UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

ROSEBUD SIOUX TRIBE, a federally recognized Indian tribe, and its individual members, Plaintiff, v. UNITED STATES OF AMERICA et al., Defendants.	CIV. No. 16-5027- JLV **DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS**

The Defendants, by and through Randolph J. Seiler, United States Attorney and Assistant United States Attorney Cheryl Schrempp DuPris, submit this brief in support of its motion to dismiss based on lack of subject matter jurisdiction, and failure to state a claim for which relief may be granted.

STATUTORY BACKGROUND

The Indian Health Service (IHS) is an agency of the U.S. Department of Health and Human Services (HHS) whose principal mission is to provide health care to American Indians and Alaska Natives.[1] The IHS's authority to provide health care services to the American Indian and Alaska Native people derives primarily from two statutes. The Snyder Act of 1921, 25 U.S.C. § 13,

[1] The Transfer Act, 42 U.S.C. § 2001 *et seq.*, (Transfer Act), transferred federal responsibility for Indian health services from the Department of the Interior to the Department of Health, Education, and Welfare, the predecessor of HHS.

constitutes a broad, general statutory mandate to "expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians," for, among other things, the "relief of distress and conservation of health." 25 U.S.C. § 13.2. The Indian Health Care Improvement Act (IHCIA) of 1976, as amended, 25 U.S.C. § 1601, *et seq.*, established numerous programs specifically created by Congress to address particular Indian health initiatives, such as alcohol and substance abuse treatment, diabetes treatment, medical training, and urban Indian health.[2]

Congress annually appropriates funds for all IHS programs, whether under the IHCIA, the Snyder Act, or the ISDEAA, through lump-sum appropriations. One lump-sum appropriation is for the delivery of all "Indian Health Services" to American Indians and Alaska Natives. Another lump-sum appropriation generally funds construction and maintenance of primary care and sanitation facilities.[3] These appropriations are finite, for sums certain. Congress has appropriated less funds annually for IHS than the HHS has requested in its annual budget submissions. IHS delivers health care services

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[2] On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act, Public Law 111-148, which amended and permanently reauthorized the IHCIA. In addition to these authorities, the Indian Self-Determination and Education Assistance Act (ISDEAA), as amended, 25 U.S.C. §§ 450 *et seq.*, authorized Indian tribes and tribal organizations to contract with the IHS to take over and operate, independent of the IHS, certain health care delivery programs, functions, services, and activities that IHS operated pursuant to the Snyder Act and the IHCIA. 25 U.S.C. §§ 450f, 458aaa-4.

[3] Starting in FY 2016, Congress also authorized a separate appropriation for contract support costs. That appropriation covers a type of funding authorized for ISDEAA contracts and, accordingly, is not at issue here.

through 170 "service units," which are local administrative units serving defined geographic areas. All service units are grouped within 12 regional IHS areas, which in turn are overseen by a Headquarters Office located in Rockville, Maryland. See http://info.ihs.gov/map.asp (IHS Regional Map).

Pursuant to 42 U.S.C. §1395qq and 42 U.S.C. §1396j, respectively, Congress has authorized the IHS to participate in reimbursement from Medicare and Medicaid so long as the IHS meets all of the conditions and requirements for such payments which are applicable generally to hospitals.

FACTUAL BACKGROUND

Plaintiff, the Rosebud Sioux Tribe (the Tribe) is a federally-recognized tribe. DE 1, ¶ 2. The primary source of health care for the Tribe is the IHS-operated Rosebud Service Unit (Rosebud) which is located on the Tribe's reservation. DE 1, ¶ 31. Rosebud is located within the Great Plains Area, IHS. Rosebud receives reimbursement from Medicare and Medicaid so long as it meets the established conditions of participation (COPs) for hospitals generally. 42 U.S.C. §1395qq; 42 U.S.C. §1396j.

On November 19, 2015, the Center for Medicare and Medicaid Services (CMS), completed re-certification surveys at Rosebud. On November 23, 2015, based upon its surveys, CMS notified Rosebud that it intended to terminate Rosebud's Medicare Provider Agreement because Rosebud was out of compliance with the COPs. DE 1, ¶ 36; Declaration of CAPT. Michael Weahkee ¶ 6. CMS determined that the deficiencies found at Rosebud with respect to emergency services were so serious that they constituted an immediate threat

to the health and safety of individuals presenting to the Rosebud Emergency Department (ED). *Id.* CMS placed Rosebud in Immediate Jeopardy (IJ) status. *Id.* According to the November 23, 2015, notice from CMS, IHS was given a deadline of December 12, 2015, to abate the conditions that led to the IJ status. *Id.*

IHS could not rectify the emergency conditions prior to the December 12, 2015, deadline. *Id.* ¶ 7. The emergency conditions identified by CMS in its re-certification survey of Rosebud and the placement of Rosebud in IJ status led to the decision by the IHS to place Rosebud's ED in "divert" status. *Id.* ¶ 9. This decision was necessary to ensure patient safety and to permit the IHS to address the concerns that led to the IJ status imposed by CMS. On December 5, 2015, IHS placed the Rosebud ED on "divert status" sending all emergency cases to local hospitals in Winner, South Dakota or Valentine, Nebraska. *Id.* Rosebud continued its inpatient and outpatient services and established an Urgent Care Center for the treatment of walk-in patients. *Id.*

The IHS diverted emergency patients at Rosebud primarily to preserve patient safety. It was the intent of the IHS that the "divert" status of the ED be temporary. IHS issued a press release on December 5, 2015, specifically stating that it was placing the ED in "divert" status and that the "Great Plain Area Indian Health Service continues to work on long and short-term solutions to resume emergency room services at Rosebud Hospital." *Id.*

Over the next several months, IHS worked toward making significant changes at Rosebud. While the ED was on diversionary status, IHS renovated

the emergency department, inventoried equipment, repaired or replaced equipment due for upgrade, revised processes to improve patient assessments and upgraded technology systems to support effective medical records documentation through the IHS electronic health record. *Id.* ¶ 17. CMS continued to survey the Rosebud facility and extended the deadlines for termination on several occasions. *Id.* ¶¶ 11-12.

On April 30, 2016, CMS and the IHS entered into a Systems Improvement Agreement (SIA) to facilitate the provision of quality health care services to the Tribe and to promote consistent compliance with the COPs. *Id.* ¶13. Consistent with the terms of the SIA, IHS awarded a contract to AB Staffing Solutions, LLC, ("ABSS"), on May 17, 2016, for one year, with four option years, to provide staffing and management services for the operation of the ED at Rosebud. Id. ¶¶ 13 and 17.

On July 15, 2016, the ED at Rosebud re-opened and was staffed and managed by IHS's contractor, ABSS. *Id.* ¶16.

ARGUMENT

PLAINTIFF'S CLAIMS SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM

A. Standard of Review.

The Supreme Court presumes that federal courts lack jurisdiction unless the contrary appears affirmatively from the record. *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 614 (1992); *Renne v. Geary*, 501 U.S. 312, 315 (1991). A party seeking federal court jurisdiction bears the burden of providing

and supporting a jurisdictional basis for judicial review. A court may grant a motion to dismiss a complaint under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction or 12(b)(6) for failure to state a claim when it "appears beyond doubt that [the plaintiff] can prove no set of facts in support of his claim which would entitle him to relief." *Carney v. Houston*, 33 F.3d 893, 894 (8th Cir. 1994) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). The purpose of the rule is to allow the Court to weed out actions that are fatally flawed in their legal premises, avoiding unnecessary litigation.

Generally, allegations in the complaint are taken as true, and disputed issues are construed and all reasonable inferences drawn in favor of the complaint. The presumption of truthfulness disappears, however, when a factual challenge is made to the jurisdictional allegations of the complaint. *Titus v. Sullivan*, 4 F.3d 590, 593 n.2 (8th Cir. 1993). When the facts in the pleadings are challenged: (1) the court may consider competent evidence outside the pleadings (such as affidavits) to determine the factual dispute, (2) no presumption of truthfulness attaches to the plaintiff's allegations, and (3) the plaintiff has the burden of proving that jurisdiction exists. *Titus*, 4 F.3d at 593 n.2. The United States contends that even when all uncontroverted facts are viewed favorably to the Plaintiff, its claims must fail as a matter of law.

Plaintiff's claim is without merit because the placing of the Rosebud ED on divert status was temporary, not permanent, and Section 1631(b)(2) allows for temporary closure, without notice, for medical or safety reasons, the exact conditions present in this case.

B. The Claim That Defendants Violated 25 U.S.C. § 1631(b) Is Without Merit and Should Be Dismissed Based On The Plain Language Of The Statute.

It is well-established that the United States, as sovereign, is immune from suit except as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (internal quotes omitted)). Consent for the United States to be sued cannot be implied but must be unequivocally expressed. *Mitchell*, 445 U.S. at 538; *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992); *United States v. Hall*, 269 F.3d 940, 943 (8th Cir. 2001). Further, the burden is on the Plaintiff to find and prove an explicit waiver of sovereign immunity. *Fostvedt v. United States*, 978 F.2d 1201, 1203 (10th Cir.), *cert. denied*, 507 U.S. 988 (1992); *Swift v. United States Border Patrol*, 578 F. Supp. 35, 37 (S.D. Tex. 1983), aff'd, 731 F.2d 886 (5th Cir. 1984). *See also McNutt v. Gen. Motors Acceptance Corp.,* 298 U.S. 178, 188-89 (1936) (plaintiff bears burden of proof on jurisdiction). Although federal law provides Indians special protections, the doctrine of sovereign immunity applies equally to suits brought by Indian plaintiffs. *United States v. Mottaz*, 476 U.S. 834, 851 (1986).

Count I of the Plaintiff's Complaint seeks declaratory and injunctive relief under 28 U.S.C. § 1331 and 28 U.S.C. § 2201. Section 1331 sets forth the general federal question jurisdiction of federal district courts, but is not a general waiver of sovereign immunity allowing suits against the government. *See DeVilbiss v. Small Bus. Admin.*, 661 F.2d 716, 718 (8th Cir. 1981). By its

express terms, § 2201 is a remedial statute applicable only to controversies already within this Court's jurisdiction. Neither of these statutes provide an independent basis for federal jurisdiction. *Zutz v. Nelson*, 601 F.3d 842, 850 (8th Cir. 2010) (quoting *Victor Foods, Inc. v. Crossroads Econ. Dev.*, 977 F.2d 1224, 1227 (8th Cir. 1992)). Likewise, they do not create any substantive right enforceable against the United States. Rather, they rely upon a claim based upon some other federal law. *See Midland Farms LLC. v. United States Dept. of Agric.*, 35 F. Supp. 3d 1056 (D.S.D. Central Div., July 23, 2014) (an independent source of jurisdiction must exist to order declaratory relief).

Here, the Tribe alleges that the Defendants permanently closed the ED at Rosebud, DE 1, ¶ 55, and failed to provide notice to Congress as required by 25 U.S.C. § 1631(b), DE 1, ¶ 48. The Tribe's position is completely contrary to the facts—the closure was indisputably temporary—and the plain language of the statute that makes an exception for circumstances such as this where patient safety is at issue. Section 1631(b)(1) provides: "no Service hospital or outpatient health care facility of the Service, or any portion of such hospital or facility, may be closed if the Secretary has not submitted to Congress at least 1 year prior to the date such hospital of facility (or portion thereof) is proposed to be closed an evaluation of the impact of such proposed closure . . .". DE 1, ¶¶ 47-48. However, 25 U.S.C. § 1631 (b)(2) specifically states that "[p]aragraph (1) shall not apply to any temporary closure of a facility or of any portion of a facility if such closure is necessary for medical, environmental or safety reasons." *Id.*

In fact, the "divert" status of the ED at Rosebud was both temporary and was necessary for both medical and safety reasons. The CMS re-certification survey from November16-19, 2015, found that Rosebud "is not in compliance with all of the Medicare Conditions of Participation for Hospitals." Weahkee Declaration, ¶ 6, Ex.1. CMS found that Rosebud was out of compliance with 42 C.F.R. § 482.55 – Emergency Services, and that the deficiencies substantially limit the hospital's capacity to render adequate care and "constitute an immediate and serious threat to the health and safety of patients." *Id.* Forcing IHS to keep the ED open under these circumstances, as urged by the Plaintiffs, would put individuals presenting to the Rosebud ED at risk of an immediate and serious threat to their health and safety.

The IHS diverted emergency patients at Rosebud primarily to preserve patient safety.[4] Therefore, the statutory notice requirements regarding closure of a facility or portion of a facility of the IHS set forth in 25 U.S.C. § 1631(b)(1), do not and should not apply here. After making significant improvements in the Rosebud ED, by July 15, 2016, the Rosebud ED was re-opened, staffed and managed by IHS's contractor, ABSS. On these facts, the Tribe cannot show that 25 U.S.C. § 1631(b)(1) is applicable. Therefore, the Tribe cannot establish jurisdiction under 28 U.S.C. § 1331 or 28 U.S.C. § 2201, and is not entitled to a declaratory judgment or a mandatory injunction.

[4] The Tribe acknowledges that Rosebud has had difficulties in attracting, hiring and retaining medical staff and employees in key administrative positions. DE 1, ¶¶ 33-34.

C. The Claim that Defendants Violated the APA Should Be Dismissed.

In its second count, Plaintiff alleges that the IHS action in placing the Rosebud Hospital on temporary "divert status" due to staffing changes and limited resources, violated the Administrative Procedures Act (APA), 5 U.S.C. § 702, DE 1, ¶¶ 52-59 and as persons aggrieved by agency action, DE 1, ¶ 53, it is entitled to judicial review. However, § 702 does not state that it confers independent jurisdiction. Only a person "aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review." 5 U.S.C. § 702. Moreover, the APA specifically exempts from judicial review "agency action . . . committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

The Plaintiff's unsupported allegation, that the closure of the ED at Rosebud is not temporary and thus a violation of the statutory requirements of 1631(b), fails to establish a statutory violation for independent jurisdiction. § 702. Because the facts show that the "divert status" of the Rosebud ED was temporary and that is was done for medical and patient safety reasons, (See Defendant's argument, section C, *supra*), it falls within the exception in Section 1631(b)(2). Thus, Plaintiff's claim is without merit.

Plaintiff's reliance on *Yankton Sioux Tribe v. HHS*, 869 F. Supp. 760, 765 (1994), is misplaced. [5] DE 1, ¶ 53. In *Lincoln v. Vigil*, 508 U.S. 182 (1993), the

[5] In *Yankton Sioux Tribe v. HHS*, 869 F. Supp. 760, 765 (1994), Judge Piersol found that the decision to renovate the Wagner IHS hospital, which resulted in the elimination of inpatient services, was reviewable under the APA because Congress specifically appropriated funds for the Wagner facility and 25 U.S.C. § 1631 placed conditions on those funds. This case is distinguishable because

Supreme Court held that where Congress has appropriated lump sums for health services to Indians, the IHS's allocation of those funds is committed to agency discretion by law and consequently is not subject to judicial review under the APA. Accordingly, the IHS's allocation of the lump-sum appropriation for Indian health services is not subject to judicial review, and this Court lacks subject matter jurisdiction over Plaintiff's claim.

Lincoln involved a challenge to the IHS's decision to discontinue a program for handicapped Indian children in a reservation service area. In the place of that program, the IHS proposed to create a nationwide program for handicapped Indian children which would no longer provide the comprehensive services that the plaintiffs had received under the local program. Handicapped Indian children eligible to receive services through the original local program sued, alleging that the IHS "violated the federal trust responsibility to Indians, the Snyder Act, the IHCIA, the APA, and the Fifth Amendment's Due Process Clause." 508 U.S. at 189. The court held that the IHS's decision to discontinue the program for handicapped Indian children was "unreviewable under § 701(a)(2)." *Id.* at 193. In reaching this conclusion, the Supreme Court observed that "both the Snyder Act and the IHCIA . . . speak about Indian health only in general terms." *Id.* at 193. As for the IHS's mission, the Snyder Act says no more than that it "shall direct, supervise, and expend such moneys as Congress may from time to time appropriate" for, among other purposes, the

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Congress has not appropriated funds specifically for the Rosebud facility and § 1631(b)(2) unambiguously excludes any temporary closure of a facility if such closure is necessary for safety reasons.

"conservation of health" of American Indians. 25 U.S.C. § 13. This broadly-worded statute contains no further direction to the IHS regarding allocation of funds appropriated by Congress for Indian health, nor does it contain any language that would entitle American Indians to full funding of all health care needs.

The Tribes' claim purports to rely upon the waiver of sovereign immunity and right of action in the APA. However, APA review is unavailable in this case. In fiscal year 2016, Congress appropriated over $4 billion for the Indian Health Service.[6] In spite of the long standing challenges at Rosebud, no funds were specifically appropriated for the Rosebud facility, and the Plaintiff does not identify any specific appropriation language that deprives the IHS of the discretion to allocate funds. *Lincoln* stands for the proposition that the IHS's allocation of funds appropriated by Congress is committed to agency discretion by law and is not subject to APA review. For these reasons, Plaintiff's statutory claim is without legal merit, fails to state a claim upon which relief may be granted, and must be dismissed for lack of subject matter jurisdiction.

The Tribe is really challenging the lack of resources at the Rosebud IHS facility. DE 1, ¶¶ 33-34. It does not allege that the IHS is using the funds appropriated under the IHCIA for things other than health care. Congress

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[6] *Consolidated Appropriations Act for Fiscal Year 2016, Division G—Department of the Interior, Environment, and Related Agencies Appropriations Act,* Public Law 114-113, 129 Stat 2566 (December 18, 2015); *IHS FY 2016 Congressional Justification* at https://www.ihs.gov/budgetformulation/includes/themes/newihstheme/documents/FY2016CongressionalJustification.pdf and https://www.ihs.gov/newsroom/factsheets/ihsyear2015profile/.

appropriates lump sum funds and commits to agency discretion regarding the distribution of such funds. Congress has options to resolve the situation underlying the Tribe's concerns. For example, it could make line-item appropriations, allocating funds specifically for the Rosebud IHS facility. However, that decision is not for this Court to mandate.

D. Plaintiff's Breach of Trust Claim Should Be Dismissed.

In its third count, Plaintiff asserts that the United States breached its fiduciary duty to "provide health care services to the Tribe and its members" and to ensure that health care services do not fall below the highest possible standards. DE1, ¶¶ 61-66. Plaintiff generally identifies the Snyder Act, the IHCIA, the Fort Laramie Treaty, and common law as separate authority that creates a right of action. DE 1, ¶ 61. However, none of these authorities, nor the special relationship between the Federal government and Indian tribes, creates an actionable breach of trust claim over which this Court would have jurisdiction.

It is well established that the general trust relationship between the United States and Indian tribes—absent a trust corpus, such as property, that the government is administering for a tribe—does not give rise to a breach of trust cause of action. *Cherokee Nation of Oklahoma v. United States*, 480 U.S. 700 (1987). The Court in *Cherokee* rejected the notion that the general obligation created specific property rights. The Court held in that case that there was no "trust corpus" and rights could not be created by some generalized notion of trust responsibility. In *United States v. Jicarilla Apache*

Nation, 564 U.S. 162, 176-177 (2011), the Supreme Court recognized the special federal ("trust") responsibility to Indian tribes but emphasized that "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." A tribe asserting that the federal government has such an obligation must identify "a specific, applicable, trust-creating statute or regulation that the Government violated . . . ." *Id.*, 564 U.S. at 177 (quoting *United States v. Navajo Nation*, 566 U.S. 287, 302 (2009)). The Rosebud Sioux Tribe has identified no such law and there is no trust corpus at issue—so this count must be dismissed.

Two recent cases, consistent with a significant amount of other precedent, have held that the IHS does not have a fiduciary trust duty to provide a particular level of health care. *Quechan Tribe of the Ft. Yuma Indian Reservation v. United States*, 2011 U.S. Dist. LEXIS 36778 (D. Ariz., March 31, 2011) (unpublished) (*aff'd by Quechan Tribe of the Ft. Yuma Indian Reservation v. United States*, 599 Fed. Appx. 698 (9th Cir. 2015) (unpublished); and *Gila River Indian Cmty v. Burwell*, 2015 U.S. Dist. LEXIS 27595 (D. Ariz., March 6, 2015). In *Gila River Indian Cmty*, the court dismissed the tribe's breach of trust claim, stating that "the Court cannot conclude that the statutes and regulations relied on by the [Gila River Indian] Community show that the United States has accepted trust responsibilities for the healthcare related duties the Community seeks to enforce." *Id.* at *13. The court focused on the corpus requirement for a breach of trust claim and distinguished the IHS appropriation from a trust corpus, *Id.* at *17, stating that "a congressional

appropriation of government funds is qualitatively different from the tribal-owned real property managed by the government on behalf of Indian tribes" where the government would owe a fiduciary duty. *See, e.g., United States v. Mitchell*, 445 U.S. 535, *infra*; *see also Vigil*, 508 U.S. at 195 (citing *Quick Bear v. Leupp*, 210 U.S. 50, 80 (1908)), for the distinction "between money appropriated to fulfill treaty obligations, to which the trust relationship attaches, and gratuitous appropriations" such as the IHS appropriation).

The *Quechan* case is instructive in that the claims are so similar to those of the Plaintiff. The tribe in *Quechan* sought a declaration that the United States breached its duty to operate at a level exceeding a minimum standard of care, alleging that the facilities at Fort Yuma (the oldest in the IHS system) are in disrepair and unsafe, that Fort Yuma lacks basic medical equipment, and that Fort Yuma affords unsafe and unhealthy medical care. The district court did not find any health-care related trust duty under the general federal-tribal trust relationship. The Ninth Circuit Court of Appeals affirmed. Following *Jicarilla*, it held that (1) the federal-tribal trust relationship does not, in itself, create a specific, judicially enforceable duty; (2) the "trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law;" and (3) "in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law." *Quechan*, 599 Fed. Appx. 698, 699, citing to *Jicarilla*, 564 U.S. at 165. The court concluded that neither the Snyder Act nor the IHCIA "contains sufficient trust-creating language on which to base a

judicially enforceable duty." *Id. See also*, *Hopi Tribe v. U.S.*, 782 F.3d 662 (Fed. Cir. 2015) ([t]he Federal Circuit affirmed Court of Federal Claims dismissal of Hopi Tribe claims concerning federal government responsibilities in the area of sanitation facilities / water quality, finding no trust duty for the federal government to provide improved water quality on the Hopi Reservation in the general trust relationship, or in the Indian Sanitation Facilities Act, 42 U.S.C. § 2004a or the section of the IHCIA pertaining to safe water and sanitary disposal facilities, 25 U.S.C. § 1632.).

In 2008, the Eighth Circuit Court of Appeals addressed whether there was a violation of the federal trust responsibility in connection with the closure of the emergency room at the Wagner, South Dakota, IHS Health Care Facility in order to convert it to an urgent care facility. *Yankton Sioux Tribe v. United States Dep't of Health & Human Servs.*, 533 F.3d 634 (8th Cir. 2008). There, the court affirmed the dismissal of this claim on the basis that no trust corpus was identified and no statutory obligation was alleged that could be characterized as creating a trust or fiduciary duty, concluding that "the tribe's vague allegation that the government violated its federal trust responsibility [by closing the emergency room] is not sufficient to state a claim." *Id.* at 644.

The Plaintiff incorrectly cites to *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) for the proposition that there is a generalized trust obligation. DE 1, ¶ 15. The *Seminole Nation* case was not about a generalized trust duty and instead specifically concerned funds that the Government was holding in trust to be distributed to members of the Seminole Nation. *Id.* at

294-296. The case describes a relationship similar to that of a private trustee. That analogy may have been appropriate in *Seminole Nation*—but not in the case at hand—because that case involved money that Congress was holding in a trust account for the benefit of members of the tribe. *Id.* Congress had placed that money in trust and, by doing so, created a fiduciary duty on behalf of the Federal government when distributing payments for tribal members from the trust account. *Id.* at 296. The Court examined the *Seminole Nation* case like that concerning a private trustee because that was what was at issue: a trust account. That is not the case here, where the IHS is administering a gratuitous appropriation. *See Lincoln*, 508 U.S. at 195.

Another line of cases in which the Federal government has been held to have trust duties involves land held in trust by the Federal government. *See United States v. Mitchell*, 445 U.S. 535 (1980) (Mitchell I) and *United States v. Mitchell*, 463 U.S. 206 (1983) (Mitchell II). In such cases, the analysis of whether a trust duty exists turns on whether the necessary elements of a common law trust are present: (1) a trustee, (2) a beneficiary, and (3) a common law trust corpus. In the case of *Mitchell II*, the three elements were met, and the Court found that the timber management statutes at issue did create a fiduciary relationship. In contrast, in *Mitchell I*, the Court found that "the [Indian General Allotment Act of 1887] does not unambiguously provide that the United States has undertaken full fiduciary responsibility as to the management of allotted lands." *Mitchell*, 445 U.S. at 542.

In the case of IHS, no trust corpus is involved, and the sole question is whether the IHS owes any trust duty in relation to its annual appropriations. As already held by multiple courts, the IHS appropriations are not trust funds. The Supreme Court has made clear the distinction between the IHS's gratuitous annual appropriations and funds specifically set aside to fulfill a trust obligation. *Quick Bear*, 210 U.S. 50; *Lincoln,* 508 U.S. at 194-195.

The Plaintiff argues that a fiduciary duty can be found in the Snyder Act, the general authority "for the benefit, care, and assistance of the Indians throughout the United States . . . for the relief of distress and conservation of health." 25 U.S.C. § 13. But this is broad language that does not contain a specific, legally enforceable fiduciary duty to provide a specific level of health care. *Quechan Tribe of the Ft. Yuma Reservation,* 2011 U.S. Dist. LEXIS 36778 at *7 ("The Snyder Act fails to impose an affirmative duty on defendants to provide a specific level of health care or to maintain facilities at a certain level. Plaintiff's breach of duty claims cannot rely on the Snyder Act.").

The analysis of the IHCIA is similar. The IHCIA provides the most specific authorities in the area of health care to be provided to Indians. As with the Snyder Act, however, the language does not create any responsibilities arising to the level of an enforceable trust obligation. The general language in the IHCIA to which the Plaintiff cites (describing the goal of ensuring "the highest possible health status for Indians" and providing "the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level," DE1, ¶17), does not create any specific

rights or obligations on the part of IHS. These congressional policy statements and findings in the introductory sections of the IHCIA recognize the special federal-tribal relationship in the area of health care, but they do not entitle the Plaintiff to any particular benefits under the IHCIA or elsewhere. These types of policy statements and congressional findings are viewed by the Supreme Court as "too thin a reed" to support particular rights and obligations being read into them. *Pennhurst State School v. Haldermann*, 451 U.S. 1, 19 (1981). Simply using the word "trust" in a statute does not give rise to a breach of trust claim. *See Quechan Tribe of Ft. Yuma Indian Reservation*, 2011 U.S. Dist. LEXIS 36778, at *8 (rejecting contention that when Congress added the word "trust" to the IHCIA it demonstrated an intent to impose specific fiduciary duties). Thus, while authorizing the provision of health care services to American Indians and Alaska Natives and recognizing the special relationship between the United States and Indian people, the duties required by IHS are defined by the statute.

The Plaintiff also cites to the Treaty of Laramie to bolster its breach of trust/fiduciary duty claim but does not cite to any treaty obligation that could be characterized as creating a trust or fiduciary duty. Because Plaintiff's cited authority only pertains to Indian health care generally and does not require any specific duties or identify any trust corpus to be managed, Plaintiff has failed to establish the property element of a breach of trust claim. Therefore, Plaintiff fails to state a claim upon which relief can be granted and the breach of trust responsibility claim must be dismissed.

E. Plaintiff's Constitutional Claims Should Be Dismissed.

In a conclusory manner, the Plaintiff alleges, in count four, that the United States allocates and distributes available federal funds in a manner that deprives Indians served by Rosebud of health care services that will help to raise health status to the highest possible level. DE 1, ¶ 71. It claims that Defendants have violated the Plaintiff's right to equal protection under the Due Process Clause of the Fifth Amendment by providing "grossly inadequate health care to members of the Tribe at levels that are substantially below or unequal to health care benefits, on a per capital basis, that the United States provides to federal inmates and others for whom the United States has a constitutional or other legally required obligation to provide health care." DE 1, ¶ 72. The Tribe does not support its claim that its members receive health care substantially below or unequal to federal inmates and others. Even if the Tribe's conclusory statement is taken as true, they state no cognizable claim.

The Plaintiff's arguments are again similar to those raised in *Quechan.* There, the district court, in rejecting the constitutional claims, reasoned that due process does not confer an affirmative right to government aid even when such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual. *Quechan at *16* citing *DeShaney v. Winnebago County Dept. of Soc. Serv.,* 489 U.S. 189, 196 (1989). In *Quechan*, like here, the tribe attempted to analogize cases dealing with prisoner's rights to health care. The *Quechan* court found this analogy unpersuasive. *Id.*

In special circumstances (not present here), the Constitution imposes an affirmative duty of care and protection with respect to certain individuals. *See Robinson v. California*, 370 U.S. 660 (1962) (a State is required to provide adequate medical care to incarcerated prisoners). The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. *DeShaney*, 489 U.S. at 200. The special relationship exception only applies when the government places someone in custody. *See Quechan*, at *18 (citing to *Deshaney*, 489 U.S. at 198-199).

It is well settled that the government has broad discretion to allocate funds for discretionary programs without violating equal protection rights. In *Dandridge v. Williams*, 397 U.S. 471 (1970), the Court explained:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.

Id. at 485. Supreme Court case law supports the constitutionality of this exercise of discretion in the realm of education and health services to Indians. In *Morton v. Ruiz*, 415 U.S. 199, 212, 214, 229, 230-31 (1974), the Court overturned on procedural grounds BIA's restriction of general assistance benefits authorized by the Snyder Act to Indians living on the reservation while, in dictum, expressly approved the restriction of such benefits to Indians

residing on or near their reservation. The Court reasoned, "[h]aving found that the congressional appropriation was intended to cover welfare services at least to those Indians residing 'on or near' the reservation, it does not necessarily follow that the Secretary is without power to create reasonable classifications and eligibility requirements in order to allocate the limited funds available to him for this purpose." In *Morton v. Mancari*, 417 U.S. 535, 552 (1974), in the course of holding that federal employment preference for qualified Indians did not violate the Fifth Amendment, the Court similarly remarked, also in dictum, that "[literally] every piece of legislation dealing with Indian tribes and reservations ". . . single out for special treatment a constituency of tribal Indians living on or near reservations." *See also Rice v. Cayetano*, 528 U.S. 495, 519-20 (2000) (construing the foregoing language from *Mancari* and pointing out that the Court's rationale for finding the BIA's preference for Indian employees to be constitutional was based on the fact that "the BIA preference could be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, and was reasonable and rationally designed to further Indian self-government") (quoting *Mancari*, 528 U.S. at 555; internal quotation marks omitted)).

The IHS allocation of the scarce funds appropriated by Congress is within its discretion and is not unreasonable. The allocation of funds from a lump sum appropriation is committed to agency discretion by law. *Lincoln*, 508 U.S. 182, 192 (1993). The *Lincoln* court noted that Congress can always, if it chooses, explicitly circumscribe agency discretion through restrictions in the

operative statutes. *Id.* But, just as there was no such language cited in *Lincoln* (because it did not exist), the Plaintiff here cannot point to any specific language in the IHS appropriation or in the general language of the IHCIA or the Snyder Act. Complaints about resource allocation from a lump sum appropriation—such as the termination in *Lincoln* of the regional program for Indian children in favor of the national program— simply do not in themselves raise viable equal protection claims.

Plaintiff also argues that "the health care services provided to the Tribe and its members by the United States qualify as an entitlement to a constitutionally protected property interest." DE1, ¶ 70. Health care provided by the IHS is not an entitlement, and courts have consistently distinguished the governmental responsibilities for Indian health care, and the related appropriations, from property rights, specifically in judicial analysis of assertions by tribes that there is a trust duty for health care. [*See* Section D, *infra*]. If there were an entitlement / property interest in health care, then courts surely would have found an associated fiduciary responsibility owed by the Federal government. But they consistently have not, instead finding, as in *Gila River Indian Cmty v. Burwell*, 2015 U.S. Dist. LEXIS 27595 at*16 (D. Ariz. March 6, 2015), that "a congressional appropriation of government funds is qualitatively different" from [property managed by the government on behalf of Indian tribes]." *See Quick Bear*, 210 U.S. 50; *Lincoln*, 508 U.S. at 194-195.

The Plaintiff's claim is subject to rational basis scrutiny since all government programs conferring monetary benefits come with a "strong

presumption of constitutionality." *Mathews v. De Castro*, 429 U.S. 181, 185 (1976) (citing to *Jefferson v. Hackney*. 406 U.S. 535, 546 (1972)): "So long as its judgments are rational, and not invidious, the legislature's efforts to tack the problems of the poor and needy are not subject to a constitutional straitjacket.").[7]

While the Plaintiff is seeking the highest possible standards of health care for its members, and while IHS aspires to achieve the highest health status among American Indians, there is not a constitutional violation when the excellence sought is not achieved. *See Alcala v. Burns*, 545 F.2d 1101, 1105 (8th Cir. 1976) ("[The] Equal Protection Clause does not require that [an agency] must choose between attacking every aspect of a program or not attacking the problem at all." (quoting *Dandridge* 397 U.S. at 487)). Therefore, the constitutional claims raised by Plaintiff must be dismissed.

F. Plaintiff Lacks Standing.

Article III limits federal courts' jurisdiction to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. Standing is one of the essential prerequisites to jurisdiction under Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, (1992). As the Supreme Court explained, the "irreducible

[7] The Plaintiff's reliance on *Rincon Band of Mission Indians v. Califano*, 464 F. Supp. 934 (N.D. Cal. 1979), DE 1, ¶ 73 is misplaced for several reasons. First, the decision has no bearing on this case because it analyzed the particular justification for unequal funding presented in that case. Second, the Ninth Circuit affirmed based on a statute without reaching the constitutional issue. Finally, the district court appears to have improperly placed the burden on the government. *See* 464 F. Supp. at 937-39.

constitutional minimum of standing contains three elements." First, an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Second, a causal connection -- the injury has to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Third, redressability— that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560–61, (internal quotations and citations omitted). "By particularized, we mean that the injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006) (personal injury that is "imminent"—that it is "certainly impending."); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("not conjectural or hypothetical"). An organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Article III. *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 40 (1976).

In conclusory fashion, Plaintiff alleges that the IHS's actions in placing Rosebud ED on divert status caused is members immediate and irreparable injury. DE 1, ¶ 44. The Tribe's unsubstantiated allegations fail to establish the requisite concrete injury traceable to anything the IHS has done, or has not done, thus lacks standing. Even if Plaintiff could allege a sufficiently concrete injury traceable to anything the IHS has done, it still could not meet the redressability prong of Article III standing. As discussed above, how to allocate

its lump sum appropriations is committed to the IHS's discretion by law. Much of the relief that Plaintiff seeks, for example, to take sufficient measures, or allocate sufficient funds, to ensure health services to members of the Tribe are raised to the highest possible level, DE 1, p. 23, is not within the Court's power to grant. Accordingly, the district court lacks jurisdiction to consider the merits of its case.

CONCLUSION

Plaintiff's claims fall outside the scope of judicial review because 25 U.S.C. § 1631(b)(1) shall not apply to any temporary closure of any portion of a facility "if such closure is necessary for medical, environmental or safety reasons." 25 U.S.C. § 1631(b)(2). There is no statutory mandate that IHS provide a certain level of health care to Indians. This Court cannot compel IHS to allocate greater funding, because allocation of lump-sum appropriations by Congress is committed to agency discretion. The IHS has broad discretion to allocate funds without violating equal protection rights.

Dated this 4th day of August, 2016.

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/s/ Cheryl Schrempp DuPris