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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Gila River Indian Community; and Gila River Health Care Corporation, Plaintiffs, v. United States Department of Veterans Affairs; and Robert A. McDonald, Secretary, United States Department of Veterans Affairs, Defendants.	Case No. 2:16-cv-772 **DEFENDANTS' MOTION TO DISMISS**

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants, the United States Department of Veterans Affairs and Robert A. McDonald, hereby move to dismiss Plaintiffs' First Amended Complaint for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted. The reasons supporting Defendants' motion are set forth in the accompanying memorandum of law.

DATED: August 10, 2016

Respectfully submitted,

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Plaintiffs,

v.

United States Department of Veterans Affairs; and Robert A. McDonald, Secretary, United States Department of Veterans Affairs,

Defendants.

Case No. 2:16-cv-772

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Congress has set up a jurisdictionally exclusive process under which questions of law and fact affecting VA's provision of benefits to veterans must be decided, if at all, by the Court of Appeals for Veterans Claims ("CAVC") and the U.S. Court of Appeals for the Federal Circuit. In this case, Plaintiffs Gila River Indian Community and Gila River Health Care Corporation ("GRHC") ask this Court to resolve an issue about the Secretary of Veterans Affairs' obligation to pay for certain health care services to veterans, which, therefore, may only be judicially addressed in a forum other than this one. The Veterans' Judicial Review Act ("VJRA"), Pub. L. No. 100-687, 102 Stat. 4105 (Nov. 18, 1988), and Ninth Circuit precedent require that the issue be channeled through the Department of Veterans Affairs ("VA") system, the CAVC, and the Federal Circuit.[1]

Moreover, even if this were the proper Court in which to bring suit, Plaintiffs have failed to challenge any final agency action, a necessary predicate for review under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* ("APA"). Plaintiffs have not submitted a claim for reimbursement to VA or appealed any such claim through VA's administrative process and therefore can point to nothing approaching a formal agency action that they could challenge as final. Plaintiffs instead base their claim on the breakdown of discussions and on an informal statement by a VA attorney regarding the relevant statute's interpretation. Neither of these "actions" constitutes a final agency

[1] *See Cox v. West*, 149 F.3d 1360, 1365 (Fed. Cir. 1998) ("The relevant issue under section 511(a) is whether the decision necessarily interpreted a *law* that affects veterans' benefits."); *see also Bates v. Nicholson*, 398 F.3d 1355, 1365 (Fed. Cir. 2005) (interpreting section 511 to "place[] review of Secretarial decisions under a single piece of legislation relating in whole or in part to benefits first in the Board [of Veterans' Appeals], and then in the Court of Appeals for Veterans Claims")

action, and therefore Plaintiffs' claims must be dismissed for lack of jurisdiction.

Plaintiffs' Complaint must also be dismissed because it fails to state a viable claim for relief. Plaintiffs rely on flawed interpretations of 25 U.S.C. §§ 1645 and 1623(b). Section 1645 does not require VA to provide tribal organizations with the kind of reimbursement Plaintiffs seek here absent a sharing arrangement, and section 1623 does not alter this prerequisite. Because Plaintiffs have failed to enter into such an arrangement with VA, the agency is under no obligation to pay.

Accordingly, Plaintiffs' Complaint should be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

BACKGROUND

I. STATUTORY FRAMEWORK

In 2010, Congress passed the Patient Protection and Affordable Care Act ("ACA"). The ACA includes several provisions aimed at improving health care for Native Americans. According to Plaintiffs' Complaint, this lawsuit implicates two such provisions. The first comes from the Indian Health Care Improvement Reauthorization and Extension Act of 2009, S. 1790, 111th Cong. (2009) ("IHCIREA"), enacted as section 10221(a) of the ACA. The IHCIREA permanently reauthorized the Indian Health Care Improvement Act and "expand[ed] programs that seek to augment the [Indian Health Service ("IHS")] health care workforce, increase the amount and type of services available at facilities funded by the IHS, and increase the number and type of programs that provide behavioral health and substance abuse treatment to American Indians and Alaska Natives." ELAYNE J. HEISLER, CONGR. RESEARCH SERV., R41630, *The Indian*

Health Care Improvement Act Reauthorization and Extension as Enacted by the ACA: Detailed Summary and Timeline (Dec. 14, 2011).

Plaintiffs' claim focuses on the provision of the IHCIREA codified at 25 U.S.C. § 1645, which is titled "Sharing Arrangements with Federal Agencies." That section is divided into four subsections. Subsection (a) grants the Secretary of Health and Human Services ("HHS") the authority to "enter into (or expand) arrangements for the sharing of medical facilities and services between the [Indian Health] Service, Indian tribes, and tribal organizations and the Department of Veterans Affairs and the Department of Defense," after consulting with Indian tribes "significantly affected by the arrangement." 25 U.S.C. § 1645(a). Subsection (b) imposes certain limitations on the Secretary of HHS, preventing her from taking any action that would impair "the quality of health care services" provided through IHS or VA, among other things. *Id.* § 1645(b). Subsection (c) concerns reimbursements and states in full:

> (c) REIMBURSEMENT.—The Service, Indian tribe, or tribal organization shall be reimbursed by the Department of Veterans Affairs or the Department of Defense (as the case may be) where services are provided through the Service, an Indian tribe, or a tribal organization to beneficiaries eligible for services from either such Department, notwithstanding any other provision of law.

Id. § 1645(c). Finally, subsection (d) advises that the statute does not "creat[e] any right of a non-Indian veteran to obtain health services" from IHS. *Id.* § 1645(d).

The second provision of the ACA on which Plaintiffs' claim relies comes from section 2901 of the ACA and is codified at 25 U.S.C. § 1623(b). That provision states:

> **(b) PAYER OF LAST RESORT.—**Health programs operated by the Indian Health Service, Indian tribes, tribal organizations, and Urban Indian organizations . . . shall be the payer of last resort for services provided by such Service, tribes, or organizations to individuals eligible for services through such programs,

notwithstanding any Federal, State, or local law to the contrary.

II. FACTUAL AND PROCEDURAL HISTORY

Pursuant to 25 U.S.C. § 1645 and 38 U.S.C. § 8153, VA entered into an agreement with IHS in December of 2012. *See* Agreement Between Department of Veterans Affairs Veterans Health Administration and Department of Health and Human Services Indian Health Service for Reimbursement for Direct Health Care Services ("IHS–VA Agreement").[2] Under this agreement, VA agreed to reimburse IHS for health services IHS provides directly to eligible American Indian and Alaska Native veterans. *Id*. at 2. The agreement also provides for information sharing between VA and IHS to ensure that high quality care is being provided to the veterans and specifies the rate of payment for reimbursement and the process for claim submission and processing. *Id*. at 2–5. VA has used this agreement as a template in entering into similar agreements with tribes operating health care facilities. First Amended Complaint ("Compl.") ¶¶ 36, 50, ECF No. 12.[3]

In February of 2013, VA began discussing entering into a reimbursement

[2] The agreement can be found online at https://www.ihs.gov/vaihsmou/includes/themes/newihstheme/display_objects/documents/VA_IHS_Final_Reimbursement_Agreement_signed_5Dec12.pdf. The Court is permitted to take this agreement into account on a motion to dismiss because Plaintiffs have referenced it in their complaint. Compl. ¶¶ 36, 47. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (explaining the "incorporation by reference doctrine, which permits us to take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading.").

[3] While VA does not agree with all of the factual allegations raised in the Complaint, Defendants assume their truth for purposes of this motion. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.").

agreement with GRHC, a wholly-owned tribal entity of Gila River Indian Community that operates health care services pursuant to the Indian Self-Determination and Education Assistance Act. Compl. ¶¶ 2, 51. Discussions continued over the next two years, but were ultimately unsuccessful, and no agreement was reached. *Id.* ¶¶ 51–68

On March 22, 2016, Plaintiffs filed the present lawsuit against VA and Robert A. McDonald, the Secretary of Veterans Affairs, in his official capacity. Plaintiffs assert that VA is required to reimburse GRHC for services it provided to beneficiaries eligible for services from VA, despite the parties' failure to enter into an agreement. On July 11, 2016, Plaintiffs filed their First Amended Complaint. Defendants now respectfully ask this Court to dismiss this action on the ground that the Court lacks jurisdiction over the subject matter of this case or, in the alternative, because Plaintiffs fail to state a claim upon which relief can be granted.

ARGUMENT

I. The Court Should Dismiss the Complaint for Lack of Subject Matter Jurisdiction.

A. The Veterans' Judicial Review Act Precludes Review by This Court.

Congress broadly divested all federal courts but the CAVC and the Federal Circuit of jurisdiction to review any "questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." 38 U.S.C. § 511(a).[4] Because Plaintiffs' claims require deciding such a question of law,

[4] Because this provision provides an adequate remedy by channeling review to the CAVC and the Federal Circuit, the Mandamus Act cited by Plaintiffs does not provide jurisdiction. *See Kennecott Copper Corp., Nevada Mines Div., McGill v. Costle*, 572 F.2d 1349, 1356 (9th Cir. 1978). *See also Louisville and Nashville R.R. Co. v. Donovan*,

this Court lacks jurisdiction.

The provisions of the VJRA establish Congress's intent to include all issues necessary to a decision affecting benefits in the "exclusive appellate review scheme" created by that statute. *Hicks v. Veterans Admin.*, 961 F.2d 1367, 1370 (8th Cir. 1992); *accord Sugrue v. Derwinski*, 26 F.3d 8, 11 (2d Cir. 1994); *Larrabee by Jones v. Derwinski*, 968 F.2d 1497, 1501 (2d Cir. 1992). Section 511 applies to decisions on "*all* questions of law and fact," as long as the questions decided are "*necessary to a decision* by the Secretary *under a law that affects the provision of benefits* by the Secretary to veterans." 38 U.S.C. § 511(a) (emphasis added); *see, e.g.*, *Hicks*, 961 F.2d at 1369 (rejecting notion that a First Amendment claim falls outside this scheme of review); *Blue Water Navy Vietnam Veterans Ass'n, Inc. v. McDonald*, No. 15-5109, 2016 WL 4056093, at *2 (D.C. Cir. July 29, 2016) (holding that section 511 applies to suit seeking "review of the validity of a VA policy that leads directly to the denial of certain benefits for most, if not all, of the veterans it affects"). Congress's broad intent is clearly expressed in the legislative history, which explains that the primary purpose behind the VJRA was to:

> Establish an independent [CAVC] . . . similar to the Court of Military Appeals and the United States Tax Court, to rule on all disputes involving the Veterans' Administration and veterans[, and to p]rovide for review by the . . . Federal Circuit of any legal matter relied on by the [CAVC] in making a decision in a particular case. This would include constitutional, statutory, and regulatory matters, and interpretations of law.

H.R. REP. NO. 963, at 4, *reprinted in* 1988 U.S.C.C.A.N. at 5785.

This exclusive review scheme is not circumscribed to adjudicative decisions on an

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713 F.2d 1243, 1245 (6th Cir. 1983) (recognizing a "limitation on section 1361 jurisdiction . . . where an exclusive statutory method of reviewing administrative action exists").

individual's claim for benefits; it encompasses all VA decisions affecting veterans' benefits, such as those pertaining to the formulation and implementation of policies and procedures related to veterans' benefits. *See Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1026 (9th Cir. 2012) (en banc) (rejecting notion that a plaintiff could "circumvent this jurisdictional limitation [of section 511] by disavowing relief on behalf of any individual veteran"); *Blue Water Navy Vietnam Veterans Ass'n*, 2016 WL 4056093 at *3–4 (rejecting argument that section 511(a) encompasses "only challenges to *individual* benefits determinations—not challenges alleging that the VA improperly interpreted its statutory and regulatory obligations" and noting that *Veterans for Common Sense* suggested "just the opposite"). If section 511(a) were in fact limited to adjudicative decisions, Congress would have had no need to provide an express exception for Federal Circuit review of certain VA actions of general applicability, 38 U.S.C. § 511(b)(1), including "substantive rules of general applicability" and "statements of general policy," 38 U.S.C. § 552(a)(1)(D). *See Blue Water Navy Vietnam Veterans Ass'n*, 2016 WL 4056093 at *3.

In *Veterans for Common Sense*, the Ninth Circuit considered section 511 and the "scheme conferring exclusive jurisdiction over claims affecting veterans' benefits to some federal courts, while denying all other federal courts any jurisdiction over such claims." 678 F.3d at 1020. The court examined the relevant legislative history and recognized that "Congress indicated that the Veterans Court's authority would extend to '*all* questions involving benefits under laws administered by the VA.'" The court summarized the test for determining whether it had jurisdiction, explaining that the

> preclusion extends not only to cases where adjudicating veterans' claims requires the district court to determine whether the VA acted properly in handling a veteran's request for benefits, but also to those decisions that may affect such cases. If that test is met, then the district court must cede any claim to jurisdiction over the case, and parties must seek a forum in the Veterans Court and the Federal Circuit.

Id. at 1025–26 (citations omitted).

Applying that test to the facts at issue here, Plaintiffs' claims are clearly not properly before this Court. Under VA regulations, a "benefit" is defined as "any payment, service, . . . or status, entitlement to which is determined under laws administered by the Department of Veterans Affairs pertaining to veterans and their dependents and survivors." 38 C.F.R. § 20.3(e). Here, Plaintiffs claim that VA is obligated to render payments to GRHC under 25 U.S.C. § 1645(c) for care provided to veterans. The payment to GRHC for care of the veterans is a "benefit," and thus any "question of law [or] fact" that "affects the provision" of this payment by the Secretary falls within the ambit of section 511.[5] 38 U.S.C. § 511(a); *see Price v. United States*, 228

[5] Ninth Circuit decisions permitting facial constitutional challenges to statutes or VA procedures do not compel a different result. *See Veterans for Common Sense*, 678 F.3d at 1035 (permitting a facial constitutional challenge to the adequacy of VA procedures for filing and handling benefits claims); *Recinto v. U.S. Dep't of Veterans Affairs*, 706 F.3d 1171, 1176 (9th Cir. 2013) (considering a facial challenge to the Filipino Veterans Equity Compensation Fund on equal protection grounds). In those cases, no VA decision was relevant, as the agency does not have power to resolve questions of the constitutionality of a statute as a whole. *See, e.g.*, *Johnson v. Robison*, 415 U.S. 361, 367–68 (1974) (explaining that the "Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration," but that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies"). Here, by contrast, the CAVC is entitled to interpret the statute at issue in the course of determining whether GRHC is due reimbursement for the care it has provided to individual veterans. This is precisely the kind of "question[] of law" that Congress chose to remove from district court authority. 38 U.S.C. § 511.

F.3d 420, 421–22 (D.C. Cir. 2000) (district court lacked jurisdiction over appellant's claim that VA failed to pay appellant's medical bills). It is of no moment that Plaintiffs are not basing their claim on the denial of benefits to any individual veteran; at base, Plaintiffs' argument is a challenge to VA's failure to pay for care any individual veterans received from GRHC. *See* Compl. ¶ 70; *Veterans for Common Sense*, 678 F.3d at 1026; *Blue Water Navy Vietnam Veterans Ass'n*, 2016 WL 4056093 at *3–4.

Determining whether such payment is required absent a sharing arrangement is a question of law, the answer to which will affect whether the Secretary makes the payments Plaintiffs allege are mandated for a veterans' benefit. Thus, section 511 applies and this Court lacks jurisdiction to decide the question. Plaintiffs must turn to the CAVC for judicial review of their claims. *See* 38 U.S.C. § 511(b)(4).

B. There Has Been No Final Agency Action Subject to Judicial Review.

A second barrier also prevents this Court—or any court—from considering Plaintiffs' claim: Plaintiffs have not pointed to any final action VA has taken that is subject to judicial review.[6] Plaintiffs are suing VA under the APA. *See* Compl. ¶ 10. By its terms, the APA allows judicial review only of "final agency action." *See* 5 U.S.C.

[6] There is some confusion regarding whether the final agency action requirement is jurisdictional as a limitation on the waiver of sovereign immunity. *See Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1104 (9th Cir. 2007) ("Absent final agency action, there was no jurisdiction in the district court to review the NEPA claim."); *Gallo Cattle Co. v. USDA*, 159 F.3d 1194, 1198 (9th Cir. 1998) (holding that "the APA's waiver of sovereign immunity contains several limitations," including the "final agency action" requirement); *but see Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989) (explaining that the APA includes "an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable"). Even if it is not jurisdictional, finality is still a prerequisite for an APA claim and thus a basis for dismissal under Rule 12(b)(6).

§ 704; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) ("When . . . review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'") (citing 5 U.S.C. § 704); *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (explaining that a party seeking judicial review under the APA "must challenge a final agency action"). Agency action is final only when the agency "has rendered its last word on the matter." *Or. Nat. Desert Ass'n*, 465 F.3d at 984. Moreover, the agency's action must "impose an obligation, deny a right, or fix some legal relationship." *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008); *see also U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (holding that agency's jurisdictional determination constituted a final agency action where it "deprive[d] respondents of a five-year safe harbor from liability" and warned that if they took certain actions "they d[id] so at the risk of significant criminal and civil penalties"). Practical consequences—even "profound economic consequences" in the real world—are not enough. *Fairbanks N. Star Borough*, 543 F.3d at 596 (alteration omitted); *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1095 (9th Cir. 2014) (agency action must have "direct and appreciable *legal* consequences" . . . "which effectively gives it the force of law") (emphasis added).

Plaintiffs' Complaint details discussions with VA and alleges that an attorney from VA's Office of the General Counsel stated that the agency's interpretation of the statute "will not change unless it is required to change by the Department of Justice or unless the Community sued the federal government and prevailed in court." Compl. ¶ 56.

Plaintiffs contend that their conversations and correspondence with VA's Office of the General Counsel mean that they have "exhausted efforts at seeking reconsideration by the VA on the scope of services available for reimbursement under 25 U.S.C. § 1645(c)." Compl. ¶ 68. Agency counsel's statements in meetings and the breakdown of discussions over the sharing arrangement, however, do not constitute the consummation of the agency's decisional processes; nor do they have the force of law.[7] *Fairbanks N. Star Borough*, 543 F.3d at 591. *See also Air Cal. v. U.S. Dep't of Transp.*, 654 F.2d 616, 620 (9th Cir. 1981) (holding that letter from FAA General Counsel opining that plaintiff had violated certain statutes was not a final agency action); *Bd. of Trade of City of Chicago v. SEC*, 883 F.2d 525, 530 (7th Cir. 1989) ("Comments by Commissioners during a meeting are no more the 'decision' of the *Commission* than comments by judges of this court during oral argument are our opinion or judgment."); *In re Murray Energy Corp. v. EPA*, 788 F.3d 330, 335-36 (D.C. Cir. 2015) (public statements about agency's legal authority did not constitute final agency action where statements were unconnected to a final rule or other final agency action); *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007) (individual statements of Commissioners were not reviewable agency actions because they were not institutional Commission actions).

Plaintiffs do not allege that they have submitted any claim for reimbursement to

[7] Indeed, the summary from the October 31, 2013 meeting that Plaintiffs attached to their complaint shows that the VA attorney made clear he did not possess authority to make a final determination on behalf of the agency. *See* Compl. Ex. 2 at 2 (summarizing agency counsel's remarks that certain proffered language for agreement "is not something we *at our level* have any flexibility on to waive or include" (emphasis added)).

VA in order to obtain a decision from the agency itself.[8] VA's regulations set out the steps Plaintiffs must take to begin such a process. *See, e.g.*, 38 C.F.R. § 17.123.[9] First, Plaintiffs must submit a claim for payment or reimbursement of services not previously authorized. In such a claim, Plaintiffs must set forth the specific amounts GRHC has paid for care to veterans for which it contends that VA is liable under section 1645. If VA denies the claim, it will provide Plaintiffs with a notice of the denial with appeal rights. *See, e.g.*, 38 C.F.R. § 17.132. At that point, Plaintiffs can either request reconsideration or submit a Notice of Disagreement, which initiates an appeal to the Board of Veterans' Appeals. From the Board of Veterans' Appeals, Plaintiffs may appeal to the CAVC, the Federal Circuit, and the United States Supreme Court.[10]

Nor can Plaintiffs base their suit on 5 U.S.C. § 706(1). Under this provision of the APA, a court may compel "agency action unlawfully withheld or unreasonably delayed,"

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[8] Plaintiffs claim that they "requested direction from the VA . . . regarding how administrative appeals and requests for reconsideration should be handled" and "followed all such directions." Compl. ¶ 73. As made clear in Plaintiffs' Complaint and the attached exhibits, however, the process Plaintiffs refer to involved the back-and-forth between Plaintiffs and attorneys from VA's Office of the General Counsel regarding language in the proposed sharing arrangement. *See* Compl. ¶¶ 59–68; Ex. 3–6. VA advised Plaintiffs on how to escalate their request to include certain language. In no way was VA directing Plaintiffs on the necessary steps to bring a lawsuit to obtain reimbursement for care provided to veterans.

[9] The IHS–VA Agreement sets out a similar claim submission process. *See* IHS–VA Agreement at 4–6.

[10] Because 38 U.S.C. § 7252 requires the CAVC to review decisions "on the record of proceedings before the Secretary and the Board [of Veterans' Appeals]," Plaintiffs must also exhaust these administrative remedies before proceeding to court. *See Brooks v. Brown*, 5 Vet. App. 484, 488 (1993), *aff'd*, 26 F.3d 141 (Fed. Cir. 1994); *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192-93 (1985) ("[W]hether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable.").

5 U.S.C. § 706(1). But VA has taken action under the statute by reimbursing IHS and other tribes with which it has entered into sharing arrangements. This is not the kind of "genuine failure to act" required by the Ninth Circuit before a plaintiff may invoke section 706(1). *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999) (denying jurisdiction under § 706(1) when plaintiff disputed the sufficiency of the agency's monitoring activities). Plaintiffs' claim is more properly characterized as a dispute regarding VA's interpretation of the statute under 5 U.S.C. § 706(2). The Ninth Circuit has repeatedly rejected attempts by plaintiffs to "evade the finality requirement with complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act.'" *Id*. (quoting *Nev. v. Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991)).

Thus, until Plaintiffs have actually submitted a claim and VA has acted on it, there is no final agency action subject to judicial review.

II. Plaintiffs' Complaint Fails to State a Claim Because the Statute Does Not Obligate VA to Reimburse the Tribe.

Even if this Court could exercise jurisdiction over Plaintiffs' claims—which it cannot, for the reasons described above—the claims still must be dismissed because Plaintiffs fail to state a claim upon which relief can be granted.

Although the Complaint alleges claims under both the APA and the Mandamus Act, Compl. ¶¶ 8, 10, the Ninth Circuit has recognized that "mandamus relief and relief under the APA are 'in essence' the same" and therefore the Court may simply "analyze the claim under the APA where there is an adequate remedy under the APA." *R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1065 (9th Cir. 1997); *Indep. Min. Co. v. Babbitt*, 105 F.3d 502, 507 & n.6 (9th Cir. 1997); *Dehrizi v. Johnson*, No. CV-15-00008,

2016 WL 270212, at *4 n.2 (D. Ariz. Jan. 21, 2016). Under the APA, a court reviews agency actions to ensure they are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).[11] Plaintiffs here claim that VA's actions are "not in accordance" with 25 U.S.C. §§ 1645 and 1623.[12] Thus, the question here is one of pure statutory interpretation.

Plaintiffs' Complaint fails to state a claim because it is based on a statutory reading that is unjustifiably cramped and fails to take into account the necessary statutory context. VA's interpretation takes into account the entire statutory provision, and its actions are in accordance with the requirements thereof.

A. Section 1645 Does Not Require VA to Reimburse the Tribe in the Absence of a Sharing Arrangement.

A plain language reading of the statute reveals that VA's obligation to pay under section 1645 arises only when VA enters into sharing arrangements with IHS, Indian tribes, or tribal organizations and only under the terms negotiated in those arrangements. The correctness of this reading is further confirmed when section 1645 is compared to other statutory sections requiring VA to function as a payer rather than a provider of medical services. Finally, the statute's legislative history provides additional support.

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[11] As previously discussed, Plaintiffs' claims are not properly construed as arising under § 706(1).

[12] Sections 1645 and 1623 do not include either an explicit or implied private right of action. *See, e.g.*, *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1214 (9th Cir. 1996) (explaining that "the availability of other enforcement mechanisms in a statutory scheme" is often viewed as "preclusive of an implied cause of action"); *Cousins v. Sec'y of Transp.*, 880 F.2d 603, 606 (1st Cir. 1989) (en banc) (Breyer, J.) ("[I]n light of the existence of the APA, it rarely makes sense to find that a substantive statute creates an 'implied private right of action' against the federal government for relief from unlawful regulatory action.").

It is axiomatic that, in cases involving statutory interpretation, the Court "must read the words in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). *See also Westwood Apex v. Contreras*, 644 F.3d 799, 804 (9th Cir. 2011) ("We believe it inappropriate to construe a statute by reading related clauses in isolation or taking parts of a whole statute out of their context."); *Redmond-Issaquah R.R. Pres. Ass'n v. Surface Transp. Bd.*, 223 F.3d 1057, 1061 (9th Cir. 2000) ("We derive meaning from context, and this requires reading the relevant statutory provisions as a whole."). "[The Court's] duty, after all, is to construe statutes, not isolated provisions." *King*, 135 S. Ct. at 2489. The proper statutory context also includes "look[ing] to similar provisions within the statute as a whole and the language of related or similar statutes to aid in interpretation." *United States v. LKAV*, 712 F.3d 436, 440 (9th Cir. 2013).

Read in full, section 1645 lays out instructions for the facilitation of sharing arrangements between IHS, Indian tribes, and tribal organizations and VA and the Department of Defense. Subsection (a) grants authority to the Secretary of HHS to "enter into (or expand)" the arrangements. 25 U.S.C. § 1645(a). Subsection (b) sets certain limitations on the sharing arrangements that may be entered into under the section. *Id.* § 1645(b). Subsection (c) discusses the reimbursement that must occur under the sharing arrangements. *Id.* § 1645(c). Finally, subsection (d) gives instruction on the proper construction of the section. *Id.* § 1645(d). Indeed, subsection (c) applies to the exact same entities listed in subsection (a), *i.e.*, IHS, Indian tribes, tribal organizations, VA, and the Department of Defense, illustrating that the statute is cohesive when read as a whole.

Despite the straightforward nature of this reading, Plaintiffs would have the Court read subsections (a), (b), and (d) as pertaining to sharing arrangements, but subsection (c) as creating a freestanding obligation for VA to provide reimbursements outside of any such arrangement. Plaintiffs' reading thus requires the Court to "examine the statutory provision in isolation," contrary to the proper method of statutory interpretation. *United States v. Maciel-Alcala*, 612 F.3d 1092, 1098 (9th Cir. 2010) (analyzing "the overall scheme" of the relevant statute to determine the intended meaning of a phrase).

The necessity of sharing arrangements prior to VA reimbursement is further highlighted when comparing section 1645 with other provisions requiring VA to make certain payments. In general, VA acts as a health care provider rather than a payer. *See, e.g.*, 38 U.S.C. § 8102(a) ("The Secretary shall provide medical facilities for veterans entitled to hospital, nursing home, or domiciliary care or medical services under this title."). When Congress requires VA to pay for services rendered elsewhere, it allows the Secretary to negotiate arrangements, as in section 1645, or to promulgate regulations to limit reimbursements. For example, 38 U.S.C. § 1725(a) allows the Secretary of Veterans Affairs to reimburse an eligible veteran for the "reasonable value of emergency treatment furnished the veteran in a non-Department facility." In addition to the "reasonable" limitation, this statute also provides that the Secretary shall "establish the maximum amount payable" and "delineate the circumstances under which such payments may be made" through regulations the Secretary prescribes. *Id.* § 1725(c). *See also* 38 U.S.C. § 1728 (requiring the Secretary to reimburse eligible veterans for "customary and usual charges of emergency treatment" and allowing the Secretary to prescribe

regulations regarding the reimbursements). 38 U.S.C. § 8111 provides an example of a provision allowing for reimbursement through negotiated agreements. That section authorizes the sharing of VA and Department of Defense health care resources, encouraging the department heads to enter into sharing agreements. The statute states that "[e]ach such agreement shall provide that a providing Department or service region shall be reimbursed for the cost of the health care resources provided under the agreement and that the rate of such reimbursement shall be determined" according to jointly developed guidelines. 38 U.S.C. § 8111(e)(3)(E). *See also* 38 U.S.C. § 1745 (allowing VA to enter into contracts with State homes for VA payment of nursing home care provided to eligible veterans and providing for negotiation of payment rates).

These provisions show that in order for the Secretary to provide reimbursements, there must be some guidance as to how the reimbursements are calculated and accomplished. As reflected in each of these provisions, that guidance either comes in the form of regulations promulgated by the Secretary or negotiated arrangements entered into by the Secretary and the reimbursed party. Without this guidance, the Secretary would not know how to calculate the amount of reimbursement, and, as evidenced by this lawsuit, the tribal organizations would not know what procedures to use to obtain the reimbursement. These concerns are easily set aside when section 1645 is read in context as requiring VA to enter into sharing arrangements before it is required to reimburse tribal organizations like Plaintiffs here. A sharing arrangement allows the parties to the agreement to establish the specifics, including the terms and conditions governing reimbursement.

The title of section 1645 provides yet another reason to read the reimbursement requirement as arising under sharing arrangements. The section is titled "Sharing arrangements with Federal agencies." Although "[t]he title of a statute . . . cannot limit the plain meaning of the text," *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998), the Supreme Court has held that "statutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute." *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008). *See also Singh v. Gonzales*, 499 F.3d 969, 977 (9th Cir. 2007) ("Although statutory titles are not part of the legislation, they may be instructive in putting the statute in context."). Here, the title makes plain that each provision within the section—including subsection (c)'s reimbursement requirement—deals with sharing arrangements.

Plaintiffs' claim that VA may not place limitations on the reimbursements it provides under the sharing arrangements is similarly unavailing. Because section 1645 makes the formation of sharing arrangements discretionary rather than required, it would be anomalous to read subsection (c) as creating an all-or-nothing system in which all sharing arrangements must result in total reimbursement of all expenses tribal organizations incur for all services provided to eligible veterans. Under such a system, there would be little incentive for VA to enter into these arrangements and little reason for congressional creation of a bilaterally negotiated arrangement rather than an outright statutory command of payment in the first place. Instead, Congress provided that under the sharing arrangements, tribal organizations "shall be reimbursed by the Department of Veterans Affairs . . . where services are provided through . . . tribal organization[s] to

beneficiaries eligible for services" from VA. 25 U.S.C. § 1645(c). Although subsection (c) explains the circumstances under which VA must reimburse tribal organizations, it does not specify any requirements for the extent of reimbursement. This is left for the parties to the arrangement to negotiate.[13]

Plaintiffs' reading of section 1645(c) would also undermine the limitations placed on sharing arrangements under subsection (b). Subsection (b) instructs that no action be taken under the section that would impair "the quality of health care services provided by the Department of Veterans Affairs." 25 U.S.C. § 1645(b)(4).[14] If VA were required to reimburse IHS, tribes, and tribal organizations without regard to negotiated sharing arrangements, the agency would not be able to monitor the quality of health care services provided. Additionally, shifting such substantial expense to VA would impair its ability to provide high-quality, clinically appropriate care through its own facilities and its regulation of health care expenditures. Making reimbursements pursuant to negotiated sharing arrangements allows VA to appropriately plan and budget for monetary obligations under the sharing arrangements to promote the cost-effective delivery of

[13] For example, VA's position limiting reimbursement to direct care services in its agreement with IHS stems from VA's role as a health care provider. Because that is the main role of the Veterans Health Administration, VA chose to shape the reimbursement agreement to maintain the primacy of that function. *See* IHS–VA Agreement at 1 (noting that the agreement covers only "health service[s] . . . provided directly by IHS"). Where IHS facilities are unable to provide the required health services and would, thus, have to contract with other facilities for care, VA maintains the opportunity to provide that care through its own facilities, where it can monitor the care and expenditures itself.

[14] Although the statute's text by its terms only forbids the Secretary of HHS from taking action that would impair VA's health care services, the statute should not be read to require VA itself to act in a way that frustrates an interest that Congress has made clear is important. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000) (prohibiting agency action that is "inconsistent with the intent that Congress has expressed in the [statute's] overall regulatory scheme").

health care services in the most clinically appropriate settings, *see* 38 U.S.C. § 1706(a), and to effectively monitor the quality of health services provided. Indeed, the agreement between IHS and VA includes certain provisions to ensure the quality of care provided to veterans at IHS facilities.[15] *See* IHS–VA Agreement at 2–3.

Even if the statute were susceptible to Plaintiffs' reading, the legislative history relevant to section 1645 as enacted confirms that Congress intended reimbursement to occur only through sharing arrangements. *See Schroeder v. United States*, 793 F.3d 1080, 1085 (9th Cir. 2015) ("When a statute is susceptible to two or more meanings, we may consider legislative history."). Prior to passing the current statute in 2010, Congress attempted to reauthorize and amend the Indian Health Care Improvement Act many times. In 2008, the Senate passed a bill known as the Indian Health Care Improvement Act Amendments of 2008, which contained a provision identical to what became section 1645. Senator Patricia Murray explained the content of that provision:

> [T]his bill also makes important improvements to the medical benefits provided to tribal veterans. . . . [T]his bill we are considering changes current law to allow the Secretary to enter into or expand arrangements to share medical facilities and services with the Department of Veterans Affairs. That provision requires consultation with the affected Indian tribes before entering into those agreements, and it requires reimbursement to the IHS, tribes or tribal organizations.

154 Cong. Rec. S173 (daily ed. Jan. 23, 2008) (statement of Sen. Patricia Murray). Like the statutory text itself, Senator Murray's comments refer to the reimbursement in the context of the sharing arrangements. There is no indication that the requirement is a

[15] For example, the agreement provides that IHS and VA will exchange "data on mutually agreed upon quality measure sets," "use existing medical quality assurance activities," and "[meet] at least annually with representatives from a representative sample of IHS facilities to review the overall quality of care provided" to veterans under the agreement. IHS–VA Agreement at 2–3.

freestanding obligation.

When the same language was introduced in S. 1790, which was enacted into law by reference by section 10221 of the ACA, the Congressional Research Service summarized the relevant language of the bill, stating that it:

> [a]uthorizes the Secretary to enter into or expand arrangements for the sharing of medical facilities and services between the Service, Indian Tribes, and Tribal Organizations and the Department of Veterans Affairs (VA) and the Department of Defense (DOD), requiring the VA or DOD to pay reimbursement for services provided to VA- or DOD-eligible Indian beneficiaries.

CONGR. RESEARCH SERV., *Summary of S. 1790* (introduced in Senate Oct. 15, 2009). [16] This summary is even clearer in connecting the reimbursement requirement to the sharing arrangements, as it explains that the Secretary is authorized to enter into "arrangements . . . requiring the VA" to reimburse IHS, tribes, and tribal organizations. *Id.*

Thus, taking into account section 1645's text—including its context—and legislative history, the statute imposes no freestanding obligation on VA to reimburse tribal organizations outside of bilaterally negotiated sharing arrangements. To the extent any doubt remains, the Supreme Court's *Skidmore* decision instructs this Court to give weight to the agency's interpretation of the statute even when "not controlling upon the courts by reason of [its] authority." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *accord Andersen v. DHL Ret. Pension Plan*, 766 F.3d 1205, 1213 (9th Cir. 2014). Because VA's interpretation is a reasonable, valid reading of the statute, the Court should uphold it and Plaintiffs' Complaint should be dismissed for failure to state a claim.

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[16] Various courts have relied on Congressional Research Service summaries. *See, e.g.*, *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 145 (D.C. Cir. 1984); *Arnold v. Islamic Republic of Iran*, 787 F. Supp. 2d 37, 44 n.4 (D.D.C. 2011); *United States v. Nesbeth*, No. 15-CR-18, 2016 WL 3022073, at *3 n.22 (E.D.N.Y. May 24, 2016).

B. Section 1623(b) Does Not Impose Any Additional Requirements on VA.

Plaintiffs' Complaint also alleges that VA has violated section 1623(b) "by forcing GRHC into a primary payer position on all services for which VA has refused to provide reimbursements." Compl. ¶ 84. The success of Plaintiffs' argument under section 1623(b), however, is completely dependent on the Court adopting Plaintiffs' reading of section 1645. Because Plaintiffs misconstrue section 1645, their argument under section 1623(b) likewise fails.

Section 1623(b) provides that "[h]ealth programs operated by" entities including tribal organizations like GRHC here "shall be the payer of last resort" for services provided through such programs. Thus, under the statute, any other entity that may be liable for the services the tribal organization provides must pay first, and the tribal organization will pay only if no other payer is liable. The statute also provides that this requirement overrides any other federal, state, or local law.

With respect to VA, section 1623(b) functions as follows. If an applicable statute requires VA to pay for certain services, but allows the agency to pay second to an entity covered by section 1623(b), the "payer of last resort" provision in section 1623(b) overrides the secondary payer provision and VA must pay before the entity covered by section 1623(b) incurs any liability. *See,* 38 U.S.C. § 1725(b)(3)(A) (limiting VA's liability for emergency treatment by requiring VA to pay second to any liable third party and requiring that the veteran be "personally liable" for such emergency treatment). Under such circumstances, VA cannot refuse to pay for treatment on the basis that the entity covered by section 1623(b) is liable for paying for the care.

Section 1623(b) only applies, however, where VA is otherwise liable for the care. Because Plaintiffs read section 1645 as imposing a freestanding obligation on VA to reimburse the tribal organization, they contend that VA is also violating section 1623(b) in refusing to pay. As explained above, however, Plaintiffs' interpretation of section 1645 removes subsection (c) from the necessary context of the remainder of the section, which shows that VA's obligation to reimburse arises only under sharing arrangements. Because Plaintiffs have not entered into any such arrangement with VA, VA is under no obligation to pay under section 1645, and section 1623 does not alter that.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint for lack of jurisdiction or, in the alternative, failure to state a claim upon which relief can be granted.

DATED: August 10, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2016, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing which served a copy of the attached document and Notice of Electronic Filing to the following CM/ECF registrants:

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