UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

DONNA M. GILBERT, JULIE MOHNEY, CHARMAINE WHITE FACE, and others similarly situated, Plaintiffs, v. RADM MICHAEL D. WEAHKEE, Principal Deputy Director Indian Health Service (IHS), JAMES DRIVING HAWK, Great Plains IHS Area Director, WILLIAM BARR, United States Attorney General, Defendants.	5:19-CV-05045-JLV DEFENDANTS' MEMORANDUM BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

COME NOW Defendants RADM Michael D. Weahkee, Principal Deputy Director of the United States Indian Health Service ("IHS"), an agency of the United States of America, James Driving Hawk, Area Director for the Great Plains Area of the IHS, and William Barr, United States Attorney General, by and through their counsel of record, United States Attorney Ronald A. Parsons, Jr., and Assistant United States Attorney SaraBeth Donovan, and file this memorandum brief in support of their motion to dismiss Plaintiffs' claims with prejudice.

The Amended Complaint must be dismissed on several grounds. First, this Court lacks jurisdiction because Plaintiffs have failed to identify an

applicable waiver of the United States' sovereign immunity from suit and because Plaintiffs lack standing under Article III. Second, Plaintiffs have failed to state a claim upon which the requested relief can be granted. Third, Plaintiffs have failed to join indispensable parties. Additionally, even if Plaintiffs' claims are not barred as set forth above, and despite their attempts at a class action, Plaintiffs cannot meet the standard required for the imposition of a permanent injunction. Therefore, for all of those reasons, this case should be dismissed with prejudice pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7).

STATEMENT OF FACTS

In the Spring of 2018, the Great Plains Tribal Chairmen's Health Board ("GPTCHB") and the Cheyenne River Sioux Tribe ("CRST"), Oglala Sioux Tribe ("OST"), and Rosebud Sioux Tribe ("RST") took separate actions, through individual resolutions, towards a self-determination proposal for the assumption of the operations of and funding for the programs, functions, services, and activities ("PFSAs") of the IHS Service Unit in Rapid City, South Dakota ("RCSU"), to include the Sioux San Hospital and related facilities, by the GPTCHB. On September 27, 2018, the GPTCHB submitted a proposal to the IHS for the assumption of the PFSAs of the RCSU. The 90-day statutory period for the IHS to award or decline the proposal was to end on December 26, 2018.

On December 4, 2018, Charmaine White Face ("White Face"), filed a Complaint and motion for a temporary restraining order against Jerilyn Church

("Church"), Chief Executive Officer ("CEO") of the GPTCHB, and IHS Area Director Driving Hawk. See White Face v. Church, et al., 5:18-cv-05087-JLV ("White Face (2018)"), Docs. 1, 8.

In her 2018 Complaint, White Face alleged the same violations of federal law -- the Fort Laramie Treaty of 1868, the United States Constitution, and the Indian Self-Determination and Education Assistance Act ("ISDEAA") – and basically the same allegations of fact, as she alleges in the instant case: that the assumption of the RCSU by the GPTCHB violated her treaty and civil rights, and those of the Rapid City community and federal IHS employees, because they were not consulted and could not vote in tribal elections, and because the IHS has the ongoing treaty responsibility to provide health care to tribal members not the GPTCHB. Doc. 1 ¶¶ I, IV (1-3). White Face requested the court to immediately enjoin the IHS and GPTCHB from contracting for the provision of services at the RCSU, to declare all Intergovernmental Personnel Act ("IPA") employment contracts[1] null and void, to allow all RCSU employees to resume their federal employment, and to award monetary damages. Doc. 1 at ¶¶ V, VI. Following a hearing on December 13, 2018, the Court dismissed White Face's Complaint without prejudice because subject matter jurisdiction was lacking. White Face (2018), Doc. 31.

[1] IPA contracts provide for the detail of a federal employee to a tribal organization, wherein the employees retain their federal salary and benefits. 5 U.S.C. §§ 3371-3375 and 5 C.F.R Chapter 34.

On December 18, 2018, the RST Tribal Council rescinded its two earlier resolutions which had provided for the assumption of health care at the RCSU by the GPTCHB from the IHS. See Donovan Declaration filed herewith ("Donovan Decl."), and Exhibit 1, attached thereto. On December 20, 2018, IHS informed the GPTCHB that it was cancelling negotiations. See Donovan Decl., Exhibit 2. On December 21, 2018, IHS informed the GPTCHB that it was officially declining in full their September 27, 2018 proposal to assume the PFSAs of the RCSU on behalf of the three tribes. See Donovan Decl., Exhibit 3.

On February 14, 2019, the GPTCHB made a new proposal to the IHS for the assumption of the PFSAs at the RCSU on behalf of the CRST and the OST, the two tribes still interested in the assumption. See Donovan Decl., Exhibit 4. Included in that proposal were the resolutions of the OST, CRST, and the GPTCHB, dated January 2, 2019, January 9, 2019, and January 18, 2019, respectively, which authorized the GPTCHB to assume the operation of and funding for the PFSAs of the RCSU from the IHS on behalf of the two tribes. See Donovan Decl., Exhibits 5-7. Since the receipt of the proposal, good faith negotiations occurred between the IHS and the GPTCHB, numerous consultations were held with all three tribes in the service area, including the RST, and meetings were held with all IHS employees working at the RCSU. See Donovan Decl., Exhibit 8, Declaration of Daniel Davis ("Davis Decl.") at ¶ 5. Discussions were also held between IHS personnel and Plaintiffs Gilbert and White Face. Id.

The assumption was partially awarded with the signing of the final contract on May 31 and June 1, 2019, and the signing of the Annual Funding Agreement on May 31 and June 3, 2019, which attached the final Scope of Work. See Donovan Decl., Exhibit 9. The assumption proposal was partially declined on June 1, 2019. See Donovan Decl., Exhibit 10. Those provisions declined focused primarily on costs and reimbursements proposed by the GPTCHB and the provision of services in specialty areas such as oncology and some alternative medicine. See Id.; Exhibit 8, Davis Decl. at ¶ 6. To date, the GPTCHB has not appealed the declination. Id. On July 21, 2019, the partial assumption became effective and services have continued to be provided at the RCSU since that date by the GPTCHB and the IHS. See Donovan Decl., Exhibit 9, at page 2; Exhibit 8, Davis Decl. at ¶ 7.

In order to implement the partial assumption of the PFSAs by the GPTCHB at the RCSU, since September 30, 2019, ninety (90) federal employees have signed IPA contracts with the GPTCHB, and nine (9) United States Public Health Service Commission Corps Officers have signed Memoranda of Agreement ("MOA"s) with the GPTCHB. See Exhibit 8, Davis Decl. at ¶ 8. There remain forty-one (41) federal employees employed at the RCSU. Id.

The RCSU user population is approximately 15,000, with beneficiaries primarily from the CRST, OST, and RST. Donovan Decl., Exhibit 4 at 4, 7. The RCSU is currently operational with the GPTCHB providing the PFSAs for primarily those beneficiaries from the CRST and the OST, and the IHS providing the PFSAs for primarily those beneficiaries from the RST. Exhibit 8,

Davis Decl. at ¶ 7. Both the GPTCHB and the IHS provide the PFSAs for those beneficiaries who are unaffiliated. Id. The IHS has an "open door" policy and provides PFSAs for any beneficiary who requests service, regardless of tribal affiliation. Id. The GPTCHB has represented to the IHS that they also have an "open door" policy. Id.

STATEMENT OF THE CASE

On June 28, 2019, Plaintiff Gilbert filed her Complaint in the instant case against Defendant IHS RADM Weahkee. Doc. 1. On July 16, 2019, an Amended Complaint was filed which added two additional Plaintiffs, Mohney and White Face, and added two additional Defendants, IHS Area Director Driving Hawk and U.S. Attorney General Barr. Doc. 5. Neither the GPTCHB, nor any Tribe were named as defendants. As of both filing dates, the partial assumption contract had been awarded (June 1, 2019), but it had not yet become effective (July 21, 2019). See Exhibits 9, 10. On July 29, 2019, Plaintiffs filed a Motion to Certify a Class Action Lawsuit, along with an attachment listing 123 potential class members. Docs. 12, 12-1.

The legal and factual allegations in the Amended Complaint in the instant case are nearly identical, substantively, to those alleged in White Face's 2018 Complaint and argued in the hearing on December 13, 2018. See White Face 2018, Docs. 1, 31. The named Plaintiffs in this case, including White Face, are allegedly individual tribal members who live in Rapid City and claim to be employees or patients of the RCSU, and members of the Great Sioux Nation. See, Doc. 1 ¶II, ¶IV (1). Neither Plaintiffs, nor the potential class

action members, identify their tribes of enrollment or the tribes who have prevented them from voting in elections or seeking input, and they do not assert that they are representatives of a tribe or a tribal organization ("TO"). Id. ¶IV (2-3).

Once again, with the exception of monetary damages, Plaintiffs seek the same relief from this Court in the instant case, as White Face sought in her 2018 Complaint: an immediate injunction against the IHS to cease all contracting actions with the GPTCHB related to the RCSU; an Order for IHS to resume previous construction plans for the new buildings on the existing RCSU campus; and a declaration that all IPA employment contracts between federal employees and the GPTCHB are null and void and that all federal employees at the RCSU shall remain IHS employees. Id.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

A threshold issue in every federal court case is whether the court maintains jurisdiction over the action. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–96 (1998). The party seeking to invoke federal jurisdiction must prove by a preponderance of the evidence that jurisdiction exists. See DaimlerChrysler v. Cuno, 547 U.S. 332, 342 (2006); V S Ltd. P'ship v. Dep't of Hous. & Urban Dev., 235 F.3d 1109, 1112 (8th Cir. 2000).

A court may grant a motion to dismiss a complaint under Federal Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and for a failure to state a claim. Fed. R. Civ. P. 12(b)(1) and 12(b)(6); Carney v.

Houston, 33 F.3d 893, 894 (8th Cir. 1994) (per curiam) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Pursuant to Fed. R. Civ. P. 12(b)(1), a plaintiff bears the burden of establishing by a preponderance of the evidence at the onset of a case that the Court possesses subject matter jurisdiction to hear the case. Federal courts have limited jurisdiction, and the law presumes that a cause of action lies outside its jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

In deciding a motion to dismiss for lack of subject matter jurisdiction, a court is not limited to the allegations set forth in the complaint, but may consider material outside of the pleadings in an effort to determine whether it has jurisdiction. Osborn v. United States, 918 F.2d 724, 729 (8th Cir. 1990). The Court must first distinguish between a facial attack and a factual attack. Id. at n. 6 (citations omitted). For a facial attack, allegations in the complaint are taken as true and disputed issues are construed and all reasonable inferences drawn in favor of the complainant. However, under a factual attack, the non-moving party loses the benefit of such safeguards. Id. Plaintiffs' complaint cannot, once again, survive either a facial or factual attack.

When a Federal agency is named as a defendant, the United States' consent to suit is a prerequisite of federal court jurisdiction. See United States v. Mitchell, 463 U.S. 206, 212 (1983). "The United States, as a sovereign, cannot be sued without its consent … [which] must be expressed unequivocally … [in a] congressional waiver [that] establish[es] the parameters of the court's subject matter jurisdiction." Manypenny v. United States, 948 F.2d 1057,

1063 (8th Cir. 1991) (citations omitted); see also United States v. Nordic Vill., Inc., 503 U.S. 30, 33-34 (1992). Thus, a failure to identify a waiver of sovereign immunity warrants dismissal for lack of jurisdiction pursuant to Rule 12(b)(1). See Brown v. United States, 151 F.3d 800, 803-04 (1998).

To withstand a motion to dismiss under Rule 12(b)(6), a complaint must contain enough facts to "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "[C]onclusory statements" and "naked assertion[s] devoid of further factual enhancement" are insufficient. Retro Television Network, Inc. v. Luken Commc'n, LLC., 696 F.3d 766, 768 (8th Cir. 2012) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

Additionally, an action may be dismissed under Federal Rule of Civil Procedure 12(b)(7), for failure to join an indispensable party under Rule 19(a)(1). Lastly, even if Plaintiffs' Amended Complaint is not dismissed because of the reasons above, Plaintiffs are not entitled to a permanent injunction unless they can show success on the merits, injury in fact, harm that outweighs the harm to the defendants, and that the public interest is not served by the action challenged. See Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109 (8th Cir. 1981).

In their Amended Complaint, Plaintiffs do not establish subject matter jurisdiction, fail to state a valid claim upon which relief may be granted, fail to join indispensable parties, and fail to meet the elements required for a permanent injunction. Therefore, for all of the above reasons, this case should be dismissed with prejudice.

II. THE COURT LACKS SUBJECT MATTER JURISDICTION TO HEAR PLAINTIFFS' CLAIMS.

A. Plaintiffs Lack Standing Under the ISDEAA.

Standing is a "jurisdictional prerequisite that must be resolved before reaching the merits of a suit." City of Clarkson Valley v. Mineta, 495 F.3d 567, 569 (8th Cir. 2007). "[I]f a plaintiff lacks standing, [a] district court has no subject matter jurisdiction. Therefore, a standing argument implicates Rule 12(b)(1)." Faibisch v. Univ. of Minn., 304 F.3d 797, 801 (8th Cir. 2002). "Standing requires (1) an injury that is concrete and particularized and actual or imminent, not conjectural or hypothetical, (2) that the injury be fairly traceable to the challenged action of the defendant, and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Turkish Coal. of Am., Inc. v. Bruininks, 678 F.3d 617, 621 (8th Cir. 2012). In this case, Plaintiffs have not identified any legitimate basis for jurisdiction, and they do not have standing to bring this action challenging a contract between the IHS and a TO that is representing tribal governments pursuant to tribal resolutions. Plaintiffs lack standing because the ISDEAA establishes a government-to-government relationship between the United States and Indian Tribes and a potential contractual relationship between the United States and authorized TOs.

The ISDEAA requires the IHS to enter into a self-determination contract with an Indian Tribe or TO to plan, conduct, and administer Federal programs,

including constructions programs, which would otherwise be administered by the federal government. Under the statute, "[t]he Secretary *is directed*, upon the request of any *Indian tribe by tribal resolution*, to enter into a self-determination contract or contracts ..." 25 U.S.C. § 5321 (emphasis added). A TO may submit a proposal for a self-determination contract to the Secretary for review if so authorized by a Tribe. 25 U.S.C. § 5321(a)(2). However, once a self-determination proposal is submitted, "the Secretary *shall*, within ninety days after receipt of the proposal, approve the proposal and award the contract *unless* the Secretary provides written notification to the applicant that contains a specific finding that [specific delineated reasons for denial are present]." Those reasons are the only reasons why a self-determination proposal may be rejected or denied.

The plain language of the statute requires a request for self-determination to be founded "upon the request of any Indian tribe or by tribal resolution." 25 U.S.C. § 5321(a). Thus, an individual plaintiff has no standing either to propose a self-determination contract, or to object to the proposal of a self-determination request. Such matters are left to tribal governments. The only parties that have standing to object to the award or the declination of a self-determination contract are the Indian Health Service and the specific authorizing tribe(s) or the TO entering into the contract.

The CRST and OST are supportive of the self-determination contract in this case. Because Plaintiffs are not acting on behalf of a tribe or a TO, they lack standing as a matter of law to challenge the proposal and this case should

be dismissed. See Demontiney v. US ex rel Dept. of Interior, 255 F.3d 801, 805-808 (9th Cir. 2001) (stating the ISDEAA's waiver of federal sovereign immunity is limited to self-determination contracts entered into by Indian tribes or tribal organizations).

Additionally, Plaintiffs allege in a conclusory fashion that they will suffer harm because of the assumption of health care by the GPTCHB. Doc. 5, IV(1). First of all, Plaintiffs' claim is a speculative and unsubstantiated allegation that fails to establish the required concrete and particularized injury sufficient for an actual controversy to exist. There are other avenues that they may avail themselves of if, at some time in the future, they suffer a concrete injury traceable to anything the IHS or the GPTCHB does or fails to do. Second, the contract has been approved and gone into effect, and Plaintiffs point to no harm they have suffered as a result. Therefore, they lack standing to challenge the approval of the partial assumption by IHS.

B. Plaintiffs Lack Standing to Bring Claims on Behalf of Other Employees or RCSU Beneficiaries

In their Amended Complaint, Plaintiffs assert that "[a]t no time" were members of the American Indian community of Rapid City afforded "participation" regarding the IHS entering into a ISDEAA contract with the GPTCHB, that a majority of the community and employees oppose the transfer and "were NOT afforded *any participation* in *any portion* of this particular plan" (emphasis added). Doc. 5, ¶ IV(3), Paragraph 1. They further allege, "at no time" were members of the community afforded any "information" or

"discretion" with this program. Doc. 5, ¶ IV(3), Paragraph 2. Those are the same bald allegations Plaintiff White Face made in her 2018 Complaint.

First of all, Plaintiffs in this case, like Plaintiff White Face in 2018, do not have standing to "speak on behalf of employees of the [RCSU]" or on behalf of the Indian community served by the RCSU. See White Face 2018, Doc. 31 at 63. Plaintiffs have no injury in fact as a result of other's supposed injuries. There are other avenues for employees who believe they have been mistreated, including the Plaintiffs, to obtain a remedy. There are other legal avenues for beneficiaries to remedy poorly provided health care services. Plaintiffs' allegations as to the plight or claims of employees or beneficiaries are merely sweeping speculative allegations.

Second, even if Plaintiffs did have standing to assert those claims, they are just plain false. Prior to the initial assumption proposal, the GPTCHB conducted nine public meetings in Rapid City between April and December 12, 2018, to discuss GPTCHB's assumption of the PFSAs of the RCSU. See Declaration of CEO Church, White Face 2018, Doc. 25, ¶ 12. Between August and December 2018, GPTCHB "worked hard to engage and communicate with IHS employees about the transition …" Id. at ¶ 14.

Since the February 14, 2019 assumption proposal at issue in this case, IHS officials held 13 meetings with tribal representatives, tribal members, IHS employees, and/or community members to discuss issues related to the assumption of the PFSAs at the RCSU. See Exhibit 8, Davis Decl. ¶ 5 (a-l). In three of those instances, IHS officials took the time to meet with Plaintiffs

Gilbert or White Face, even though Plaintiffs initiated the meeting unannounced. Id. ¶ 5 (g, i, l). And, in at least one instance, Plaintiff White Face was present at a RST meeting. Id. ¶ 5(j).

Furthermore, the IHS is not required to "afford participation" to any of the Plaintiffs. The ISDEAA requires that, in situations where a contract proposal requires that IHS divide the administration of a program, as was required here, IHS engage in "consultation with the [TO] and all affected tribes" regarding services rendered to the tribes not served by the contract. 25 U.S.C. § 5324(i)(1). The IHS clearly met is consultation requirement and went above and beyond that requirement to provide information and meaningful discussion with the community and the RCSU staff, including Plaintiffs.

Therefore, because Plaintiffs do not have standing to bring claims on behalf of the RCSU employees or beneficiaries as they can show no injury resulting from those claims, Plaintiffs' claims on behalf of other community members or employees should be dismissed with prejudice.

III. PLAINTIFFS' TREATY CLAIM SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Plaintiffs' treaty claim should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The Plaintiffs invoke Article 13 of the 1868 Fort Laramie Treaty and argue that the IHS' entering into a tribal self-determination contract with the GPTCHB violates the treaty. Doc. 5, ¶¶ I and

IV(1). However, Article 13 does not provide for a private right of action.[2] See White Face 2018, Doc. 31 at 13, 49. The language of Article 13 states:

> The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

See Donovan Decl., Exhibit 11. Article 13 of the 1868 Fort Laramie Treaty should be read in conjunction with Articles 4 and 9, which also discuss the provisions for "the physician" and his or her residence. Id.

The 1868 Fort Laramie Treaty recognizes the relationship between the Federal Government and Indian Tribes that were a party to the Treaty. As with other treaties, the 1868 Fort Laramie Treaty should be construed and enforced as a contract. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) (citing Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations."). The parties to that "contract" are the Tribes and the United States, and not the Plaintiffs in this case.

Plaintiffs are clearly not Tribes and cannot bring an action under the Treaty on their behalf. Moreover, Plaintiffs' reliance upon the 1868 Fort Laramie Treaty fails because nothing in the Treaty contradicts the ISDEAA or

[2] Article I of the Treaty, the "bad men" clause, does provide for a private right of action and is the only such Article to do so. However, that Article is not plead by Plaintiffs in their Amended Complaint, nor is it relevant in this case.

gives Plaintiffs a right to challenge the ISDEAA agreement. The ISDEAA directs the Secretary to enter into self-determination contracts with Tribes and TOs. 25 U.S.C. § 5321. Accordingly, Plaintiffs' allegation that IHS entering into a self-determination contract with the GPTCHB is a breach of the 1868 Fort Laramie Treaty should be dismissed for failure to state a claim upon which relief may be granted.

IV. PLAINTIFFS HAVE FAILED TO JOIN INDISPENSABLE PARTIES

An action may be dismissed under Rule 12(b)(7), for failure to join an indispensable party under Rule 19(a)(1). Fed. R. Civ. P. 12(b)(7) and 19(a)(1). Under Rule 19(a)(1), a party is "required," if, 1) in that person's absence, a court cannot accord complete relief among the parties, or 2) disposing of the action in that person's absence may impede the person's ability to protect their interest, or may leave an existing party subject to substantial risk or damages. Fed. R. Civ. P. 19(a)(1)(A) and (B). However, if joinder is not feasible, "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). In making that decision, the court should consider:

> 1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> 2) the extent to which any prejudice could be lessened … ;
> 3) whether a judgment rendered in the person's absence would be adequate; and
> 4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b)(1-4). If a party not joined is a required party, joinder is not feasible, and the action should not proceed "in equity and good conscience,"

then the case must be dismissed under Rule 12(b)(7). N. Arapaho Tribe v. Harnsberger, 697 F.3d 1272 (10th Cir. 2012).

The dilemma in Harnsberger is exactly the situation in the instant case. Here, Plaintiffs failed to join the GPTCHB, or the CRST and the OST, the two Tribes who passed resolutions authorizing the GPTCHB to assume the servicing of the PFSAs of the RCSU from the IHS. Plaintiffs twice make reference in their Amended Complaint to the GPTCHB as defendant, Doc. 1 ¶ IV(3) Paragraph 3, but those references appear to be language left over from the 2018 Complaint.

Those three parties are indispensable parties to this action because their absence "impede[s] [their] ability to protect their interest" in the partial RCSU assumption contract, and that absence may leave the federal government defendants subject to substantial risk or damages if the contract is not upheld and significant numbers of beneficiaries without health care. Fed. R. Civ. P. 19(a)(1)(A). The GPTCHB, CRST, and OST, all have an interest in making sure the awarded partial assumption contract remains in place and continues to be implemented. Stopping the implementation of the contract would interfere with the rights of two tribal nations and a sovereign TO. White Face 2018, Doc. 31 at 28-29. Moreover, tribal beneficiaries are currently receiving health care services at the RCSU under the partial assumption contract. Exhibit 8, Davis Decl., ¶ 7. Enjoining the contract will create health risks and uncertainty for those beneficiaries as well as for the federal and contract employees providing the services.

However, joining any of those three parties – the GPTCHB, the CRST, or the OST – is not feasible because they have not waived sovereign immunity. The two Tribes are sovereign nations and the GPTCHB is entitled to sovereign immunity as a TO. See J.L. Ward Assocs. Inc. v. Great Plains Tribal Chairmen's Health Bd., 842 F.Supp. 2d 1163, 1176 (D. S.D. 2012); White Face 2018, Doc. 31 at 62-63. Because of the risks to not only the named defendants and those potential defendants not joined, but also to the health care beneficiaries and employees at the RCSU, this action should not proceed "in equity and good conscience." Therefore, this action should be dismissed under Rule 12(b)(7).

V. THE COURT SHOULD NOT INTERFERE WITH THE IMPLEMENTATION OF THE ISDEAA SELF-DETERMINATION CONTRACT BETWEEN THE IHS AND THE GPTCHB.

A. Mission of the IHS and History of the ISDEAA

IHS's principal mission is to provide primary health care for American Indians and Alaska Natives throughout the United States. See S. Rep. No. 102-392, at 2-3 (1992), as reprinted in 1992 U.S.C.C.A.N. 3943. IHS delivers health care to American Indians and Alaska Natives through three separate mechanisms: (1) by providing health care services directly through its own facilities; (2) by contracting with tribes and TOs pursuant to the ISDEAA to allow those tribes/TOs to independently operate health care delivery programs that IHS would otherwise provide; and (3) by funding contracts and grants to organizations operating health programs for urban Indians. Id. at 4. Through the first two of these mechanisms, IHS delivers health care services at Service

Units that are grouped within 12 regional IHS Areas, which, in turn, are overseen by a Headquarters Office.

In 1975, Congress passed the ISDEAA to allow tribes and TOs to contract with the Secretary of the U.S. Department of Health and Human Services, through the IHS, to operate many of the programs that the IHS previously operated for the benefit of tribal members. 25 U.S.C. § 5301 et seq. A TO is defined as "the recognized governing body of any Indian tribe" or,

> any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities [.]

25 U.S.C. § 5304(l). Additionally, if the contract is to benefit more than one tribe, "the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant." Id. Thus, in order for an entity that is not a federally-recognized tribe to enter into an ISDEAA contract with the Secretary through IHS, the entity must be a TO under the ISDEAA that is authorized to enter into the contract by tribal resolution of each tribe the contract will benefit. See N. Arapaho Tribe v. LaCounte, CIV. 16-11-BLG-BMM, 2017 WL 2728408, at *3 (D. Mont. June 23, 2017) ("The Court agreed in its previous Order that § 5304(l) barred the BIA from awarding 638 contracts for shared services . . . without both [Tribes'] supporting resolutions.").

B. The GPTCHB is a Tribal Organization (TO) under the ISDEAA.

According to its website, the GPTCHB is an organization that represents the eighteen tribal communities in the four-state region of South Dakota, North

Dakota, Nebraska, and Iowa. *About GPTCHB*, http://gptchb.org/about/ (last visited Dec. 8, 2018). The organization provides public health support and health care advocacy and "serv[es] as a liaison between the Great Plains Tribes and the various Health and Human Services divisions including the Great Plains Area [IHS]." Id. The governing body of [each] tribe, or chairperson, or its authorized elected official or the tribally authorized designee is the "member representative" on the GPTCHB. See Donovan Decl., Exhibit 12 (By Laws and Articles of Incorporation of the Aberdeen Area Tribal Chairmens' Health Board; By Laws at Article II (2006), and Articles of Incorporation at Article IV (naming the voting members of the Board).

The GPTCHB is deemed a "tribal organization" under the ISDEAA because it is composed of and "controlled" by the recognized governing body of each federally-recognized tribe that it serves. The organization has entered into contracts or contract discussions under the ISDEAA in such a capacity since at least 2007. See J.L. Ward Associates, Inc., 842 F.Supp. 2d at 1166 (processing of ISDEAA contract proposal at issue in 2007).

C. The GPTCHB Provided the Required Tribal Resolutions For Its Title I Proposal.

The RCSU is part of the Great Plains Area Office ("Area").[3] Historically, the Area has taken the position that the CRST, OST, and/or the RST may authorize an ISDEAA proposal for the assumption of the PFSAs of the RCSU. The Agency's adjudicative review body, the Office of Hearings and Appeals of

[3] IHS delivers health care services at "service units" that are grouped within twelve regional IHS Areas and overseen by a Headquarters Office.

the Interior Board of Indian Appeals ("IBIA"), recognized this historical trend, observing that "the IHS appears to have held to a consistent view that the sanctioning 'tribes' of [the TOs at issue in the case, the CRST, OST, and RST,] 'benefitted' from various Rapid City programs for purposes of the [ISDEAA], and were, therefore, entitled to contract to administer them pursuant to the [ISDEAA] ..." Rapid City Indian Health Bd., Inc. v. Dir., Aberdeen Area Office, IHS, IBIA 97-100-A, ¶ 8 (footnote omitted). See Donovan Decl., Exhibit 13. In that case, concluding that the ISDEAA contract entered into by the TO authorized by the three tribes should be renewed, IBIA affirmed the ability of those three tribes to contract for the servicing of the PFSAs of the RCSU. Id.

In this case, the GPTCHB obtained tribal resolutions enacted by the CRST and the OST and provided them to IHS as a part of its proposal. Donovan Decl., Exhibits 5-6. Each of those resolutions authorized the GPTCHB "to plan for and assume the [PFSAs] and funding (including related Area and Headquarters [PFSAs] and funding, and construction [PFSAs] and funding) of the [RCSU] . . ." on behalf of each Tribe. Id. Therefore, the GPTCHB obtained approval from each of the two tribes that would be benefiting from the proposed contract, in accordance with the ISDEAA.

D. The ISDEAA Contract Was Submitted, Awarded, and Has Taken Effect.

Under Title I of the ISDEAA, the self-determination contracting processes begin when a T/TO submits a complete proposal, approved by tribal resolution,

to IHS. [4] On February 14, 2019, IHS received a proposal from the GPTCHB to assume operation of the PFSAs associated with the CRST's and OST's shares of the RCSU, pursuant to Title I of the ISDEAA. See Donovan Decl., Exhibit 4.

Once a proposal is received by IHS, the Agency has 90 days to review the proposal and either "approve the proposal and award the contract" or decline to award the severable, objected-to portion based on statutorily defined declination criteria. Id. §§ 5321(a)(2) and 5321(a)(4). In this case, extensions to the 90 days were given to the IHS by the GPTHCB and the contract was partially approved on June 1, 2019, and became effective on July 21, 2019. See Donovan Decl., Exhibits 9, 10. The declinations mainly involved costs and reimbursements requested by the GPTCHB as well as several specialized treatment areas such as oncology and some alternative medicine. Donovan Decl, Exhibit 10; Exhibit 8, Davis Decl., ¶ 6. Beneficiaries from the CRST, OST, RST, and unaffiliated tribal members are all currently being serviced at the RCSU by either the GPTCHB or the IHS. Exhibit 8, Davis Decl., ¶ 7.

VI. PLAINTIFFS FAIL TO MEET THEIR BURDEN OF PROOF FOR INJUNCTIVE RELIEF

In order for this Court to grant the requested preliminary injunction, Plaintiffs must meet the standard articulated in Dataphase Systems, Inc., 640 F.2d 109 (8th Cir. 1981):

> Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other party litigants; (3) the

[4] Discussion for the purposes of this brief is limited to Title I as the proposal at issue was made under Title I of the ISDEAA.

> probability that movant will succeed on the merits; and (4) the public interest.

Id. at 113. The standard is the same for a permanent injunction except the movant must show actual success on the merits. Amoco Prod. Co. v. Vill. of Gambell, Alaska, 480 U.S. 531, 546 n. 12, (1987). When applying this balancing test, the burden on the movant is heavy. United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1179 (8th Cir. 1998).

A. No Irreparable Harm From the Self-Determination Contract.

Proof of irreparable injury is an essential prerequisite to obtaining injunctive relief. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982); Sampson v. Murray, 415 U.S. 61, 189-90 n.63 (1974). The absence of a finding of irreparable injury is sufficient grounds for denying an injunction. Gelco Corp. v. Coniston Partners, 811 F.2d 414, 418 (8th Cir. 1987).

Both the IHS and the GPTCHB have committed to providing quality health care for tribal members at the RCSU. The IHS was required to evaluate the proposal to ensure that the proposed services to be rendered to the Indian beneficiaries would be satisfactory and it did so by approving the proposal in part. See 25 U.S.C. § 5321(a)(2); Donovan Decl., Exhibit 10. The Scope of Work for the self-determination proposal submitted by GPTCHB addressed "STANDARDS OF CARE," and stated that the GPTCHB:

> shall strive at all times to provide the PFSAs … in accordance with national and regulatory standards, as applicable, and in a manner that is considered culturally proper. GPTCHB will comply with applicable state and federal regulations and standards concerning safety, background investigations, professional licensing, certification, and credentialing, financial management, procurement and billing, and compliance activities.

See Donovan Decl., Exhibit 9 (Scope of Work at 3; Contract at 2). The GPTCHB supplied a comprehensive statement of work for the assumption of the RCSU. Moreover, Indian beneficiaries who present themselves to the RCSU are receiving health care, regardless of whether they are from the CRST, OST, RST, or unaffiliated, and regardless of whether that care comes from providers associated with the GPTCHB or the IHS. See Exhibit 8, Davis Decl. 7.

None of the Plaintiffs allege any specific injuries as a result of the awarded partial assumption contract, nor can they show that any injury has occurred. The only injury plead is, at best, both prospective and speculative. Doc. 5 at IV(1)(3, Paragraph 3). Moreover, the injury plead by Plaintiffs in their Amended Complaint in this action is the same prospective injury plead by Plaintiff White Face in 2018, *even though* the partial assumption contract is now in place. Plaintiff White Face had no injury in fact in December of 2018, see White Face 2018, Doc. 31 at 63, and she and the other Plaintiffs have no injury in fact now. Therefore, because Plaintiffs have failed to meet their heavy burden to show that they have suffered irreparable harm now that the contract was awarded and the partial assumption is effective, their request for a permanent injunction should be denied.

B. The Balance of Harm Favors Tribal Self-Determination.

Congress enacted the ISDEAA to promote tribal self-governance and control over tribal health care. If a tribe wishes to enter into a self-determination contract, the Secretary of HHS is "directed" to enter into such a contract. 25 U.S.C. § 5321(a)(2). There are only a few limited reasons why the

Secretary may decline to award the contract, and any severable portions of a contract proposal that do not support a declination finding shall be approved.

Plaintiffs' personal dissatisfaction with the resolutions submitted by the CRST and OST in support of the GPTCHB self-determination proposal is outweighed by clear Congressional and Tribal Government support for awarding the self-determination contracts, where appropriate. If the IHS is enjoined from carrying out the contract as awarded, the health care of thousands of tribal beneficiaries will be jeopardized. The provision of health care at the RCSU is up and running, and beneficiaries are being served, regardless of tribal affiliation, by either the GPTCHB or the IHS. See Exhibit 8, Davis Decl. ¶ 7. No beneficiaries are turned away. Id. The balance of harm if the ISDEAA contract with the GPTCHB is enjoined far outweighs the harm to the Plaintiffs if the contract is allowed to stand.

C. The Plaintiffs Cannot Succeed on the Merits.

As demonstrated above, there is no legal theory upon which the Plaintiffs may prevail. They do not have standing to object to the self-determination contract approved by IHS and the GPTCHB, or to remedy employment grievances possessed by other individuals. They have not presented any claim upon which relief can be granted, they have failed to join indispensable parties, and they do not meet the threshold elements for a permanent injunction. For all these reasons, Plaintiffs are unlikely to succeed on the merits of their claims.

D. The Public Interest Is Served By Self-Determination Contracts.

The ISDEAA was enacted to promote the public interest of tribal self-governance. Through consultation with the Tribal governments, specifically the CRST and OST, the GPTCHB entered into an ISDEAA contract with the IHS with the goal of improving health care for tribal members because the Tribes would have more input into the implementation of their care. See Donovan Decl., Exhibits 4-7. Plaintiffs' lawsuit is an attempt to thwart that public policy and decision of two tribal governments for their own self-interest. The public interest is best served by allowing Tribes and TOs to engage in the process of self-determination contracting without interference from private individuals.

VII. PLAINTIFFS' ATTEMPTED CLASS ACTION DOES NOT CURE THE ABOVE JURISDICTIONAL BARS

Plaintiffs have moved for Court approval to certify a class for a class action lawsuit, Doc. 12, and filed an attachment therewith setting forth 123 class action consent forms from individuals presumably living in the Rapid City community who are or would be beneficiaries for health care benefits at the RCSU. Doc. 12-1. Defendants plan to file a separate memorandum in opposition to Plaintiffs' motion setting forth more detail and legal analysis as to why a class action is not proper in this case. However, several issues warrant a brief discussion here.

A class action brought on behalf of individual Rapid City community members does not cure the jurisdictional bars discussed, *supra*. For all of the reasons previously stated, individual community members, whether it be three or three hundred, do not have standing to challenge the partial assumption of

the PFSAs of the RCSU by the GPTCHB from the IHS, nor do they have the standing to assert employment claims on behalf of other individuals. Regardless of the number of individuals in the class, the lawsuit must still be dismissed for failure to join indispensable parties as defendants, namely the GPTCHB and the CRST and OST.

No private right of action exists for individual community members, regardless of the number, to assert such a claim under the 1868 Treaty, nor under the ISDEAA. They are not a Tribe or a TO. They are, presumably, all members of a tribe, and it is through their Tribal governments that their interests must be advocated.

Furthermore, a class action is not proper on the merits. Plaintiffs cannot show, even at a minimum, that "the class is so numerous that joinder of all members is impracticable" or that "questions of law or fact common to class members predominate over any questions affecting only individual members." See Orduno v. Pietrzak, 2019 WL 3489089 *4 (8th Cir. 2019) (quoting Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 460 (2013). The fact that some members of the Rapid City Indian community oppose the partial assumption of the PFSAs of the RCSU by the GPTCHB, does not mean that all members of the community oppose it. Some employees may have different issues than others. Not all potential class members are in need of the same medical care and not all healthcare services were assumed. Therefore, Plaintiffs' request for a class action should fail.

Although Plaintiffs' request for a class is improper and should be denied, the Court need not reach that issue. Regardless of whether this case involves only three individual Plaintiffs or a class action, it should be dismissed with prejudice on jurisdictional grounds.

CONCLUSION

For all of the above reasons, Plaintiffs' case should be dismissed with prejudice for lack of subject matter jurisdiction, failure to state a claim upon which relief may be granted, and failure to join indispensable parties pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 12(b)(7). Additionally, even if the case was not dismissed for the above reasons, the Court should not interfere with the implementation of the ISDEAA because Plaintiffs cannot meet their burden of proof on the merits for the entry of a permanent injunction.

Dated this 4th day of October, 2019.

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WORD COUNT CERTIFICATION

The undersigned attorney hereby certifies that in accordance with local rules, the foregoing brief, which exceeds the court's page limit of 25 pages, does not exceed the word count limit of 12,000 words. According to MS Word software, the word count is 7,401.

/s/SaraBeth Donovan

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2019, I caused copies of the foregoing Defendants' Motion to Dismiss to be served upon the following via the CM/ECF system and by U.S. Mail to:

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