No. 17-15629

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GILA RIVER INDIAN COMMUNITY and GILA RIVER HEALTH CARE CORPORATION,

Plaintiffs - Appellants,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS and DAVID J. SHULKIN, Secretary, United States Department of Veterans Affairs,

Defendants - Appellees.

On appeal from the United States District Court for Arizona
D.C. No. 2:16-cv-00772-ROS

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THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GILA RIVER INDIAN COMMUNITY and GILA RIVER HEALTH CARE CORPORATION, Plaintiffs, v. UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; and DAVID J. SHULKIN, Secretary, United States Department of Veterans Affairs, Defendants.	No. 2:16-cv-00772-ROS **NOTICE OF APPEAL**

Notice is hereby given that Plaintiffs Gila River Indian Community and Gila River Health Care Corporation hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order (Doc. 18) and Judgment (Doc. 19) entered by the United States District Court for the District of Arizona granting the Defendants'

Motion to Dismiss.

SUBMITTED this 4th day of April, 2017.

Respectfully submitted,

GILA RIVER INDIAN COMMUNITY

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2017, I electronically transmitted this document to the Clerk's Office of the United States District Court for the District of Arizona using the CM/ECF system for electronic filing and service of this document and a Notice of Electronic Filing to the following CM/ECF registrants:

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Gila River Indian Community, et al.,

Plaintiffs,

v.

United States Department of Veterans Affairs, et al.,

Defendants.

NO. CV-16-00772-PHX-ROS

JUDGMENT OF DISMISSAL IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed March 23, 2017, judgment of dismissal is entered. Plaintiff to take nothing, and the complaint and action are dismissed without prejudice.

Brian D. Karth
District Court Executive/Clerk of Court

March 23, 2017

By s/ Kenneth G. Miller
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Gila River Indian Community, et al., Plaintiffs, v. United States Department of Veterans Affairs, et al., Defendants.	No. CV-16-00772-PHX-ROS **ORDER**

The Gila River Indian Community ("Community") sometimes provides health care to Native Americans who are veterans. The Community believes a relatively recent statute requires the United States Department of Veterans Affairs ("VA") reimburse the Community for the care it provides to veterans. The VA disagrees with the Community's statutory interpretation but, more importantly, believes the Community has filed suit in the wrong court. Pursuant to Ninth Circuit guidance, the VA is correct and this suit must be dismissed.

BACKGROUND

As part of its "special trust responsibilities and legal obligations to Indians," the United States provides health care to Native Americans. 25 U.S.C. § 1602. *See also Blatchford v. Alaska Native Tribal Health Consortium*, 645 F.3d 1089, 1090 (9th Cir. 2011) (discussing § 1602). The United States attempts to fulfill that obligation through the federal Indian Health Service ("IHS"). In 2002, IHS entered into "a compact of self-governance" with the Community. (Doc. 12 at 4). That compact allows the Community

to provide health care services to Native Americans through its wholly-owned entity known as the Gila River Health Care Corporation ("GRHC"). The health care provided by GRHC is paid for by money from the IHS.

On occasion, GRHC provides health care to Native Americans who are also veterans. As veterans, those individuals are eligible to receive care from the VA but choose to receive care from GRHC. Prior to 2010, care provided by GRHC to veterans was paid for through IHS. That is, the VA did not reimburse GRHC for such care even though the veterans could have received care from the VA.

In 2010, the Patient Protection and Affordable Care Act ("ACA") was signed into law. One provision of the ACA allows tribal organizations, such as GRHC, to be reimbursed for health care provided to individuals eligible to receive care from the VA. 25 U.S.C. § 1645(c). According to GRHC, that provision gave Native American veterans "flexibility and choice" in deciding whether to obtain healthcare from the VA or a tribal organization. (Doc. 12 at 6-7). As a result of "well-publicized health care scandals alleging poor quality of care and long waits for appointments" at VA facilities, Native American veterans began receiving more of their care from tribal organizations instead of the VA. Relying on the new statutory provision, GRHC sought reimbursement from the VA for that care. The VA refused to reimburse GRHC, claiming § 1645(c) is not self-executing. In the VA's view, § 1645(c) allows it to negotiate the terms whereby it will provide reimbursements to tribal organizations.

In December 2012, the VA and IHS announced they had reached an agreement setting out the terms for VA reimbursements of IHS-provided care. (Doc. 12 at 10). The VA then started "soliciting tribal health programs to 'sign on' to [that] agreement." In February 2013, the VA began negotiating with GRHC. Those negotiations were contentious in that GRHC believed the VA was demanding certain inappropriate limitations to GRHC's statutory right to reimbursement. Those negotiations continued for more than three years but, eventually, GRHC concluded no acceptable agreement

could be reached. In July 2016, GRHC[1] filed the present suit.

In its complaint, GRHC asserts three claims against the VA.[2] The first two claims allege the VA is violating governing law by refusing to reimburse GRHC for care provided to Native American veterans. The third claim seeks "Mandamus Relief" in the form of an order "compelling the VA" to provide reimbursements for care GRHC provided to Native American veterans. (Doc. 12 at 15). The VA responded to the complaint by moving to dismiss, arguing the Court lacks jurisdiction and, even if jurisdiction were found to exist, the complaint fails to state a claim on which relief can be granted.

ANALYSIS

The Court must address the VA's jurisdictional first. *See Ex parte McCardle*, 74 U.S. 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause."). That argument turns on the proper interpretation and application of the two relevant statutes: 38 U.S.C. § 511(a) which limits federal jurisdiction over claims involving veterans' benefits and 25 U.S.C. § 1645(c) which allows GRHC to seek reimbursement from the VA for care provided to veterans. The parties do not cite any authority directly addressing the interaction of these two statutes. The Ninth Circuit has, however, directed district courts to read § 511(a) as broadly as possible. Under a broad reading of § 511(a), the merits of GRHC's claims under § 1645(c) cannot be heard here.

The current version of § 511(a) was passed as part of the Veterans' Judicial Review Act of 1988 ("VJRA"). As described by the Ninth Circuit, the VJRA was aimed, in large part, at "limit[ing] outside court intervention in the VA decisonmaking process." *Veterans for Commons Sense v. Shinseki*, 678 F.3d 1013, 1022 (9th Cir. 2012). To accomplish that goal, § 511(a) directs the Secretary of the Department of Veterans Affairs ("Secretary") to "decide all questions of law and fact necessary to a decision by

[1] The Community is also a named plaintiff. For simplicity, the Court will refer to both plaintiffs as "GRHC."

[2] The Secretary of the United States Department of Veterans Affairs is also a named defendant. For simplicity, the Court will refer to both defendants as "the VA."

the Secretary under a law that affects the provision of benefits by the Secretary to veterans." Any decision by the Secretary is "final and conclusive and may not be reviewed by any other official or by any court" except for review in the Court of Veterans Claims and Federal Circuit. The Ninth Circuit has interpreted § 511(a) as a message "that Congress was quite serious about limiting [federal] jurisdiction over anything dealing with the provision of veterans' benefits." *Veterans for Commons Sense*, 678 F.3d at 1023. And to further Congress's intent, the Ninth Circuit in recent years has instructed courts to read § 511 as a *very* broad jurisdictional bar.

In 2012, the Ninth Circuit described § 511(a)'s reach as precluding district court "jurisdiction over a claim if [the claim] requires the district court to review VA decisions that relate to benefits decisions, including any decision made by the Secretary in the course of making benefits determinations." *Id.* at 1025 (quotation marks and citations omitted). In other words, the preclusive effect of § 511(a) "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." *Id.* In 2013, the Ninth Circuit provided a slightly different formulation of 511(a)'s reach. Under that formulation, § 511(a) precludes a district court from exercising jurisdiction over "claims that would require [the court] to review a question of fact or law relating to or affecting veterans' benefits decisions." *Recinto v. U.S. Dep't of Veterans Affairs*, 706 F.3d 1171, 1175 (9th Cir. 2013). Or "[s]tated another way," § 511(a) precludes jurisdiction "if reviewing Plaintiffs' claim would require review of the circumstances of individual benefits requests." *Id.*

The question for the present case is whether GRHC's claims for reimbursement fall within these descriptions of § 511(a)'s reach. At a basic level, GRHC is claiming it provided care to veterans and the VA is refusing to reimburse GRHC for that care. The parties disagree on whether such reimbursements are "benefits decisions" as that phrase must be applied in light of Ninth Circuit authority. The better reading is that disputes about reimbursements are, in fact, "benefits decisions" that cannot be heard in district

court.

The starting point is determining what qualifies as veterans benefits. There is no question that when the VA provides medical care directly to veterans, it is providing "benefits." Thus, disputes about the care the VA provides directly to veterans are subject to § 511(a).[3] *See Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1026 (9th Cir. 2012) ("Section 511 undoubtedly would deprive us of jurisdiction to consider an individual veteran's claim that the VA unreasonably delayed his mental health care."). Similarly, under longstanding regulations and practice, the VA is providing "benefits" to veterans when it pays third-parties for care provided to veterans.

Under the VA's regulations, "benefit" is defined as "any payment, service, commodity, function, 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. This definition means the VA is providing "benefits" to veterans when it makes payments to third-parties on behalf of veterans. For example, the VA often pays a state for providing care to a veteran "in a State home." 38 U.S.C. § 1741. Payments for such care are made directly to a state home and, under the regulatory definition of "benefit," those payments qualify as a type of veteran's benefits.[4] Similarly, the VA often pays for emergency care provided to veterans by non-VA facilities or doctors. 38 U.S.C. § 1725. *Cf. Staab v. McDonald*, 28 Vet. App. 50, 52 (U.S. Vet. App. 2016) ("VA will reimburse a veteran for the reasonable value of emergency treatment furnished the veteran in a non-VA facility . . . ."). Those payments also qualify as "benefits" under the regulatory definition. And both caselaw and

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[3] This statement is subject to a large exception involving claims under the Federal Tort Claims Act. *See Veterans for Common Sense*, 678 F.3d at 1023 (noting claims against the VA pursuant to the Federal Tort Claims Act may be heard in district court). There are no claims under the Federal Tort Claims Act at issue in this case.

[4] If a state home disagrees with the VA's payment decisions, it appears the state must pursue a claim through the administrative process contemplated by § 511(a). That was the conclusion reached in a well-reasoned opinion by the VA's General Counsel. General Counsel Department of Veterans Affairs, *Jurisdiction of the Board of Veterans' Appeals in Consideration of Per Diem Payments to a State Home* (Dec. 14, 2000), *available at* http://www.va.gov/ogc/opinions/2000precedentopinions.asp.

additional regulations recognize that third-party medical providers must pursue reimbursement through the administrative process, not through lawsuits. *See Christman v. United States*, No. C-1-09-189, 2009 WL 3418684, at *3 (S.D. Ohio Oct. 19, 2009) (emergency room doctor's suit against veteran dismissed because doctor was required to pursue administrative process); 38 C.F.R. § 17.1004(a) (allowing "entity that furnished the [emergency] treatment" to make administrative claim for payment).

Extending the logic of these examples to the present case, the VA would be providing "benefits" to veterans if it were to reimburse GRHC for care provided to those veterans. GRHC is in the same position as state homes that care for veterans or hospitals that provide emergency care to veterans. The fact that the "benefits" at issue consist of transfers between two federal governmental entities does not change this conclusion; even though it is just a matter of transferring money, the VA would be conferring "benefits" on veterans by making "payment[s]" to GRHC. 38 C.F.R. § 20.3. And because GRHC's claims in this suit are simply claims that GRHC has not received "payments," GRHC is seeking to challenge the VA's benefits decisions. At the very least, GRHC's claims "relate to benefits decisions" in that the decision whether to reimburse GRHC is a "decision made by the Secretary in the course of making benefits determinations." *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1025 (9th Cir. 2012). GRHC's offers a variety of arguments against this conclusion but none are convincing.

GRHC's first argument is that § 511(a) only applies to laws "that affect[] the provision of benefits" by the VA. (Doc. 16 at 8). GRHC's believes its right to reimbursement under § 1645(c) does not "affect" the provision of veterans' benefits, meaning § 511(a) does not apply. In other words, GRHC argues § 1645(c) neither "expands [nor] diminishes a veteran's right to [benefits]. It merely shifts which federal budget bears the burden of paying for benefits a veteran is otherwise eligible for." (Doc. 16 at 8). GRHC is correct that its dispute with the VA is about which federal budget will bear the burden of the veterans' care. But GRHC is incorrect that § 1645(c) does not

"affect" the provision of veterans' benefit as that phrase has been interpreted by the Ninth Circuit. The language of § 511(a) applies to any claim that involves "a question of fact or law *relating to* or affecting veterans' benefits decisions." *Recinto v. U.S. Dep't of Veterans Affairs*, 706 F.3d 1171, 1175 (9th Cir. 2013) (emphasis added). Section 1645's requirement that the VA pay GRHC for healthcare "affects" the provision of veterans' benefits in that it "relates" to benefits decisions. That is all that is required for § 511(a) to apply.

GRHC's second argument is that § 511(a) is limited to disputes between veterans and the Secretary. GRHC stresses portions of the statutory language to claim § 511 should be limited to situations where benefits are "provided *by* the Secretary . . . *to* veterans." (Doc. 16 at 8). GRHC then interprets its provision of medical services to Native Americans as not qualifying as benefits provided *by* the Secretary *to* veterans because the actual care is being provided by GRHC. This statutory interpretation would artificially limit the reach of § 511. As mentioned above, "benefits" include payment to third-parties for services provided to medical providers. While the actual recipient of the payments may not be the veterans themselves, the payments are being provided "*by* the Secretary . . . *to* veterans," in the form of payments on behalf of the veterans. Benefits provided indirectly to veterans are still within § 511(a)'s reach.

GRHC's next argument is that § 511(a) is meant to preclude review only of "individual benefits requests." (Doc. 16 at 12). Because the present litigation "does not require the Court to consider individual benefits decisions," GRHC claims § 511(a) does not apply. The Ninth Circuit, however, has made clear that § 511(a) is not limited to challenges involving individual benefits decisions. In *Veterans for Commons Sense*, the plaintiffs brought class claims meant to remedy the VA's alleged failure "to provide timely medical care and disability benefits." 678 F.3d at 1017. The Ninth Circuit interpreted the class claims as an attempt to "circumvent" § 511(a) "by disavowing relief on behalf of any individual veteran." 678 F.3d at 1026. The Ninth Circuit held § 511(a) could not be evaded by merely challenging "many benefits decisions rather than a single

decision." *Id.* at 1027. Similarly here, GRHC's assertion that it is seeking reimbursement for care provided to multiple veterans, instead of care provided to a single veteran, does not take GRHC's claims outside "the preclusive bite of § 511." *Id.* (quotation omitted). The reach of § 511(a) does not turn on how many veterans are involved but on the type of claims being asserted.

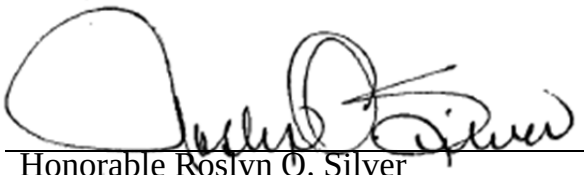
GRHC's final argument is that § 511(a) does not prevent the Court from exercising jurisdiction because this suit will not present any need to "consider veterans' individual benefits decisions." *Recinto*, 706 F.3d at 1175. There is nothing to "consider" in GRHC's view because GRHC has an absolute right to reimbursement and the VA has no choice but to make the payments. The problem with this argument is that interpreting § 511(a) as not applying to benefits the VA must provide would, in effect, eviscerate § 511(a). By statute, the Secretary of Veterans Affairs "shall furnish hospital care and medical services" to eligible veterans. 38 U.S.C. § 1710. Use of "shall" implies the provision of those benefits are mandatory and, using GRHC's logic, any disputes regarding hospital care or medical services would be outside of § 511(a)'s reach. That is, a veteran's statutorily mandated right to medical care would mean there is nothing to "consider" about whether the care should be provided. But the Ninth Circuit has held § 511(a) "undoubtedly" precludes jurisdiction over a veteran's claim regarding delayed treatment. *Common Sense*, 678 F.3d at 1026. And in that case, there was no dispute that the veteran was statutorily entitled to that treatment. Thus, GRHC's argument regarding the need to "consider" benefits decisions is not correct.

In sum, reimbursement for care provided to veterans is a type of veterans' benefit. The refusal to provide such reimbursement—even assuming reimbursement is statutorily mandated—is a decision that relates to a benefits decision. Because district courts cannot hear any claim that would require the court to "review VA decisions that relate to benefits decisions," this case must be dismissed for lack of jurisdiction. *Veterans for Commons Sense*, 678 F.3d at 1023.

Accordingly,

IT IS ORDERED the Motion to Dismiss (Doc. 15) is **GRANTED**. The Clerk of Court is directed to enter a judgment of dismissal without prejudice.

Dated this 23rd day of March, 2017.



Honorable Roslyn O. Silver
Senior United States District Judge

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THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GILA RIVER INDIAN COMMUNITY, a federally-recognized Indian tribe; and GILA RIVER HEALTH CARE CORPORATION, a wholly-owned and subordinate entity of the Gila River Indian Community, Plaintiffs, v. UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; and ROBERT A. McDONALD, Secretary, United States Department of Veterans Affairs, Defendants.	No. 2:16-cv-00772-ROS **RESPONSE TO MOTION TO DISMISS** **ORAL ARGUMENT REQUESTED**

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INTRODUCTION

The United States has a trust obligation to provide health care to Native Americans, including Native American veterans. In the Gila River Indian Community ("Community"), the provision of health care under the trust obligation has been assumed by the Community under a self-governance compact with the United States, with health care services provided by the Gila River Health Care Corporation ("GRHCC"). Historically, however, federal budgets for Native American health care services have been grossly underfunded. Congress took steps over the years to address this funding crisis, primarily by relieving the burden of payment for health care services on the Indian Health Service ("IHS"), Indian tribes and tribal organizations. In 1999, the federal "payer of last resort" regulation was adopted to confirm that IHS would pay secondary to other program and private insurance "notwithstanding any State or local law to the contrary." 42 C.F.R. § 136.61.

Two amendments previously offered to the Indian Health Care Improvement Act

were designed to address these issues—codifying the payer of last resort rule and requiring the VA to reimburse Indian tribes and tribal organizations for health care services provided to eligible veterans. These two amendments were ultimately adopted as part of the Patient Protection and Affordable Care Act ("ACA") in 2010. The VA strongly opposed these provisions when they were originally proposed because it considered them to be cost-shifting provisions that would override current VA authority. When the provisions were enacted as part of the ACA, the VA's response was to produce a legal opinion which provided the VA with the complete authority—through "sharing agreements" not mandated by 25 U.S.C. § 1645(c)—to dictate, control and completely close the process of reimbursing Indian tribes and tribal organizations for health care provided to eligible veterans, contrary to the plain language of the statute.

ARGUMENT

I. THE VETERANS' JUDICIAL REVIEW ACT DOES NOT APPLY TO PRECLUDE THIS COURT FROM REVIEWING THE VA'S ACTIONS.

A. Standard of review for Rule 12(b)(1) motions attacking subject matter jurisdiction

When addressing a motion to dismiss for lack of subject matter jurisdiction, a court is generally not bound by the factual allegations of the complaint. Pursuant to Fed. R. Civ. P. 12(b)(1), the court "may 'hear evidence regarding jurisdiction' and 'resolv[e] factual disputes where necessary.'" *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009) (quoting *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983)). A Rule 12(b)(1) motion may be either *facial*, where the court's inquiry is limited to the allegations in the

complaint; or *factual*, where the court may look beyond the complaint to consider extrinsic evidence. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "If the moving party converts 'the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.'" *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) (quoting *Safe Air*, 373 F.3d at 1039). Accordingly, in deciding jurisdictional issues, the court is not bound by the factual allegations within the complaint. *Augustine*, 704 F.2d at 1077.

B. This unique matter is excluded from review under the VJRA by the plain language of 38 U.S.C. § 511.

The VA contends that the Veterans' Judicial Review Act ("VJRA"), Pub. L. 100-687, 102 Stat. 4105 (Nov. 18, 1988) provides the exclusive vehicle for the Community to challenge the VA's unlawful actions. The VA is incorrect. 38 U.S.C. § 511(a), the primary codification of the VJRA's administrative review process, provides:

> The Secretary shall decide all 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* or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(emphasis added). This is admittedly a broad provision; however, it clearly does not reach the Community's claims in this matter.

It is well-settled in the Ninth Circuit that "statutory interpretation begins with the plain language of the statute." *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010)

(quoting *United States v. Chaney*, 581 F.2d 1123, 1126 (9th Cir. 2009)). "The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous."*Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009) "In statutory interpretation, courts must adhere to the plain language of a statute unless "literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."" *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1236 (9th Cir. 1995) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

The VA's analysis of § 511(a)'s plain language misconstrues the phrase "under a law that affects the provision of benefits," and disregards two critical terms that follow that phrase—the benefits must be provided *by* the Secretary and *to* veterans. Doc 15 at 6. First, it is clear by this language that § 511(a) is concerned with laws that affect a veteran's eligibility for VA benefits. 25 U.S.C. § 1645 does not affect a veteran's eligibility for benefits. Nothing in Section 1645(c) either expands or diminishes a veteran's right to either IHS or VA benefits. It merely shifts which federal budget bears the burden of paying for benefits a veteran is otherwise eligible for. No eligibility or any other provisions affecting the provision of benefits to a veteran are affected at all. Nor does Section 1645(c) affect any benefits provided "by the Secretary to veterans." By definition, Section 1645(c) only affects benefits that are provided through IHS or a tribal health facility.

One need only look at the ordinary meaning of these words to see that § 511(a) is

concerned with decisions by the VA with regard to benefits that the VA administers to veterans, and does not address the benefits conferred by Section 1645(c) which, by definition, are provided, administered or adjudicated through a federal benefit scheme (in Title 25) wholly separate from the VA (Title 38). Under Section 1645(c), the only thing to be provided is reimbursement from the VA to an Indian tribe or tribal organization "to beneficiaries eligible for services from" the VA. While § 511(a) governs an eligibility dispute between a veteran and the VA, it would not affect reimbursement obligations under Section 1645(c) by the VA for individuals where eligibility is not in dispute. In the case at bar, VA has categorically denied all reimbursements, *regardless of eligibility*.

25 U.S.C. § 1645(c) provides:

> **(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.

(emphasis added). The plain language of Section 1645(c) unambiguously excludes it from the broad scope of § 511(a). Section 1645(c) is clear: (1) the reimbursement for services provided through IHS, an Indian tribe or tribal organization is mandatory, using the term "shall"; (2) by its express terms, Section 1645(c) applies only to services provided "through" IHS, an Indian tribe (such as the Community) or tribal organization (such as GRHCC), and not the provision of benefits by the VA to veterans; and (3) the reimbursement obligation of Section 1645(c) applies "notwithstanding any other provision of the law."

Instead of a plain language analysis of § 511(a), the VA relies heavily upon case law

which broadly construes the scope of § 511(a), without any consideration for the specific language of Section 1645(c). This analysis is primarily from three cases: *Hicks v. Veterans Admin*., 961 F.2d 1367 (8th Cir. 1992), *Blue Water Navy Veterans Ass'n v. McDonald*, 2016 WL 4056093 (D.C.Cir. 2016) and *Veterans for Common Sense v. Shineski*, 678 F.3d 1013 (9th Cir. 2012) (en banc). The Community believes that the direction from the Ninth Circuit on interpreting § 511(a) provides a clear answer here.

Veterans for Common Sense was an action brought by two non-profit organizations "to remedy delays in the provision of mental health care and the adjudication of service-connected disability compensation claims *by* the VA." 678 F.3d 1016 (emphasis added). The Ninth Circuit's thorough discussion of the history of the judicial review of veterans' benefits determinations and the enactment of the VJRA provides specific guidance to this Court on the question before it. "Congress indicated that the Veterans Court's authority would extend to "*all* questions involving benefits under laws *administered by* the VA."" 678 F.3d at 1021 (quoting H.R. Rep. No. 100-963, at 5) (emphasis of "all" in original; emphasis of "administered by" added). Section 1645(c) is not administered by the VA.

In summarizing the limitations of the VJRA, the Ninth Circuit said, "Congress has expressly disqualified us from hearing cases related to *VA benefits* in 511(a)." 678 F.3d at 1023 (emphasis added). In its judicial construction of § 511, the Court cited its prior decision in *Littlejohn v. United States*, 321 F.3d 915 (9th Cir. 2003), in which it held that although the Federal Circuit is the only Article III court with jurisdiction to hear challenges to VA determinations regarding disability benefits, it could hear an FTCA claim involving

negligence against VA physicians "because doing so would not "possibly have any effect on the benefits he has already been awarded."" 678 F.3d 1023 (quoting *Littlejohn*, 321 F.3d at 921). After discussing prior cases, including cases from other circuits, the Ninth Circuit concluded that § 511 "precludes jurisdiction over a claim if it requires the district court to review "VA decisions that relate to benefits decisions."" 678 F.3d at 1925 (quoting *Beamon v. Brown*, 125 F.3d 965, 971 (6th Cir. 1997)). Hearing this matter would not have any effect on the benefits actually received by any veteran. In fact, the VA has refused to provide any reimbursements regardless of whether a veteran is clearly eligible for benefits from both the VA and GRHCC.

The Ninth Circuit further explained that the preclusion of judicial review of decisions under § 511 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." 678 F.3d at 1025-26 (citations omitted). This case is neither a case involving a question of whether the VA acted properly in handling a veteran's claim nor is it a decision that would affect such cases. The broad interpretation of § 511 in *Veterans for Common Sense* clearly does not encompass the claims made in this case or the unique nature of Section 1645(c).

The Community's position is bolstered by the Ninth Circuit's subsequent decision in *Recinto v. U.S. Dep't of Veterans Affairs*, 706 F.3d 1171 (9th Cir. 2013). *Recinto* involved a challenge to VA decisions regarding payments to veterans under the Filipino Veterans Equity Fund. 706 F.3d at 1172. In its first decision following its en banc decision in *Veterans*

for Common Sense, the Ninth Circuit limited the scope of § 511 to whether the claims made required the court to consider individual veterans' benefits decisions:

> **Stated another way, if reviewing Plaintiffs' claim would require review of the circumstances of individual benefits requests, jurisdiction is lacking.** *See id.* at 1034. "Benefits" include "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." *Id.* at 1026 (citing 38 C.F.R. § 20.3(e)). We must therefore evaluate both of Plaintiffs' claims to determine whether they require us to consider veterans' *individual benefits decisions*.

706 F.3d at 1175 (citing *Veterans for Common Sense*) (emphasis added). This matter does not require the Court to consider individual benefits decisions. Like the facial equal protection challenge in *Recinto*, this case requires only an evaluation of the text of the statute requiring the VA to reimburse IHS, Indian tribes or tribal organizations. As in *Recinto*, "[t]o assess this claim we need not assess whether individual claimants have a right to veterans benefits." 706 F.3d at 1176.

A review of appellate court decisions in which courts have found that § 511(a) precludes judicial review shows that many meet a common criterion: They are "group challenges" brought by veterans' organizations on behalf of veterans or putative class action lawsuits. *Veterans for Common Sense* (two non-profits groups representing class of veterans); *Recinto* (group of Filipino World War II veterans and their widows); *Blue Water Navy Vietnam Veterans* (organizations that represented "blue water" Navy veterans during Vietnam War); *Beamon* (putative class action by honorably discharged war veterans); *de Fernandez v. U.S. Dep't of Veterans Affairs*, 2013 WL 623240 (N.D. Cal. 2013) (putative class action brought by Filipino World War II veterans and non-profit organization). This

case involves a unique issue that is *not* analogous to a group challenge to veteran benefits decisions.

The VA relies on a definition of "benefit" from 38 C.F.R. § 20.3(e). As with the plain language analysis of § 511(a), the VA's convoluted reasoning fails to consider the plain language of the statute (which the rule tracks). Section 1645(c) is not a law administered by the VA. In addition, because Section 1645(c) is not a law administered by the VA, the VA is not entitled to any deference to its interpretation. Finally, it is worth noting that the definition of "benefit" is from 38 C.F.R. Part 20, which are the rules of practice for the Board of Veterans' Appeals.

A good question for the VA in this matter would be what would happen if the Community attempted to use the VA's administrative process.[1] Long-standing precedent from the United States Court of Veterans Appeals holds that the Board of Veterans' Appeals lacks jurisdiction to review the Secretary's grant of or refusal to grant equitable relief. *Darrow v. Derwinski*, 2 Vet.App. 303 (1992); *Edwards v. Peake*, 22 Vet.App. 29 (2008). In holding that the appellant was not entitled to the remedy of equitable tolling, the court noted that there was "no authority empowering the Court to grant equitable relief to extend a deadline other than that which permits the Court to obtain jurisdiction over the merits of his case." *Peake*, 22 Vet.App. at 37. Thus, "the equitable relief sought by the appellant is solely

[1] In the "meet and confer" prior to the filing of the First Amended Complaint, while taking the position that the Community and GRHCC must proceed under the VJRA, defendants' attorneys were unable to guarantee that the Board of Veterans' Appeals would have jurisdiction over the matter.

available at the discretion of the Secretary." *Id.*

Section 1645(c) is a unique statute and the cases involving group challenges to veterans' benefits do not fit this situation. Under the plain language of 38 U.S.C. § 511(a), the claims in this case do not fall under the scope of the VJRA.

II. THE ACTIONS OF THE VA MEET THE REQUIREMENTS FOR "FINAL AGENCY ACTION" UNDER THE ADMINISTRATIVE PROCEDURES ACT.

The VA argues that its actions do not constitute a final agency action under the judicial review provisions of the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706. The APA says that the following actions are reviewable:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704. Agency action under the APA includes "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). In this case, the VA's actions clearly meet the "final agency action" requirement. After more than two years of attempting to resolve these issues with the VA, the VA not only failed to act, but they informed the Community and GRHCC that they would not act without the filing of a lawsuit.

In their First Amended Complaint, the Community and GRHCC laid out the facts

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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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UNITED STATES DISTRICT COURT
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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 **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

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).

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Gila River Indian Community and
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THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GILA RIVER INDIAN COMMUNITY, a federally-recognized Indian tribe; and GILA RIVER HEALTH CARE CORPORATION, a wholly-owned and subordinate entity of the Gila River Indian Community, Plaintiffs, v. UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; and ROBERT A. McDONALD, Secretary, United States Department of Veterans Affairs, Defendants.	No. 2:16-cv-00772-ROS **FIRST AMENDED COMPLAINT**

In 2010, the Patient Protection and Affordable Care Act ("ACA") was enacted. One goal of the ACA was to improve health care access and delivery for Native Americans. A provision in the ACA allows Indian tribes to be reimbursed for health care provided to

veterans and states:

> 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.

25 U.S.C. § 1645(c). This law provides that, if an Indian tribe or tribal organization provides health care services to an individual who is otherwise eligible for care from the VA, the VA must reimburse the Indian tribe or tribal organization for the services provided. Despite this plain and mandatory language directing the Department of Veterans Affairs ("VA") to reimburse Indian tribes and tribal organizations for health care services provided to veterans, the VA refuses to do so unless Indian tribes and tribal organizations agree to conditions well beyond the plain language of the law and which reduce the reimbursements that Indian tribes are entitled to under the law.

Because of the VA's refusal to follow the law, Plaintiffs Gila River Indian Community and Gila River Health Care Corporation make and file this First Amended Complaint against Defendants and allege as follows:

THE PARTIES

1. Plaintiff, Gila River Indian Community (the "Community"), is a federally-recognized Indian tribe with its headquarters in Sacaton, Arizona and occupies the Gila River Indian Reservation on lands located in Pinal and Maricopa Counties in Arizona.

2. Plaintiff, Gila River Health Care Corporation ("GRHC"), is a wholly-owned and subordinate tribal entity of the Community, and has been designated responsibility as a tribal organization in providing health care services pursuant to the Indian Self-Determination and Education Assistance Act ("ISDEAA").

3. Defendant, United States Department of Veterans Affairs ("VA"), is an executive agency, department, or instrumentality of the United States government.

4. Defendant, Robert A. McDonald, is the Secretary of the United States Department of Veterans Affairs (the "Secretary"), and has the overall responsibility for carrying out functions, duties and responsibilities of the VA, including the provision of reimbursements for health care services in accordance with 25 U.S.C. § 1645(c). His office is located in Washington, D.C. and he is sued in his official capacity.

5. As used throughout this Complaint (and unless context commands otherwise), the terms "Secretary" and "VA" are used interchangeably.

6. As used in this Complaint (and unless the context commands otherwise), the terms "Community" and "GRHC" are used collectively.

JURISDICTION AND VENUE

7. This action includes claims for mandamus, injunctive and declaratory relief, and violations of federal statutory duties to compel the VA to pay medical expenses for eligible veteran care as required by 25 U.S.C. § 1645(c).

8. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1361 (original jurisdiction over mandamus actions to compel an agency to perform its duties), and 28 U.S.C. § 1362 (original jurisdiction over actions brought by Indian tribes under the Constitution, laws or treaties of the United States).

9. The Court is authorized to grant declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201 and 2202.

10. Judicial review of the VA's administrative actions is authorized pursuant to Chapter 7 of the Administrative Procedures Act (the "APA"), 5 U.S.C. §§ 701-706.

11. This matter is not subject to the Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988), because this case does not involve a benefit determination by the VA.

12. The law at question in this matter, 25 U.S.C. § 1645(c), does not affect the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans, but the payment for services provided through Indian tribes or tribal organizations.

13. Venue is proper under 28 U.S.C. §§ 1391(b)(2), 1391(e) and 5 U.S.C. § 703 because a substantial part of the events giving rise to the claim occurred in this District and also because the Community's tribal headquarters are located in this District.

GENERAL ALLEGATIONS

a. Health care is provided to Native and non-Native veterans through the Community and GRHC

14. The Community and GRHC provide certain health care services through a compact of self-governance with the United States Indian Health Service ("IHS"), dated October 1, 2002, under Title V of the ISDEAA (the "Compact"), and through separate funding agreements negotiated between the Community and IHS on an annual or multi-year basis (a "Funding Agreement").

15. Through its wholly-owned entity, GRHC, the Community provides a broad range of "direct services" care that can be provided by GRHC staff at GRHC facilities and contract health services (also referred to as purchase/referred care) ("CHS" or "PRC") when referral to an outside provider is medically necessary and other criteria are met.

16. While direct services care and PRC services are primarily provided to Native American patients of GRHC, eligibility for both types of services provided through GRHC can include certain care to individuals who are not Native Americans ("non-Natives").

17. For example, Section 813 of the Indian Health Care Improvement Act, as added by the ACA, specifically allows the Community and GRHC to provide direct care services to a broad range of non-Natives on a fee-for-service basis.

18. Eligibility for direct care services and PRC services has also long been extended to non-Natives based on certain care or relationships, for example, including care

for a non-Native woman pregnant with an eligible Native's child, certain other care for spouses and children of an eligible Native, stabilization of those in need of emergency care, and care for the prevention of communicable diseases (see, e.g., 25 U.S.C. § 1680c).

19. The Community and GRHC further provide such direct and PRC health care services to both Native and non-Native veterans even if they are entitled to coverage or eligibility through the VA as well.

b. Tribal health care resources are underfunded

20. Federal budgets for both direct care services and PRC services have historically been underfunded.

21. The underfunding of tribal health care and the adverse impact on Native American populations has been long recognized by the United States and Congress and documented in studies conducted by government bodies including the United States General Accountability Office (the "GAO"). See, e.g., GAO-05-789 (report on health care services not available to Native Americans); GAO-11-767 (report on estimating unfunded contract health services); GAO-14-57 (report on opportunities to improve contract health services); GAO-13-553 (report on expanded options for Native Americans under PPACA).

22. Congress has taken several steps over the years to alleviate the underfunded health care burden on Native American populations. For example, under the Indian Health Care Improvement Act ("IHCIA"), 25 U.S.C. § 1621e, Congress enacted a statutory framework to enhance the ability of tribal health programs to secure third party reimbursements for the cost of health services otherwise covered through a tribal health program.

23. In 1999, a federal "payer of last resort" ("PLR") regulation, 42 CFR § 136.61, was adopted to confirm that Indian Health Services would pay secondary to other programs and private insurance "notwithstanding any State or local law to the contrary."

c. The ACA strengthens tribal PLR rights and specifically calls for reimbursements from the VA

24. On March 23, 2010, the ACA was signed into law, making several statutory reforms designed to improve the level of care and health services available to Native Americans.

25. One of the key ACA changes was the enactment of a statutory PLR rule, that not only confirmed that tribal health programs would pay behind other programs, notwithstanding state or local law to the contrary, but confirmed that tribal PLR rights also superseded federal law to the contrary.

26. Effective March 23, 2010, 25 U.S.C. § 1623(b) provides in part as follows:

> Health programs operated by . . . Indian tribes [or] tribal 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.

(emphasis added).

27. Another key ACA change was designed to specifically remove any doubt that tribal health programs pay secondary to the VA.

28. Effective March 23, 2010, 25 U.S.C. § 1645(c) was enacted to promote flexibility and choice to Native American veterans in deciding where and how they elect to receive their health care by specifically requiring the VA to reimburse Indian tribes or tribal organizations for veterans who receive care through a tribal health program in lieu of seeking benefits through the VA.

29. 25 U.S.C. § 1645(c) provides in part as follows:

> 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.

(emphasis added).

30. The impact of these provisions (referred to herein as "Native Veteran Reimbursements Rights") is to allow Native American veterans the ability to choose where they receive their care based on quality of care factors, while ensuring that tribal budgets will not be drained when patients chose tribal services over care they could otherwise receive through the VA.

31. In recent years, this has become increasingly important for the Community and GRHC, as more patients, on information and belief, have elected to receive their care through GRHC as a result of being unable to secure timely appointments through the VA, and because the Phoenix VA in particular has been plagued by well-publicized health care scandals alleging poor quality of care and long waits for appointments.

d. The VA opposes and seeks to limit Native Veteran Reimbursement Rights

32. On information and belief, the VA was aware of the statutory proposal to strengthen Native Veteran Reimbursement Rights and opposed those reforms by lobbying against their adoption.

33. On information and belief, in their efforts to oppose enactment of Native Veteran Reimbursement Rights, the VA acknowledged its understanding that if these rights were enacted into law VA would be required to grant tribal health programs broad reimbursement rights, with regard to both direct and PRC health services.

34. When the legislation which became 25 U.S.C. § 1645(c) was being considered, the VA objected to the legislation acknowledging that the changes "would require the Department of Veterans Affairs (VA) to reimburse the Indian Health Service (IHS), tribes, or tribal organizations whenever a VA-eligible beneficiary chooses to receive, and receives, care from any of those entities." Attached as **Exhibit 1** are copies of four letters written by the Acting Secretary of Veterans Affairs to the Chairman of the House Ways and Means

Committee, the Chairman of the House Committee on Energy and Commerce, and the Chairman of the House Committee on Veterans Affairs, and the Chairman of the Senate Committee of Veterans Affairs, all dated October 11, 2007, acknowledging that the legislative changes at issue in this case would require the VA to pay for such care without having any control over how the care is provided.

35. Although it clearly understood the proposed legislation to require reimbursements, upon enactment of the statutory Native Veteran Reimbursement Rights the VA failed to comply with the law and did not commence reimbursements as directed in 25 U.S.C. § 1645(c)

36. Instead, on information and belief, VA withheld all tribal health program reimbursements pending its efforts to develop "template" reimbursement agreements (hereafter "template agreements") with the United States Indian Health Service ("IHS") to be used by VA for both IHS and tribal health program reimbursements.

37. On information and belief, the VA worked with IHS to develop its template agreements without substantive consultation with any Indian tribal governments knowing, however, that its actions were intended to affect Indian tribal governments.

38. The VA efforts with IHS to develop template agreements did not, in any event, include any consultation with the Community or GRHC.

39. On information and belief, the VA sought to include provisions in its template agreements specifically designed to limit the scope of Native Veteran Reimbursement Rights beyond the statutory language of 25 U.S.C. § 1645(c).

40. Limitations to Native Veteran Reimbursement Rights sought by the VA in its template agreements beyond the language of 25 U.S.C. § 1645(c) included, but were not limited to:

a. No reimbursements would be made without VA's express agreement;

b. Reimbursements, when agreed to by VA, would be limited to direct care

services only;

c. No reimbursements would be made for PRC services provided through a tribal health program;

d. No reimbursements would be made for direct care services, if a tribe seeks to preserve its right to pursue reimbursement claims for PRC services (i.e., requiring tribes to give up reimbursement for PRC services in order to receive any reimbursement for direct care services);

e. No reimbursements would be made for any services provided to non-Native veterans receiving care through a tribal health program; and

f. No agreement (and no reimbursements) would be made by the VA unless the tribe agreed to allow the VA contracting officer to resolve any disputes over Native Veteran Reimbursement Rights.

41. On information and belief, IHS disagreed with the limitations that the VA was demanding with regard to veteran reimbursements (the "IHS-VA Dispute").

42. On information and belief, the IHS-VA Dispute was briefed for submission to the United States Department of Justice (the "DOJ").

43. On information and belief, the IHS-VA Dispute was not decided by the DOJ because VA and IHS leadership agreed to a resolution which, on information and belief, was designed to address inter-agency political concerns in addition to or in lieu of legal entitlement to reimbursements under the 25 U.S.C. § 1645(c) (the "Inter-Agency Agreement").

44. On information and belief, the Inter-Agency Agreement did not include consultation from any Indian tribal governments.

45. The Inter-Agency Agreement did not, in any event, include consultation with the Community or GRHC.

46. IHS, in either event, had no authority to compromise or limit tribal government, tribal organization, Community or GRHC reimbursement rights under 25 U.S.C. §§ 1645(c) or 1623(b).

e. The VA and IHS roll out template agreements limiting Native Veteran Reimbursement Rights

47. On or about December 6, 2012, almost three years after VA reimbursements were to have already begun under the ACA, IHS and VA announced a "national agreement" purporting to allow the VA to reimburse IHS for "direct care services".

48. In reality, IHS and tribal health programs were already entitled to reimbursements beginning March 23, 2010 from the VA in the absence of any agreement through the express language of 25 U.S.C. § 1645(c), and the Inter-Agency Agreement restricted, rather than expanded, Native Veteran Reimbursement Rights.

49. On information and belief, the VA and IHS failed to inform tribal governments that the national agreement included provisions limiting statutory tribal reimbursement rights, and that IHS itself had previously submitted legal briefs to the DOJ in an effort to strike down many of the same key provisions included in the final Inter-Agency Agreement, including VA's insistence on limiting reimbursements to only direct care services.

50. On information and belief, approximately three years after the VA was required to have started reimbursements to tribal health programs under the ACA, the VA began a new publicity campaign soliciting tribal health programs to "sign on" to the template agreement.

f. Template agreement negotiations with GRHC - Scope of Reimbursements

51. In February of 2013, the VA opened discussions with GRHC to enter into a template agreement for reimbursements under 25 U.S.C. § 1645(c).

52. The template agreement, however, included limitations not found in 25 U.S.C. § 1645(c) including, for example: (1) reimbursement was limited to prospective services

rather than reimbursements based on the ACA effective date; (2) reimbursement was limited to direct care services only, and did not include PRC services; (3) reimbursement did not include non-Native veterans receiving care through GRHC; and (4) the agreement required GRHC to submit disputes with the VA for resolution by the VA's own contracting officer.

53. Moreover, the VA indicated that no reimbursements would be provided unless GRHC entered into the template agreement, despite the fact that 25 U.S.C. § 1645(c) mandated such reimbursements, and did not call for separate agreements at all.

54. Over the next approximately eight months, GRHC and the VA exchanged redlines of the template agreement and engaged in efforts to reach a compromise on the scope of reimbursements due under 25 U.S.C. § 1645(c).

55. Negotiations over changes to the scope of reimbursements to be provided under the template agreement culminated with a phone conference with VA representatives and its legal counsel, Dennis Foley, from the VA Office of General Counsel, on October 31, 2013, during which VA made it clear that the VA had already addressed the scope of reimbursements under 25 U.S.C. § 1645(c) in lengthy negotiations with IHS, and that a decision had already been made by the VA not to allow reimbursements other than for direct services. A copy of the VA-prepared meeting summary for the October 31, 2013 meeting is attached and incorporated as **Exhibit 2**.

56. At the October 31, 2013 meeting, VA legal counsel, Dennis Foley, confirmed that the VA's position 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.

57. Following the October 31, 2013 meeting, GRHC continued to request reconsideration on the scope of reimbursements, but VA rejected all such discussions.

g. Template agreement negotiations with GRHC - Reservation of Rights

58. After the VA made it clear that its administrative decision with regard to the scope of reimbursements available under 25 U.C.S. § 1645(c) was final, GRHC attempted to

mitigate damages by securing an agreement limited to the direct service reimbursements already called for in the VA template agreement, but under a reservation of rights.

59. In November of 2013, the VA informed GRHC that such negotiations would have to be addressed to the General Counsel of the Department of Veterans Affairs (William A. Gunn) at the VA Central Office. A copy of the VA-prepared meeting summary, dated November 22, 1013, confirming that the Community was directed to address further requests for consideration through the VA general counsel, is attached and incorporated as **Exhibit 3**. On or about December 5, 2013, GRHC submitted a request for reconsideration as instructed through the General Counsel of the Department of Veterans Affairs (William A. Gunn) at the VA Central Office. Attached as **Exhibit 4** is a copy of the Community's request.

60. Negotiations over whether the VA would agree to provide direct service reimbursements while allowing the Community to reserve its rights over non-agreed matters continued for the next year, and through the VA's final rejection of a redline agreement on July 1, 2015. Attached and incorporated as **Exhibit 5** is a copy of the summary of the VA's position prepared by VA and transmitted via email dated July 1, 2015. After several years, the VA refused to back down from its position regarding the terms of the template agreemen

h. Final Efforts at Government-to-Government Consultation.

61. In March of 2014, and while the VA General Counsel was considering GRHC's effort to mitigate, the Community sent a delegation to meet with VA leadership in Washington D.C. on a government-to-government basis under Executive Order 13175.

62. On April 9, 2014, the VA General Counsel rejected the Community's requests. A copy of the VA response is attached and incorporated as **Exhibit 6**.

63. On or about May 1, 2014, the Community reached out to Arizona Senators John McCain and Jeff Flake an effort to encourage reconsideration of the agency's prior actions through government-to-government consultation.

64. GRHC also suggested a delegation meeting, including Congressional representatives, to be held at the Community's offices.

65. On May 12, 2014, the Community sent a second letter seeking reconsideration from the VA General Counsel. A copy of the May 12, 2014 letter is attached as **Exhibit 7**.

66. On or about June 19, 2014, Senator John McCain sent a letter to the then Acting Director of the Department of Veterans Affairs, Sloan Gibson, requesting an update on reimbursements to the Community as required by 25 U.S.C. § 1645(c).

67. On or about September, 9, 2014, the Community and GRHC sent another delegation to a VA consultation meeting held in Albuquerque, New Mexico, and again urged the VA to consult with tribes on substantive changes to the template agreement, including the subject of PRC service reimbursements, pre-agreement reimbursements, and allowing tribes to receive direct service reimbursements without waiving other rights under 25 U.S.C. § 1645(c).

68. The Community has exhausted efforts at seeking reconsideration by the VA on the scope of services available for reimbursement under 25 U.S.C. § 1645(c), and on mitigation through a direct service reimbursement agreement, under a reservation of rights.

69. All Community efforts have been rejected, and from March 23, 2010 through the date of this Complaint, the VA has provided no reimbursements to GRHC in violation of 25 U.S.C. § 1645(c).

i. No Individual benefit determinations at issue.

70. The positions taken by VA throughout the administrative consideration and in all meetings between VA and the Community as referred to above, did not depend on any individual benefit decisions made by the VA.

71. VA made it repeatedly clear that it would refuse to provide any reimbursements to the Community, even for claims in which it was agreed by all parties that

the eligibility criteria for VA benefits were met, unless the Community agreed to enter into the VA template agreement and waive its rights under the agreement.

72. Reimbursement by the VA under Title 25, or its refusal to do so, does not affect the individual benefits that a veteran is entitled to under Title 38.

j. The Community followed the proper administrative process.

73. The Community requested direction from the VA throughout the administrative review period outlined above regarding how administrative appeals and requests for reconsideration should be handled. The Community followed all such directions. At no time did the VA indicate that a claim for reimbursement or demand for these Title 25 issues must be brought under the Title 38 process for individual VA benefit determinations or appeals.

74. In fact, no form of the VA template agreement provided to the Community, which expressly addresses disputes, has ever contemplated requiring a tribe or tribal organization to make a claim or demand under the Title 38 process.

FIRST CAUSE OF ACTION

(Violation of 25 U.S.C. § 1645(c))

75. Plaintiffs incorporate all previous allegations of fact and law into this cause of action.

76. Under 25 U.S.C. § 1645(c), the VA is required to reimburse GRHC for all services provided through GRHC to any beneficiaries eligible for services from the VA.

77. The VA violated and continues to violate this statute by failing to provide reimbursements from the effective date of the ACA, March 23, 2010, forward.

78. The VA violated and continues to violate this statute by conditioning reimbursements on entering into a separate agreement by VA.

79. The VA violated and continues to violate this statute by conditioning any reimbursements on the Community's agreement to terms and conditions not included in 25 U.S.C. § 1645(c).

80. The VA violated and continues to violate this statute by limiting reimbursements to Native American veterans.

81. The VA violated and continues to violate this statute by limiting reimbursements to direct care services only, and by excluding PRC services.

SECOND CAUSE OF ACTION

(Violation of 25 U.S.C. § 1623(b))

82. Plaintiffs incorporate all previous allegations of fact and law into this cause of action.

83. Under 25 U.S.C. § 1623(b), GRHC is a payer of last resort to VA, notwithstanding Federal law to the contrary.

84. The VA has violated this statute by forcing GRHC into a primary payer position on all services for which VA has refused to provide reimbursements as set forth herein.

THIRD CAUSE OF ACTION

(Mandamus Relief)

85. Plaintiffs incorporate all previous allegations of fact and law into this cause of action.

86. Under 25 U.S.C. § 1645(c), the VA is required to perform a non-discretionary duty owned to the Community.

87. Defendants have breached this duty by failing to reimburse Plaintiffs and no other remedy is available.

88. The Community and GRHC are entitled to the entry of a writ of mandamus compelling the VA to perform duties owed to the Community and GRHC.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. A declaration that the VA has violated 25 U.S.C. §§ 1645(c) and 1623(b);

2. Injunctive and declaratory relief compelling the VA to provide reimbursements for all direct care and PRC services provided through GRHC to VA-eligible veterans from March 23, 2010, through the date of judgment;

3. Injunctive and declaratory relief compelling the VA to provide reimbursements for all direct care and PRC services provided through GRHC to VA-eligible veterans from and after the date of judgment; and

4. An award of the Community's costs, including full reasonable attorneys' fees and litigation costs, as provided for in 28 U.S.C. § 2412, together with such other and further relief as the interests of justice and equity may require.

Dated this 11th day of July, 2016.

Respectfully submitted,

GILA RIVER INDIAN COMMUNITY

By s/ *Thomas L. Murphy*
Linus Everling, Esq.
Thomas Murphy, Esq.

-and-

YODER & LANGFORD, P.C.

Robert R. Yoder, Esq.

Attorneys for Plaintiffs
Gila River Indian Community and
Gila River Healthcare Corporation

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2016, I electronically transmitted this document to the Clerk's Office of the United States District Court for the District of Arizona using the CM/ECF system for electronic filing and service of this document and a Notice of Electronic Filing to the following CM/ECF registrants:

Aimee W. Brown
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, D.C. 20530
Aimee.W.Brown@usdoj.gov

s/ *Thomas L. Murphy*

THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

October 11, 2007

The Honorable Charles B. Rangel
Chairman
Committee on Ways and Means
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We are pleased to provide you with the Department's views on certain provisions of H.R. 1328, a bill entitled the "Indian Health Care Improvement Act Amendments of 2007."

H.R. 1328 would add to the Indian Health Care Improvement Act (IHCIA) a section 406(c), which would require the Department of Veterans Affairs (VA) to reimburse the Indian Health Service (IHS), tribes, or tribal organizations whenever a VA-eligible beneficiary chooses to receive, and receives, care from any of those entities. We strongly object to this provision. VA pays for health care for eligible veterans from non-VA providers only in very limited circumstances and only as part of the care that VA has determined is necessary but is otherwise unable to provide. VA controls and monitors all care that eligible veterans receive. This provision would require VA to pay for care without having any control over how that care is provided. Of course, if VA determines that a veteran needs care at a non-VA facility, VA has authority to enter into an agreement with IHS under which VA would pay for that care. But VA should not be required to pay for the care of all veterans in IHS, tribe, or tribal organization facilities. Current law provides sufficient direction and authority for the appropriate apportionment of costs for the care of Indian veterans between IHS and VA. VA strongly objects to new legislation that would override current authority and shift costs now borne by the IHS programs to VA. Therefore, proposed section 406(c) should be stricken from the bill.

For the same reason, VA also strongly objects to the application to VA of proposed new section 407 of IHCIA entitled "Payor of Last Resort." Both VA and IHS currently have limited authority to reimburse private hospitals and other providers for emergency care furnished to eligible Indian veterans. The law currently requires VA to pay for a veteran's emergency care if it is for a service-connected disability. 38 USC 1728(a)(1). In addition, VA will pay for the emergency care of certain veterans' non-service connected disabilities if they have no other coverage that would pay in whole or in part. 38 CFR 17.1002(g). This proposal would make IHS the payor of last resort for such care. As a result,

2.

The Honorable Charles B. Rangel

it would require VA to pay private providers for emergency care of certain eligible Indian veterans' nonservice-connected disabilities. We strongly object to proposed section 407, to the extent that it effectively shifts costs from IHS to VA. VA believes that enactment of this provision would serve as a precedent for enacting legislation to shift the emergency-care costs of other government health programs onto VA. Such a shift would be very costly to VA.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

Gordon H. Mansfield
Acting

THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

October 11, 2007

The Honorable John D. Dingell
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

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We are pleased to provide you with the Department's views on certain provisions of H.R. 1328, a bill entitled the "Indian Health Care Improvement Act Amendments of 2007."

H.R. 1328 would add to the Indian Health Care Improvement Act (IHCIA) a section 406(c), which would require the Department of Veterans Affairs (VA) to reimburse the Indian Health Service (IHS), tribes, or tribal organizations whenever a VA-eligible beneficiary chooses to receive, and receives, care from any of those entities. We strongly object to this provision. VA pays for health care for eligible veterans from non-VA providers only in very limited circumstances and only as part of the care that VA has determined is necessary but is otherwise unable to provide. VA controls and monitors all care that eligible veterans receive. This provision would require VA to pay for care without having any control over how that care is provided. Of course, if VA determines that a veteran needs care at a non-VA facility, VA has authority to enter into an agreement with IHS under which VA would pay for that care. But VA should not be required to pay for the care of all veterans in IHS, tribe, or tribal organization facilities. Current law provides sufficient direction and authority for the appropriate apportionment of costs for the care of Indian veterans between IHS and VA. VA strongly objects to new legislation that would override current authority and shift costs now borne by the IHS programs to VA. Therefore, proposed section 406(c) should be stricken from the bill.

For the same reason, VA also strongly objects to the application to VA of proposed new section 407 of IHCIA entitled "Payor of Last Resort." Both VA and IHS currently have limited authority to reimburse private hospitals and other providers for emergency care furnished to eligible Indian veterans. The law currently requires VA to pay for a veteran's emergency care if it is for a service-connected disability. 38 USC 1728(a)(1). In addition, VA will pay for the emergency care of certain veterans' non-service connected disabilities if they have no other coverage that would pay in whole or in part. 38 CFR 17.1002(g). This proposal would make IHS the payor of last resort for such care. As a result,

it would require VA to pay private providers for emergency care of certain eligible Indian veterans' nonservice-connected disabilities. We strongly object to proposed section 407, to the extent that it effectively shifts costs from IHS to VA. VA believes that enactment of this provision would serve as a precedent for enacting legislation to shift the emergency-care costs of other government health programs onto VA. Such a shift would be very costly to VA.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

Gordon H. Mansfield
Acting

THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

October 11, 2007

The Honorable Bob Filner
Chairman
Committee on Veterans' Affairs
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We are pleased to provide you with the Department's views on certain provisions of H.R. 1328, a bill entitled the "Indian Health Care Improvement Act Amendments of 2007."

H.R. 1328 would add to the Indian Health Care Improvement Act (IHCIA) a section 406(c), which would require the Department of Veterans Affairs (VA) to reimburse the Indian Health Service (IHS), tribes, or tribal organizations whenever a VA-eligible beneficiary chooses to receive, and receives, care from any of those entities. We strongly object to this provision. VA pays for health care for eligible veterans from non-VA providers only in very limited circumstances and only as part of the care that VA has determined is necessary but is otherwise unable to provide. VA controls and monitors all care that eligible veterans receive. This provision would require VA to pay for care without having any control over how that care is provided. Of course, if VA determines that a veteran needs care at a non-VA facility, VA has authority to enter into an agreement with IHS under which VA would pay for that care. But VA should not be required to pay for the care of all veterans in IHS, tribe, or tribal organization facilities. Current law provides sufficient direction and authority for the appropriate apportionment of costs for the care of Indian veterans between IHS and VA. VA strongly objects to new legislation that would override current authority and shift costs now borne by the IHS programs to VA. Therefore, proposed section 406(c) should be stricken from the bill.

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The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

Gordon H. Mansfield
Acting

THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

October 11, 2007

The Honorable Daniel K. Akaka
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

We are pleased to provide you with the Department's views on certain provisions of H.R. 1328, a bill entitled the "Indian Health Care Improvement Act Amendments of 2007."

H.R. 1328 would add to the Indian Health Care Improvement Act (IHCIA) a section 406(c), which would require the Department of Veterans Affairs (VA) to reimburse the Indian Health Service (IHS), tribes, or tribal organizations whenever a VA-eligible beneficiary chooses to receive, and receives, care from any of those entities. We strongly object to this provision. VA pays for health care for eligible veterans from non-VA providers only in very limited circumstances and only as part of the care that VA has determined is necessary but is otherwise unable to provide. VA controls and monitors all care that eligible veterans receive. This provision would require VA to pay for care without having any control over how that care is provided. Of course, if VA determines that a veteran needs care at a non-VA facility, VA has authority to enter into an agreement with IHS under which VA would pay for that care. But VA should not be required to pay for the care of all veterans in IHS, tribe, or tribal organization facilities. Current law provides sufficient direction and authority for the appropriate apportionment of costs for the care of Indian veterans between IHS and VA. VA strongly objects to new legislation that would override current authority and shift costs now borne by the IHS programs to VA. Therefore, proposed section 406(c) should be stricken from the bill.

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The Honorable Daniel K. Akaka

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The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

Gordon H. Mansfield
Acting

APPEAL,CLOSED,STD

U.S. District Court
DISTRICT OF ARIZONA (Phoenix Division)
CIVIL DOCKET FOR CASE #: 2:16-cv-00772-ROS

Gila River Indian Community et al v. United States Department of Veterans Affairs et al
Assigned to: Senior Judge Roslyn O Silver
Case in other court: Ninth Circuit, 17-15629
Cause: 28:1362 Indian Tribal Controversy

Date Filed: 03/22/2016
Date Terminated: 03/23/2017
Jury Demand: None
Nature of Suit: 890 Other Statutes: Other Statutory Actions
Jurisdiction: U.S. Government Defendant

Plaintiff

Gila River Indian Community
a federally-recognized Indian tribe

represented by **Linus Everling**
Gila River Indian Community - Sacaton, AZ
P.O. Box 97
Sacaton, AZ 85147
520-562-9763
Fax: 520-562-9769
Email: linus.everling@gric.nsn.us
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Robert Richard Yoder
Yoder & Langford PC
4835 E Cactus Rd., Ste. 260
Scottsdale, AZ 85254
602-808-9578
Fax: 602-468-0442
Email: robert@yoderlangford.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas L Murphy
Gila River Indian Community - Sacaton, AZ
P.O. Box 97
Sacaton, AZ 85147
520-562-9764
Email: thomas.murphy@gric.nsn.us
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

Gila River Health Care Corporation
a wholly-owned and subordinate entity of the Gila River Indian Community

represented by **Linus Everling**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Robert Richard Yoder

(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas L Murphy
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

United States Department of Veterans Affairs

represented by **Aimee W Brown**
US Dept of Justice
20 Massachusetts Ave. NW
Washington, DC 20530
202-305-0845
Fax: 202-616-8470
Email: aimee.w.brown@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Robert A McDonald
Secretary, United States Department of Veterans Affairs

represented by **Aimee W Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
04/06/2017	22	REPRESENTATION STATEMENT by Gila River Health Care Corporation, Gila River Indian Community re: 20 Notice of Appeal. (Murphy, Thomas) (Entered: 04/06/2017)
04/05/2017	21	USCA Case Number re: 20 Notice of Appeal. Case number 17-15629, Ninth Circuit. (copies sent by the Ninth Circuit) (REW) (Entered: 04/05/2017)
04/04/2017	20	NOTICE OF APPEAL to 9th Circuit Court of Appeals re: 19 Clerks Judgment, 18 Order on Motion to Dismiss/Lack of Jurisdiction, Order on Motion to Dismiss for Failure to State a Claim by Gila River Health Care Corporation, Gila River Indian Community. Filing fee received: $ 505.00, receipt number 0970-14089638. (Yoder, Robert) (Entered: 04/04/2017)
03/23/2017	19	CLERK'S JUDGMENT - IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed March 23, 2017, judgment of dismissal is entered. Plaintiff to take nothing, and the complaint and action are dismissed without prejudice. (KGM) (Entered: 03/23/2017)
03/23/2017	18	ORDER that the Motion to Dismiss (Doc. 15) is GRANTED. The Clerk of Court is directed to enter a judgment of dismissal without prejudice. Signed by Senior Judge Roslyn O Silver on 3/23/17.(KGM) (Entered: 03/23/2017)
09/26/2016	17	REPLY to Response to Motion re: 15 MOTION to Dismiss for Lack of Jurisdiction *or, in the alternative* MOTION to Dismiss for Failure to State a Claim filed by Robert A

		McDonald, United States Department of Veterans Affairs. (Brown, Aimee) (Entered: 09/26/2016)
09/09/2016	16	RESPONSE to Motion re: 15 MOTION to Dismiss for Lack of Jurisdiction *or, in the alternative* MOTION to Dismiss for Failure to State a Claim filed by Gila River Health Care Corporation, Gila River Indian Community. (Attachments: # 1 Exhibit Exhibit 1 - VA Legal Opinion, # 2 Exhibit Exhibit 2 - Letter to VA Secretary)(Murphy, Thomas) (Entered: 09/09/2016)
08/10/2016	15	MOTION to Dismiss for Lack of Jurisdiction *or, in the alternative*, MOTION to Dismiss for Failure to State a Claim by Robert A McDonald, United States Department of Veterans Affairs. (Brown, Aimee) (Entered: 08/10/2016)
08/02/2016	14	ORDER granting 13 Motion for Leave to File Excess Pages. Defendants may file a 26-page motion to dismiss and supporting memorandum. IT IS FURTHER ORDERED Plaintiffs' opposition may be of equal length (26 pages) and Defendants' reply may be up to 16 pages. Signed by Senior Judge Roslyn O. Silver on 8/2/16.(CLB) (Entered: 08/02/2016)
08/02/2016	13	Consent MOTION for Leave to File Excess Pages by Robert A McDonald, United States Department of Veterans Affairs. (Attachments: # 1 Text of Proposed Order)(Brown, Aimee) (Entered: 08/02/2016)
07/11/2016	12	AMENDED COMPLAINT *First Amended Complaint* against Robert A McDonald, United States Department of Veterans Affairs filed by Gila River Indian Community, Gila River Health Care Corporation. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, # 3 Exhibit Exhibit 3, # 4 Exhibit Exhibit 4, # 5 Exhibit Exhibit 5, # 6 Exhibit Exhibit 6, # 7 Exhibit Exhibit 7)(Murphy, Thomas) (Entered: 07/11/2016)
06/27/2016	11	ORDER the stipulation 10 is GRANTED and Plaintiffs shall file an amended complaint no later than July 11, 2016. Defendants shall file a response to theamended complaint no later than August 10, 2016. Defendants need not respond to the original complaint. Signed by Senior Judge Roslyn O. Silver on 6/27/16. (CLB) (Entered: 06/27/2016)
06/27/2016	10	STIPULATION *AND REQUEST FOR NEW SCHEDULING ORDER* by Robert A McDonald, United States Department of Veterans Affairs. (Attachments: # 1 Text of Proposed Order)(Brown, Aimee) (Entered: 06/27/2016)
05/19/2016	9	ORDER granting the parties' 8 Stipulation For Extension of Time To Answer Complaint. Defendants shall have through and including June 29, 2016 to respond to Plaintiff's complaint. Signed by Senior Judge Roslyn O. Silver on 5/19/16. (CLB) (Entered: 05/19/2016)
05/19/2016	8	STIPULATION FOR EXTENSION OF TIME TO ANSWER COMPLAINT by Robert A McDonald, United States Department of Veterans Affairs. (Attachments: # 1 Text of Proposed Order)(Brown, Aimee) (Entered: 05/19/2016)
05/19/2016	7	NOTICE of Appearance by Aimee W Brown on behalf of Robert A McDonald, United States Department of Veterans Affairs. (Brown, Aimee) (Entered: 05/19/2016)
04/01/2016	6	NOTICE re: Service of Order by Gila River Health Care Corporation, Gila River Indian Community re: 5 Order re Rule 12(b) Motions . (Murphy, Thomas) (Entered: 04/01/2016)
03/23/2016	5	ORDER that motions pursuant to Fed. R. Civ. P. 12(b) are discouraged if the defect can be cured by filing an amended pleading. The parties must meet and confer prior to the filing of such motions to determine whether it can be avoided. FURTHER ORDERED that Plaintiff(s) serve a copy of this Order upon any Defendant(s) who have not yet appeared

		and file notice of service. See attached Order for complete details. Signed by Senior Judge Roslyn O Silver on 3/23/2016. (KAL) (Entered: 03/23/2016)
03/22/2016	4	Summons Issued as to Robert A McDonald, United States Department of Veterans Affairs, U.S. Attorney and U.S. Attorney General. (Attachments: # 1 Summons, # 2 Summons, # 3 Summons)(KMG) (Entered: 03/22/2016)
03/22/2016	3	Filing fee paid, receipt number 0970-12767838. This case has been assigned to the Honorable Roslyn O Silver. All future pleadings or documents should bear the correct case number: CV-16-00772-PHX-ROS. Notice of Availability of Magistrate Judge to Exercise Jurisdiction form attached. (KMG) (Entered: 03/22/2016)
03/22/2016	2	SUMMONS Submitted by Gila River Health Care Corporation, Gila River Indian Community. (Attachments: # 1 Summons, # 2 Summons, # 3 Summons) (submitted by Thomas L. Murphy)(KMG) (Entered: 03/22/2016)
03/22/2016	1	COMPLAINT. Filing fee received: $ 400.00, receipt number 0970-12767838 filed by Gila River Indian Community, Gila River Health Care Corporation. (Attachments: # 1 Civil Cover Sheet) (submitted by Thomas L. Murphy)(KMG) (Entered: 03/22/2016)

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06/20/2017 16:58:01

PACER Login:	TLMurphy02:3246021:4390236	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	2:16-cv-00772-ROS
Billable Pages:	3	**Cost:**	0.30

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2017, I electronically filed Appellants' Excerpts of Record with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system.

GILA RIVER INDIAN COMMUNITY

By *s/ Thomas L. Murphy*
Thomas L. Murphy