

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**OGLALA SIOUX TRIBE**

P.O. Box 2070

Highway 18, Main St.

Pine Ridge, SD 57770

PLAINTIFF,

v.

**SYLVIA BURWELL**, in her official capacity  
as Secretary,

U.S. Department of Health & Human Services

200 Independence Avenue, S.W.

Washington, D.C. 20201

**DEPARTMENT OF HEALTH AND  
HUMAN SERVICES**

200 Independence Avenue, S.W.

Washington, D.C. 20201

**ROBERT MCSWAIN**, in his official capacity  
as Director,

Indian Health Service

801 Thompson Avenue, Ste. 400

Rockville, MD 20852-1627

**INDIAN HEALTH SERVICE**

801 Thompson Avenue, Ste. 400

Rockville, MD 20852-1627

DEFENDANTS.

Civil Action No. 15-\_\_\_\_\_

**COMPLAINT**

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff Oglala Sioux Tribe (“Tribe”), a federally-recognized tribe, for its causes of actions against the Defendants named above, alleges as follows:

## **INTRODUCTION AND SUMMARY**

1. The Tribe brings this action against the Department of Health and Human Services (“HHS”) and its agency, the Indian Health Service (“IHS”) seeking redress for their decision to use \$1.6 million in funds appropriated for the Pine Ridge Service Unit, which provides health services to tribal members and other Indian beneficiaries, to fund a settlement of overtime pay that the IHS reached with unions. The IHS intends to use these funds to pay for the settlement even though the funds are required by law to be used to make improvements in the programs of the IHS operated by or through the Pine Ridge Service Unit which may be necessary to achieve or maintain compliance with the applicable conditions and requirements of Medicare and Medicaid. 25 U.S.C. § 1641(c)(1)(B). According to Defendant Robert McSwain, Acting IHS Director, the payments are to be made to the unions by August 14, 2015.

## **JURISDICTION AND VENUE**

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331 and 1362. This is a civil action brought by an Indian tribe that arises under the Constitution, federal common law and federal statutes, including the APA.

3. This Court has jurisdiction to adjudicate claims under 5 U.S.C. §§ 701-706. The Tribe is suffering legal wrong, and is adversely affected or aggrieved by Defendants’ actions to use Service Unit funding to fund the Settlement.

4. This Court has jurisdiction to adjudicate claims under 28 U.S.C. §§ 2201 and 2202. This is an action that seeks declaratory and injunctive relief.

5. Pursuant to 5 U.S.C. § 702, the United States has waived its sovereign immunity from this lawsuit, including claims against its agencies and officials.

6. Venue is proper in this Court under 28 U.S.C. §§ 1391(b)(2) and (e)(1) because this is an action in which the Defendants are officers and employees of the United States acting in their official capacities and a substantial part of the events or omissions giving rise to this claim occurred in this judicial district.

### **PARTIES**

7. Plaintiff, the Oglala Sioux Tribe is a federally recognized Indian Tribe that is served by the Pine Ridge Service Unit of the Indian Health Service.

8. Defendant Sylvia Burwell, the Secretary of Health and Human Services (“Secretary”), has overall responsibility for carrying out all the functions, responsibilities, authorities and duties of the U.S. Department of Health and Human Services, including oversight of the IHS, an agency within the Department. She is sued in her official capacity.

9. Defendant Department of Health and Human Service is an agency in the Executive Branch of the Federal government, and it oversees the IHS.

10. Defendant Robert McSwain is the Acting Director of the IHS. He is sued in his official capacity.

11. The IHS is an agency of the Department of Health and Human Service and is responsible for providing federal health care services to American Indians and Alaska Natives. The IHS operates the Pine Ridge Service Unit.

### **FACTUAL ALLEGATIONS**

12. On May 22, 2015, IHS Acting Director McSwain sent a “Dear Tribal Leader” letter to Indian tribal leaders. The letter informed tribal leaders of a settlement that the IHS had reached with employee unions concerning overtime compensation. The letter stated that the

settlement payments would be paid using various sources of funding, including approximately 50 to 51 million dollars from prior year third party health insurance collections.

13. On July 29, 2015, IHS Acting Director McSwain sent a second “Dear Tribal Leader” letter to Indian tribal leaders concerning the settlement. This letter confirmed that the Judgment Fund (available to pay judgments against the United States and compromise settlements with the United States) would not be used to make the settlement payments. The letter stated that service unit third party collections would be used to make the payments for back years.

14. Third party collections are collections made by service units from insurers and third party payers for services provided by the service unit. Across the IHS, by far the largest third-party payer to IHS programs is Medicaid, which provides 70% of third-party payments. Medicare accounts for another 19 percent of third-party payments.

15. The July 29, 2015 Dear Tribal Leader letter stated that IHS had made an initial estimate of the amounts that would be owed by each service unit, for purposes of making a \$60 million payment due to the union, which payment it said is due on August 14, 2015. It stated that Acting Director McSwain had directed IHS Area Directors to make available to tribal leaders the impact on their service units.

16. The Tribe has been advised by IHS officials that \$1,655,658 will be taken from their service unit, including \$1,346,976 from the Pine Ridge Hospital, and lesser amounts from the Kyle and Wanblee clinics (\$210,465 and \$98,217, respectively).

17. According to Pine Ridge Hospital officials, if these amounts are actually taken from the service unit, direct patient care will be impacted dramatically, causing service reductions and difficulty in maintaining Medicare and Medicaid accreditation.

18. The Pine Ridge Service Unit has historically and chronically been underfunded. The reduction of its funding by over \$1.6 million would dramatically and directly impact the delivery of health care services to the Tribe's members served by the service unit, who already suffer from health disparities at shocking rates relative to mainstream America. The service unit health care facilities need a significant influx of monies and resources to even come close to meeting enormous unmet health needs; a reduction would be devastating. The Tribe is currently in the midst of a youth suicide epidemic which this Administration is trying to address. Taking \$1.6 million from the Pine Ridge Service Unit would seriously undermine that effort.

### **CAUSES OF ACTION**

#### **Count I — Violation of the Indian Health Care Improvement Act § 401**

19. The Tribe incorporates by reference paragraphs 1 through 18 as if set forth fully herein.

20. The use of third-party collections from Medicaid and Medicare is limited by Section 401 of the Indian Health Care Improvement Act ("IHCIA"). U.S.C. § 1641. That section provides in relevant part:

(A) 100 percent pass-through of payments due to facilities

Notwithstanding any other provision of law, ... payments to which a facility of the Service is entitled by reason of a provision of title XVIII [Medicare] or XIX [Medicaid] of the Social Security Act [42 U.S.C. 1395 et seq., 1396 et seq.] shall be placed in a special fund to be held by the Secretary. In making payments from such fund, the Secretary shall ensure that each Service unit of the Service receives 100 percent of the amount to which the facilities of the Service, for which such Service unit makes collections, are entitled by reason of a provision of either such title.

(B) Use of funds

Amounts received by a facility of the Service under subparagraph (A) by reason of a provision of title XVIII or XIX of the Social Security Act shall first be used ... for the purpose of making any improvements in the programs of the Service

operated by or through such facility which may be necessary to achieve or maintain compliance with the applicable conditions and requirements of such respective title. Any amounts so received that are in excess of the amount necessary to achieve or maintain such conditions and requirements shall, subject to consultation with the Indian tribes being served by the Service unit, be used for reducing the health resource deficiencies (as determined in section 1621(c) of this title) of such Indian tribes, including the provision of services pursuant to section 1621d of this title.

25 U.S.C. § 1641(c)(1)(A)&(B) (emphasis added).

21. The statute requires that third party collections made by a service unit (1) be retained by the service unit, and (2) be used by the service unit for specific purposes. First, the monies shall be used “to achieve or maintain compliance with the applicable conditions and requirements” of the Medicaid and Medicare programs. If the amounts collected are “in excess of the amount necessary to achieve or maintain such conditions and requirements,” then they may be used, “subject to consultation with the Indian tribes being served by the Service unit..., for reducing the health resource deficiencies (as determined in section 1621(c) of this title) of such Indian tribes.” Settlement of claims against the agency are not included as a permissible purpose.

22. The monies that IHS intends to take from the Pine Ridge Service Unit are required to make improvements in the Pine Ridge Service Unit necessary to achieve or maintain compliance with the applicable conditions and requirements of Medicare or Medicaid.

23. Further, to the extent that the collections of the Pine Ridge Service Unit could be used to reduce health deficiencies at the service unit, the use of the funds to pay the settlement will not reduce health deficiencies. To the contrary, it will exacerbate them. In any event, the IHS did not consult with the Tribe with regard to using the third party revenues to pay the settlement.

## **PRAYER FOR RELIEF**

### **Wherefore, Plaintiff prays for relief as follows:**

- A. An Order holding unlawful the Dear Tribal Leader letters and the IHS plan to use service unit funds to fund the settlement.
- B. An Order compelling Defendants to retain the Pine Ridge Service Unit third party collections at the service unit, and to expend said third party collections for the purposes provided in Section 401 of the IHCI A.
- C. A declaration that the Dear Tribal leader letters violate Section 401 of the IHCI A insofar as they provide for the use of service unit funds to fund the settlement.
- D. Such temporary and injunctive relief as is necessary to preserve the Pine Ridge Service Unit's third party collections pending resolution of this litigation.
- E. Any further relief to which the Tribe may be entitled or which the Court may deem appropriate after full development of the facts.

s/ Michael L. Roy

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DATED: August 12, 2015