consultation Policy. The only tribe which commented on the proposed regulation believed it would *not* deny §1402 benefits as a consequence of Tribes being deemed Large Employers. (*See* Ex. 11 at 2.) Other tribes may not have commented because they had the same misunderstanding. The practical effect of the

[18] In addition to these consultation policies, on December 16, 2010, the United States supported the United Nations Declaration on the Rights of Indigenous Peoples ("Declaration"). In its article 18, the Declaration affirms the right of indigenous peoples to "participate in decision making in matters which would affect their rights ..." Further, in its article 21, the Declaration affirms that "[i]ndigenous peoples have the right ... to improvement of their economic and social conditions, including ... health ..." United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, (adopted September 13, 2007), articles 18 and 21. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement (last viewed on April 30,2015).

regulatory scheme was hidden.

Defendants assert that the Executive Order lacks application because it does not create any right enforceable at law. It does, however, establish a federal standard for acceptable and meaningful notice to tribes. Defendants' position contradicts the government's posture of support for tribal consultation and is jurisprudentially unsound. To the extent that the United States has embraced and promoted the principles of tribal consultation, Executive Order 13175 and the Treasury's Consultation Policy are highly instructive in examining regulations that have significant tribal implications and affect a treaty right to health care, and whether the notice provided to tribes and tribal members was inadequate. To decline to see Executive Order 13175 and the Treasury's Consultation Policy as controlling contradicts federal policies of active consultation, protection of treaty-based rights, and Indian self-determination.

(3) The Tribe May Challenge the Regulations Regardless of Comments in Advance. Finally, the NAT is permitted to bring a substantive challenge to the Defendants' regulations regardless of whether the Rancheria or any other commenter raised similar concerns in the notice-and-comment period. Case law from the D.C. Circuit is particularly persuasive in this matter because that Court is "well known for an unusual caseload that is disproportionally weighted toward administrative law."[19] The D.C. Circuit has affirmed the importance of allowing substantive challenges to the ongoing application of regulations. In *Graceba Total Communications, Inc. v. F.C.C.*, the D.C. Circuit held that:

. . . [because] administrative rules and regulations are capable of continuing

[19] Eric M. Fraser, David K. Kessler, Matthew J.B. Lawrence and Stephen A. Calhoun, *The Jurisdiction of the D.C. Circuit*, Cornell Journal of Law and Public Policy, Vol. 23, p. 131 (2013); available at http://ssrn.com/abstract=2238049 (last viewed on April 30, 2015).

> application, limiting review of a rule to the period immediately following rulemaking would effectively deny many parties ultimately affected by a rule an opportunity to question its validity. For this reason, we permit both constitutional and statutory challenges to an agency's application or reconsideration of a previously promulgated rule, even if the period for review of the initial rulemaking has expired.

Graceba Total Commc'ns, Inc. v. F.C.C., 115 F.3d 1038, 1040 (D.C. Cir. 1997) (internal cites and quotations omitted).

In *Independent Community Bankers of America v. Board of Governors of Federal Reserve System*, 195 F.3d 28 (D.C. Cir. 1999), the D.C. Circuit echoes the importance of substantive challenges to rules. There, the Court held that "a party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule, including claims that an agency lacked the statutory authority to adopt the rule, even where the petitioner had notice and opportunity to bring a direct challenge within statutory time limits." *Id.* at 34.

In its Order Denying the Preliminary Injunction, this Court refers to both *Graceba* and *Independent* (Doc. #21, p. 15). In addition, the Court makes special mention of a Tenth Circuit case advanced by NAT – *Big Horn Coal Co. v. Temple*, 793 F.2d 1165, 1170 (10th Cir. 1986). In particular, the Court highlights Judge Barrett's specially concurring opinion in *Big Horn Coal Co.*. While *Big Horn* ruled against the challenger in that instance, it is consistent with *Graceba* and stands for the principal that substantive challenges, like the one brought by NAT, should be permitted:

> The "estoppel rule" . . . [presupposes that] . . . failing to so object during the notice and comment period forever waives the party's right to contest the validity of the regulation even within the sixty days normally provided to file a petition to review. This should not be the rule. The rule should be that *unless a petitioner can demonstrate that an agency rule* is invalid *ab initio* because it is constitutionally infirm or *exceeds the agency's statutory authority*, the petitioner is estopped from challenging the procedural promulgation of the rule after the

> time period for filing such a challenge has expired, regardless of whether petitioner objected during the notice and comment period. . . .

793 F.2d at 1170 (emphasis added).

Perhaps inadvertently, the Court attributes Judge Barrett's concurrence to *Graceba*, a D.C. Circuit case, and states that Judge Barrett's rule, while inviting, is not the law in the Tenth Circuit. Doc. #21, p. 15. In fact, *Big Horn Coal Co.* is a Tenth Circuit decision and Judge Barrett's recommended rule is persuasive authority which should be adopted by this Court to safeguard against constitutionally infirm and *ultra vires* regulations, including those promulgated by the IRS which are challenged in the present case.[20]

The Tribe challenges the substance of the regulations and authority of Defendants to promulgate them pursuant to the ACA. This Court should rely on the well-reasoned case law from the D.C. Circuit and Judge Barrett's proposed rule to find that the Tribe may bring a substantive or "as-applied" challenge to these *ultra vires* regulations.

(B) The Regulations Exceed Statutory Authority Under the ACA and Are Contrary to the Intent of Congress.

(1) The Regulations Clash With the ACA and Are *Ultra Vires*. With the cluster of regulations that implement the Large Employer mandate, the Defendants disregard

[20] Other cases relied on by Defendants involve permit challenges in an adjudicatory administrative process or procedures specific to the National Environmental Policy Act, 42 U.S.C. §4321 *et. seq*., (NEPA). *See, e.g., Wilson v. Hodel*, 758 F.2d 1369, 1372-73 (10th Cir. 1985), (a BLM permit applicant failed to present to the Interior Board of Land Appeals an argument about procedural irregularities affecting his application; as a result, the court declined to consider it) and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 533-34 (1978) (Atomic Energy Commission declined to reopen a case because the intervenor had had the opportunity to present additional evidence during the appeals process but failed to do so; Court also affirmed that agency decisions may be set aside for "substantive reasons as mandated by statute," *id.* at 558.)

entirely what Congress has set forth, and essentially divorce tribes and their Native American employees from the benefits that Congress has provided.

The agency regulations disregard the basic structure of the ACA, and numerous, specific provisions that clearly demonstrate Congress' intent to fashion a special set of laws and benefits for Native American health care. The Act includes permanent reauthorization for the IHCIA. ACA §10221; 25 U.S.C. §1601 *et seq*. It exempts Native Americans from the individual mandate on the basis of the trust relationship. ACA §5000A(e)(3). It creates special cost-share benefits for Native Americans. ACA §1402(d). It allows IHS to receive reimbursement for Part B Medicare services. ACA §2902. It adjusts the valuation of out-of-pocket costs for Part D Medicare provided through IHS. ACA §3314. It creates special monthly enrollment periods for Native Americans designed to promote and protect the rights of Native Americans to make choices about health care insurance. ACA §1311(6)(D). It provides special grant funding opportunities to tribes and tribal organizations. ACA §§2951(h)(2)(A), 3505(a). The law gives special emphasis to promoting health among native communities and involves tribes in that process. ACA §§4001 *et seq*, 5101 *et seq*. It preserves a tax immunity for insurance or other health care assistance provided by tribes for tribal members. ACA §9021.

If it were necessary to interpret the above sections, expressly passed for the benefit of Indians, they must be liberally construed in favor of Indians. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (internal cites omitted). Even if one sees the Large Employer definition in isolation, as merely a law of general applicability, such statutes are also "to be construed liberally in favor of the Indians. . . ." *County of Yakima v. Confederated Tribes*, 502 U.S. 251, 269 (1992), quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). *See also Dobbs v.*

Anthem Blue Cross and Blue Shield, 600 F.3d 1275, 1283 (10th Cir. 2010) and *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1191-92 (10th Cir. 2002). A "general" provision within a statute which provides significant benefits to Indians, like the rest of the provisions, must be construed in favor of the Tribe. As a part of the ACA, the definition of Large Employer (which is silent as to tribes) must be construed so as not to extend to the Tribe.

The regulations implementing the Large Employer mandate fail to recognize the unique status of tribes and tribal members under the ACA. The agency regulations relegate tribal-member employees of tribal organizations to a generic category of large employers, erasing the distinction created by Congress. The barrier the regulations create to obtaining §1402(d) Cost-Sharing benefits reveals the unlawful effect of the regulations most starkly. Congress did not create a special benefit in the ACA for working-class Indians below 300 percent of the poverty line, only to have Defendants promulgate regulations that prevent working-class Native Americans working for Tribes from obtaining that benefit.[21]

(2) Plaintiff's Position is Not Foreclosed by *Chickasaw Nation* or Other Case Law. Defendants argue that *Chickasaw Nation v. United States*, 208 F.3d 871, 880 (10th Cir. 2000) *aff'd*, 534 U.S. 84 (2001) forestalls NAT's Complaint. Defendants describe the ruling over broadly and ignore other applicable law.

The law at issue in *Chickasaw* abrogated significant tribal sovereign rights. Through the Indian Gaming Regulatory Act, 25 U.S.C. §2701, *et. seq*, (IGRA), Congress used its power to abrogate the right of Indian tribes to operate gaming purely as an exercise of inherent sovereign

[21] The Tribe relies on further authority and argument presented in its Opening Brief in Support of Motion for Preliminary Injunction, Doc. #9, incorporated by reference herein.

authority.[22] By contrast, nowhere in the ACA is Congress' plenary power invoked to abrogate the rights of tribes. In fact, throughout the breath of the ACA, Congress demonstrates its clear intent to uphold and respect treaty rights and trust obligations. Congressional findings in the IHCIA, and the larger ACA, express the "special trust responsibilities and legal obligations to Indians," upon which the statute is based. 25 U.S.C. §1602.

Chickasaw involved the interpretation of express language imposing a tax on tribes which the Court found to be unambiguous. 534 U.S. at 89. On its face, IGRA required Indian casinos to pay certain taxes that were included in the Internal Revenue Code of 1986. Notably, previous drafts of IGRA had exempted tribes from paying these taxes. ("Nor can we believe that anyone seeking to grant a tax exemption would intentionally substitute a confusion-generating numerical cross-reference, see Part II-A, *supra*, for pre-existing language that unambiguously carried out that objective.") *Id.* at 92. One commentator explained:

> Far from recognizing an ambiguity in such a provision [of IGRA] . . . [*Chickasaw*] established that the statutory language in the case was unambiguous . . . the *Chickasaw* Court affirmed what every other Supreme Court case regarding the interpretation of Indian treaties or statutes has illustrated – congressional intent is what matters in diminishing Indian rights [internal citations omitted].[23]

Here, §4980H is absolutely silent as to Indian tribes. And, there is no evidence that earlier drafts

---

[22] Prior to IGRA, tribes' inherent sovereignty allowed them to operate gaming even when doing so outside of their reservation was prohibited under state law, with minor exceptions. Under IGRA, a tribe may not operate gaming on its reservation unless the state where the tribe is located permits that gaming for one or more purposes. 25 U.S.C. §2710(b)(A) ("class II gaming) and (d)(1)(B) ("class III gaming"). IGRA also imposes a number of other requirements on tribal gaming which narrowed the pre-IGRA authority of tribes over that activity. *See, e.g.*, 25 U.S.C. §2711 (management contract approvals by federal commission [NIGC] required) and §2712 (tribal ordinance approvals by NIGC required).

[23] Scott C. Hall, *The Indian Law Canons of Construction v. The Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 Conn. L. Rev. 495 at 530-31 (2004).

of the ACA were modified in ways that suggest tribes are to be included under §4980H or that tribal members working for large tribes are to be barred from accessing §1402(d) benefits.

Furthermore, *Chickasaw* involved the levy of taxes. "The subject matter at issue also counsels against accepting the Tribe's interpretation. That subject matter is tax exemption." 534 U.S. at 90. "Exemptions from taxation . . . must be unambiguously proved." *Id.* at 95 (internal citation omitted). To be sure, the NAT has brought suit *in part* to avoid penalties under the ACA,[24] but, as noted above, these penalties are not revenue-generating taxes. Significantly, the Tribe has also brought suit in *parens patriae* to protect health insurance benefits for tribal members.[25] The Tribe's claims to preserve special health care benefits for Indians do not involve the levy of any taxes on any individuals or on the Tribe itself.

Chickasaw was not based on any specific treaty obligations regarding the tribe involved. Here, the 1868 Treaty with the NAT includes a bargained-for promise that the United States will provide healthcare benefits for its tribal members – a full-time physician to provide medical services.[26] Interpretations of statutory language involving treaty obligations directly and necessarily invoke the Indian canons of construction. *See Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997) ("normal rules of construction do not apply when Indian treaty rights, or even non-treaty matters involving Indians, are at issue") (internal cites omitted). Here, Congress enacted special benefits for Indians to honor specific treaty-based health care obligations of the United States, and the ACA must be interpreted so as to accomplish that

---

[24] Complaint, Doc. #1, p. 16.

[25] Complaint, Doc. #1, pp. 16-17.

[26] 15 Stat. 655 (May 10, 1868) (Article 7). In 1868, care from a full-time physician was a significant bargained-for benefit, and may have been state-of-the-art medical care at the time.

Congressional objective.

Defendants would like the Court to rely on a long-abandoned statement in *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960), that "a general statute in terms applying to all persons include Indians and their property interests." Defendants argue that general language in the ACA includes within it Indian tribes and their members. This reliance on the *Tuscarora* statement is misplaced.

Since *Tuscarora*, the Supreme Court has cited its majority opinion in significant respects in only two cases, both repudiating the disputed *Tuscarora* statement. *See* Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 Or. L. Rev. 413 (2007) at 464-73, discussing *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 786 (1984), *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 248, n. 21 (1985), and other citations to *Tuscarora*. "Oneida plainly indicates that Tuscarora cannot be viewed as precedent with regard to the canons-violating statement about general federal laws. . . . Escondido and Oneida, together, make clear that the *Tuscarora* statement about generally applicable federal laws is itself no longer generally applicable, and has not been for at least twenty-two years – if it ever properly was." Wildenthal at 470. More than two dozen other Supreme Court decisions since *Tuscarora* have reaffirmed the Indian canons of construction while ignoring the purported "rule" Defendants seek to rely on. *Id.* Three particularly notable Supreme Court decisions after *Tuscarora* apply the Indian canons to general federal laws straightforwardly: *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149-52 (1982) (Natural Gas Policy Act of 1978); *U.S. v. Dion*, 476 U.S. 734, 738-46 (1986) (Eagle Protection Act); and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 17-18 (1987) (federal diversity jurisdiction

statute).

Accordingly, the Tenth Circuit has consistently applied the Indian canons to statutes of general applicability. In *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275 (10th Cir. 2010), the court interpreted the pre-2006 version of the Employee Retirement Income Security Act (ERISA), which exempted federal, state and local governments from the Act, but was silent as to Indian governments. *Dobbs* held that "ERISA would not apply to insurance plans purchased by tribes for employees primarily engaged in governmental functions unless Congress expressly or necessarily preempted Indian tribal sovereignty." *Id.* at 1284. The rule from *Dobbs* prevents the agency from interpreting the Large Employer mandate as a rule of general applicability which they have discretion to apply to the Tribe by regulation. In the Tenth Circuit, the proper respect for tribal sovereignty creates "a presumption that a federal statute does not apply to an Indian tribe directly absent express congressional authorization."[27]

Defendants rely on *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002), which made a distinction between "proprietary" and "governmental" functions. However, *San Juan* then applied the Indian canons of construction, finding that the Pueblo's labor law was governmental in nature. The distinction itself has been found to be problematic by the Supreme Court in the context of state government:

> The problem is that neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. . . . We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to

---

[27] Cohen's Handbook of Federal Indian Law, 2012 Ed., p. 125, fn. 21, citing *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010).

> inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.

Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 545-47 (1985). The distinction is equally problematic as to tribal governments.

Defendants also rely on *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982). But *Navajo Forest* applied the Indian canons of construction to a statute of general applicability involving economic activity by the tribe. The enterprise was owned and operated by the tribe and revenue it generated was used for the advancement of the tribe and its members; it was, therefore, "an arm or instrumentality of the Tribal government." *Id.* at 710. Likewise, NAT enterprises are "instrumentalities" of the Tribe wholly operated and controlled by the Tribe. They are needed as a substitute for tax revenue because of the severe poverty and lack of private enterprise on the Reservation, and all such revenue goes towards governmental services. Decl. of Goggles, Doc. #16-3, ¶¶2-3. Furthermore, like Defendants in the case at bar, the U.S. relied on *Tuscarora* for its preferred interpretation of the federal statute in *Navajo Forest*. But the Tenth Circuit concluded that *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) "overrules *Tuscarora*," specifically with respect to its disputed statement that laws of general applicability apply to tribes. 692 F.2d 709 at 713.[28] In *Merrion*, the Court advances the principle that a tribe does not lose its character as a sovereign when it happens to act in a "commercial" capacity. 455 U.S. at 145-50.

Finally, even if the "proprietary - governmental" distinction were valid, it would not lead

[28] Although *Merrion* does not require it, the 1868 treaty provision examined in *Navajo Forest*, 692 F.2d at 712, is virtually identical to Article 2 of the 1868 treaty establishing the Wind River Reservation, where the NAT now resides. 15 Stat. 673 (July 3, 1868).

to dismissal of the Tribe's Complaint for several reasons. First, the Tribe brings this suit not in any "proprietary" capacity, but in *parens patriae* to protect its members from an *ultra vires* regulation blocking them from Congressionally intended health benefits. If the Tribe is successful, *more* tribal members will obtain health care coverage and the financial burden on the Tribe will *increase*, not decrease.[29] Second, nearly one-third of all tribal employees work not for any enterprise, but for agencies or departments of tribal government performing "traditional" governmental functions.[30] Even if the Court were to apply the "proprietary - governmental" distinction to the NAT's enterprises, as Defendants urge, the NAT's Complaint survives with respect to those employees working in its more traditionally designated governmental agencies.

IV. CONCLUSION.

The Defendants should not be permitted to insulate an *ultra vires* regulation from judicial scrutiny. For the reasons stated above, Defendants' Motion to Dismiss should be denied.

Dated this 30th day of April, 2015.

Respectfully submitted,

/s/

Andrew W. Baldwin
Berthenia S. Crocker
Kelly A. Rudd
Janet E. Millard
Mandi A. Vuinovich
Baldwin, Crocker & Rudd, P.C.
P.O. Box 1229
Lander, WY 82520

[29] The Tribe seeks this relief even though compliance with the Large Employer mandate is projected to reduce the Tribe's overall insurance expense.

[30] About 270 employees of the Tribe do not work for the Tribe's enterprises but for governmental programs. Plaintiff's Exhibit 7, Conrad Dec. ¶4 (Doc. #9-2).

(307) 332-3385
ATTORNEYS FOR PLAINTIFF
NORTHERN ARAPAHO TRIBE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing NORTHERN ARAPAHO TRIBE'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS was served upon the following by the methods indicated below on the 30th day of April, 2015:

Nicholas Vassallo	[ ]	By Facsimile
Assistant United States Attorney	[ ]	By U.S. mail, postage prepaid
P.O. Box 668	[ ]	By Hand Delivery
Cheyenne, WY 82003-0668	[ ]	By Overnight Courier
	[X]	Electronic Filing
Jacek Pruski	[ ]	By Facsimile
U.S. Dept. of Justice	[ ]	By U.S. mail, postage prepaid
Civil Division, Federal Programs Branch	[ ]	By Hand Delivery
20 Massachusetts Ave. N.W., Room 6141	[ ]	By Overnight Courier
Washington, DC 20001	[X]	Electronic Filing
Alice Shih LaCour	[ ]	By Facsimile
U.S. Dept. of Justice	[ ]	By U.S. mail, postage prepaid
Civil Division, Federal Programs Branch	[ ]	By Hand Delivery
20 Massachusetts Ave. N.W., Room 6143	[ ]	By Overnight Courier
Washington, DC 20001	[X]	Electronic Filing

/s/
Andrew W. Baldwin