UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

DONNA M. GILBERT, JULIE MOHNEY, CHARMAINE WHITEFACE, 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.	)	Case No. 519-CV-5045-JLV PLAINTIFFS' RESPONSE TO DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

NOW COMES the Plaintiffs, Donna M. Gilbert, Julie Mohney, Charmaine Whiteface, and Others Similarly Situated (hereinafter referred to as "Plaintiffs"), by and through their attorney, Patrick A. Lee, and in response to Defendants' Memorandum Brief in Support of Their Motion to Dismiss, hereby submit the Plaintiffs' Response To Defendants' Motion To Dismiss which addresses each argument in the order stated as follows:

Federal Law, 28 USC 1331 provides that: "The district court shall have original jurisdiction of all civil actions arising under the Constitution, Laws or Treaties of the United States." The Federal Question statutes provide that "Federal question jurisdiction is the subject matter jurisdiction of the United States Federal Court to hear a civil case because the plaintiff

has alleged a violation of the U.S. Constitution, federal law or a treaty to which the United States is a party." The evidence will show that the Defendants are in violation of federal law, specifically P.L. 93-638, Title 42, section 2001, and Article 13 of the Fort Laramie Treaty of 1868. The United States has taken an oath to support and uphold the Constitution, Laws and Treaties of the United States under Article VI of the U.S. Constitution. If the Defendants challenge federal court jurisdiction of this case, it is their burden to prove that this court lacks jurisdiction in spite of 28 U.S.C. 1331, Title 42, and P.L. 93-638.

The supremacy clause does not limit itself to a requirement that the United States must first consent to be sued if such laws are violated. The *Lone Wolf v. United States,* 187 U.S, 533 (1903) case cited by Defendants is an antiquated 1903 case in which the U.S. Supreme Court ruled that the United States must waive its sovereign immunity before it can be sued for violation of a treaty, in that case, the Medicine Lodge Treaty of 1867. After that decision, the precedent was removed in the 1920 special jurisdictional act which allowed the Sioux Nation to file a suit against the United States for violation of Article XII of the Fort Laramie Treaty of 1868.

The U.S. Supreme Court noted several lawsuits that had been filed after *Lone Wolf* and determined that Congress may not act as a federal trustee over Indian property and convert the same property to its own use without a formal review by the judicial branch of the federal government. Mr. Justice Blackmun wrote in the Black Hills case: "In *Shoshone Tribe v. United States*, 299 U.S. 476 (1937)," concedes Congress' paramount power over Indian property, but holds nonetheless that "(t)he power does not extend so far as to enable the Government to give the tribal lands to others or to appropriate them to its own purposes without rendering, or assuming an obligation to render, just compensation'" In *Shoshone Tribe*, Mr. Justice Cardozo,

in speaking for the Court, expressed the distinction between the conflicting principles in a characteristically pithy phrase: "Spoliation is not management." 299 U.S. at 498. These cases favor governmental protection of Indian rights and the right of Indians to prosecute in federal court for these rights.

There are many other cases in which the United States was taken to court by Indian tribes. P.L. 93-638 is governed by the Code of Federal Regulations (CFR). Section 900.153 addresses the question; Does an Indian tribe or tribal organization have any option besides an appeal? The answer provided in the regulation states as follows: "Yes. The Indian tribe or tribal organization may request an informal conference. An informal conference is a way to resolve issues as quickly as possible without the need for a formal hearing. The Indian tribe or tribal organization may also choose to sue in the U.S. District Court under section 102(b) and section 110(a) of the Act. The only recourse for Indian people and their community is in federal court.

As Indian people of Rapid City and the surrounding area, the Plaintiffs have standing to demand participation in any P.L. 93-638 contract that seeks to transfer control and administration of their health care at the Sioux San Hospital from the I.H.S. to the Great Plains Tribal Chairmen's Health Board (hereinafter referred to as "GPTCHB") pursuant to the language of P.L. 93-638 and Title 42, Section 2001. Indeed, Defendant RADM Weahkee insisted on 'the consent of the people served" in his Delegation to I.H.S. employees (see Exhibit 1). The Plaintiffs are a part of the Indian community consisting of thousands of beneficiaries from more than three hundred Indian tribes who are entitled to the health services provided by I.H.S.

If the decision is left solely to the Defendants, then federal law means nothing to the Plaintiffs and their rights under the law are denied. The right to make a choice is a very

substantial and important right that the Indian people as citizens under the U.S. Constitution have as well as beneficiaries of the treaty protected health benefits.

The so-called contract between the Defendants and the GPTCHB fails to meet the elements of a lawful contract. One such element is legality of the Subject Matter. Contracts made under the law of P.L. 93-638 require the consent of the Indian community to be served. The Defendants failed to acquire the consent of the Indian Community to be served. The Indian community was prohibited from full participation and therefore the contract fails under the *Malum Prohibitum* category of illegality. The local Indian community has the right to agree or disagree to the proposed contract and in that sense becomes a third-party beneficiary in the event a contract is lawfully made. In this case the local Indian community was ignored, its rights were violated and unless it was obtained, the Defendants did not have the right to determine that the GPTCHB had contractual capacity to enter into a contract with the Defendants. Therefore the contract was unlawfully entered into and must be declared null and void on the basis of illegality.

Dismissal of a complaint that involves tribal rights according to law would set a precedent that would enable any organization to take over the programs and services that benefit Indian people without their knowledge or consent. A court should at least hear the facts of a case before arbitrarily dismissing it on the basis of a simple motion to dismiss on jurisdictional grounds.

In 1980 the U.S. Supreme Court entered its opinion in the *United States v. Sioux Nation of Indians (448 U.S. 37) (1980)* appeal from an order entered by the U.S Court of Claims. The Supreme Court cited language from the Court of Claims decision that "A more ripe and rank

case of dishonorable dealings will never, in all probability be found in our history ..." The remark came from the actions of the government when it violated Article XII of the Fort Laramie Treaty of 1868 by failing to obtain the consent of three-fourths (3/4) of all adult male Indians before taking property from the tribes, specifically the Black Hills. Article XII is a treaty obligation requiring the consent of the tribal community (males). P.L. 93-638, an extension of the treaty rights,requires the consent of the Indian community (male and female) before taking control of any treaty or program that is beneficial to the Indian community. In that sense the actions of the Defendants resembles a case of dishonorable dealings between a government agency and the Indian Community of the Rapid City and the Black Hills who are entitled to determine who should provide health services under Article XIII of the Fort Laramie Treaty of 1868.

Mr. George Jewett, Representative of the Native American Indian Community of Rapid City, South Dakota and the Black Hills Area Council of Representatives (hereinafter referred to as "NAIC") requested a formal meeting between Defendant RADM Michael D. Weahkee and the Rapid City Indian Community. On May 22, 2019, NAIC received a written response from Defendant James Driving Hawk on behalf of RADM Michael Weahkee regarding the request by NAIC for a formal meeting. The written response from Defendant James Driving Hawk was that there was no time to have a meeting to hear the Indian community's concerns. This response is contrary to the Delegation letter from Defendant RADM Michael Weahkee, as evidenced in Plaintiffs' previous Exhibit No. 1 listed herein. It is also contrary to Defendant James Driving Hawk's words at a RST Council meeting held on May 15, 2019. (See YouTube video via https://www.youtube.com/watch?v=L1VuAuzOQ for an audio and visual recording of RST Council meeting on May 15, 2019.)

If the language of P.L. 93-638 is confusing to the Defendants so that they can ignore the wishes of the Indian community in Rapid City, the Court has a source that was enunciated by this very District Court in the case of *Cook v Parkinson*, (CIV. 74-4023) U.S. District court, South Dakota, April 21, 1975, in headnote No. 6— "Each treaty with Indian tribes, or act of Congress governing Indian conduct must be analyzed separately to determine congressional intent." In 25 U.S. Code Section 5302(a) and (b). Congressional declaration of policy, it states:

> "(a) Recognition of obligation of United States.
> The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.
>
> (b) Declaration of Commitment.
> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services ..."

Also in Cook v Parkinson, Headnote No. 7— "In construing treaties and statues passed for the benefit of Indians and Indian tribes, courts must construe them liberally, and whenever possible, resolve any doubt in favor of the Indians." Therefore, the Rapid City Indian community demands full participation and approval of any contract made by I.H.S. as provided in P.L. 93-638.

The regulations governing P.L. 93-638 25 CFR 900 defines a tribal organization as such:

> "Tribal organization means the recognized governing body of any Indian tribe; 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 provided that in every case where a contract is let or a grant made to an organization to perform services benefitting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant."

The Defendants have contracted with the GPTCHB which is not the governing body of any Indian tribe, is not controlled, sanctioned or charted by any such governing body. They are incorporated by the State of South Dakota (see Exhibit No. 2, Certificate of Incorporation Non-Profit dated Jan. 21, 1992), and the members are not democratically elected by the adult members of the Indian community to be served. (see Exh. No. 3, Order of Dismissal for Lack of Jurisdiction, Case No. CIV-18-0409) The Indian community has not been provided the maximum participation in any phase of these activities. There is more than one tribe involved, and the Defendants have not gained the approval of each such Indian tribe as required by law. (25 CFR 900.8)

Defendants failed to acquire the prerequisite approval, and this failure is grounds for enjoining the Defendants from enforcing its contract with the GPTCHB. In the case of Rapid City Indian Health Board v. Director, Aberdeen Area Office, Indian Health Service, Docket No. IBIA 97-100-A (08/29/1997), the Interior Board of Indian Appeals addressed the Defendant Indian Health Services' (hereinafter referred to as "I.H.S") failure to follow the procedures designated in the regulations. The court stated that: "The IHS must comply with its own regulations, and failure to do so is arbitrary conduct on the IHS' part that is not permissible ... even where those procedures are more rigorous than required." In this instant case, the Defendants are required to obtain the approval of each of the more than 300 Indian tribes to be served. The language in the CFR stating that the approval of each Indian tribe shall be a prerequisite to the letting or

making of such contract or grant is also mandatory according to the Office of Hearings and Appeals. As such, it is the Defendants who lack standing to enter into a 93-638 contract for the operation of the Sioux San Hospital because they gained the approval of only two Indian tribes, the Oglala and the Cheyenne River Sioux Tribe (hereinafter referred to as "CRST"), whose laws do not apply off the reservation. The Defendants are responsible to assure that the two Indian tribes whom they rely on for the support of the contract are very limited in their jurisdiction to control the health benefits of the Indian people who reside in Rapid City.

Some of the tribes' limitations are found in the tribal constitutions which defines their authority in the area within their geographical boundaries. For example, the Constitution of the Oglala Sioux Tribe defines the powers of the council as such:

> "Article IV—POWERS OF THE COUNCIL:
>
> (a) To negotiate with the Federal, State, and local governments on behalf of the tribe and to advise and consult with the representatives of the Interior Department on all activates of the Department that may affect the Pine Ridge Indian Reservation."

The Pine Ridge Indian Reservation is not affected by allowing a state-chartered organization to operate the Sioux San Hospital without the consent of the local Indian community.

> "(f) To manage all economic affairs and enterprises of the Oglala Sioux Tribe in accordance with the terms of a charter that may be issued to the Tribe by the Secretary of the Interior."

No such charter was issued.

> "(k) To promulgate and enforce ordinances governing the conduct of persons **on the Pine Ridge Indian Reservation** by providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and power."

Chapter 21 of the Oglala Sioux Tribe Law and Order Code defines "Tribal entity" as "any committee, office, program or project of the Oglala Sioux Tribe established by the tribal council for the benefit of the Oglala Sioux people. This shall include all organizations except privately chartered profit and non-profit corporations chartered for individual tribal members." The GPTCHB is incorporated by the State of South Dakota as a non-profit corporation. It is not democratically elected by members of the Oglala Sioux Tribe (hereinafter referred to as "OST") and the group is not established by the OST Council or recognized by the OST Court. (see Plaintiffs' Exh. No. 3 aboveherein). The OST's jurisdiction is limited to the confines of the reservation and these boundaries do not extend to the Rapid City area. Their resolutions, as used by the Defendants, are therefore not applicable.

Defendants claim that the Plaintiffs do not make up a tribe and therefore cannot sue for the violation of a treaty which is between the United States and an Indian tribe. However, there are cases in which an individual tribal member's treaty rights were recognized in court when the right was violated. *State v. Tinno*, Supreme court of Idaho, 1972, 94 Idaho 759, P.2d 1386 is such a case. Gerald Tinno, a duly enrolled member of the Shoshone-Bannock Tribes near Pocatello was charged with taking a chinook salmon from the Yankee Fork of the Salmon River in 1968 in violation of state fishing regulations. The Supreme Court of Idaho upheld the decision of the lower court that Mr. Tinno was protected by the Fort Bridger Treaty and that he was exempt from the state fishing regulations because of the language in the treaty.

In Herrera v. Wyoming, 587 U.S._____, (2019) the U.S. Supreme Court decided that a member of the Crow Indian Tribe could invoke the treaty right "to hunt on the unoccupied lands of the United States so long as game may be found thereon." (Treaty between the United

States of America and the Crow Tribe of Indians (1868 Treaty). Art. IV, May 7, 1868, 15 Stat. 650.) This is a most recent case decided by the Supreme Court wherein a tribal individual successfully invoked the treaty of his tribe to protect the treaty rights that extended to tribal members, and not just to the government of the tribe. At the time the treaties were created, there were no "tribes," only Indigenous Nations.

As these cases have shown, individual tribal members may invoke their treaty rights. Furthermore, the Defendants state: "The parties to that 'contract' (1868 Treaty) are the Tribes and the United States, and not the Plaintiffs in this case. "Also 'Plaintiffs are clearly not Tribes and cannot bring an action under the Treaty on their behalf ..."

However, the Defendants clearly erred in assuming that the Plaintiffs could not "bring an action under the Treaty." "One of the Plaintiffs, Charmaine White Face, whose Tituwan name is Zumila Wobaga, is the Official Spokesperson for the 1894 Sioux Nation Treaty Council. From the CONCLUSION of the Oglala Inherent Powers Memorandum Opinion by William J. Bielecki, Sr., dated Oct. 5, 2008, page 7:

> "Various historians has [sic] determined that the 'Sioux Nation Treaty Council' formally formed in 1894, shortly after the Wounded Knee massacre. The Sioux Nation Treaty Council represents all of the Sioux Tribes (Approx 49 Tribes), and all other Sioux Treaty Councils would be subordinate to it, regardless of the Treaty Council's name..."

Charmaine White Face was appointed to the lifetime position of Spokesperson in 1994 according to the cultural procedures of the Oceti Sakowin (Great Sioux Nation), and began assuming her duties and responsibilities as Spokesperson in 2004 upon the death of the previous Spokesperson, Antoine Black Feather. Contrary to the misinformation given in history books written by non-Indian authors, the Oceti Sakowin was a matriarchy. Charmaine White

Face's leadership position was based on her abilities, not her gender, economic position, or popularity. As the Official Spokesperson, it is her duty and responsibility to protect and preserve all of the Articles and provisions of the Fort Laramie Treaty of 1868 as the right of all people of the Great Sioux Nation and as the responsibility and obligation of the United States. As a Plaintiff in this case, she undeniably has the authority necessary to speak on behalf of the Indian people and the Treaty.

Treaties are made between Indian nations and the federal government. The "tribes" consist of people, members who belong to the tribe. Without members, there can be no tribe. Webster's Dictionary defines a tribe as "a group of persons, families or clans believed to be descended from a common ancestor and forming a close community under a leader or chief, etc." The Indian community in Rapid City consists of members from more than three hundred different tribes, and federal regulations require the Defendants to obtain the permission of every tribe served to legally obtain a Resolution, which the Defendants have not done. Indian people in Rapid City cannot vote in tribal elections and do not participate in the economic and political activities of the tribal councils held on the reservations. Instead, the Defendants originally obtained the permission of only three tribal presidents who sit on the GPTCHB who do not represent or speak on behalf of the Indian community in Rapid City. Therefore, the CRST and OST are not indispensable parties in this case.

The GPTCHB is not an indispensable party to this case because it does not have the authority to enter into a contract to take control of the Sioux San Hospital by itself. The GPTCHB does not meet the qualifications to be designated as a Tribal Organization. It is the Defendant I.H.S. who awarded the contract to the GPTCHB. But for the actions of the Defendants there

would be no contract, and there can be no lawful 638 contracts without the participation of the local Indian community to be served as the law requires. Moreover, the Defendant I.H.S. has never met with the local Indian community for the purpose of obtaining the consent to contract, as required by law.

The local Indian community has had many public meetings at the Mother Butler Center. On December 17, 2018, RST Councilwoman Kathleen Wooden Knife from RST attended a local community meeting, and after learning that the local community was opposed to the Sioux San P.L. 93-638 contract, Councilwoman Wooden Knife informed the RST council of the Rapid City Indian community's opposition to said contract. The RST Council subsequently rescinded its Resolution in support of the P.L. 93-638 takeover. (see Defendant's Exhibit No. 1, page 5 of Rosebud Sioux Tribe Resolution No. 2018-117 Reconsidered & Rescinded: 12-18-18)

On April 30, 2019, the OST passed a Motion of No Confidence in Defendant James Driving Hawk. (see Exhibit No. 4, Oglala Sioux Tribal Minutes of the April 30, 2019 Meeting) Defendant I.H.S. should not have proceeded with the contract after the OST was questioning the ethics and integrity of Defendant Driving Hawk, who promoted and approved the contract with GPTCHB that was signed on June 1, 2019, which was after the May 31, 2019 deadline. (see Exhibit No. 5, Self-Determination Contract Number HHS-241-2019-01111)

Another issue of standing arises with the historical establishment of the Sioux San Hospital. Initially, the "Sioux San" was not a provider of medical services. It was an Indian boarding school where many Indian children attended school. After the educational services were no longer needed in that area, a tuberculosis epidemic swept throughout the United States. The Sioux Sanitorium was the provider of medical services for Indian patients who

suffered from tuberculosis. As the tuberculosis epidemic subsided, with no medical services available to the Indian community, it was converted to the Sioux San Hospital through the efforts of the Rapid City Indian Community. The CRST and OST had no participation in and did not support these efforts.

The GPTCHB has now designated a portion of the Sioux San facility as the Oyate Health Center. The historical site is very important to the local Indian community. There are many Indian people who say that it will always be the Sioux San Hospital to them and not the Oyate Health Center. The fact that many Indian people, including children died at the site is a very compelling emotional issue with most Indian residents and to casually rename it as such is a disgrace to the memories that many Indian people in the community value. This disgraceful act in addition to ignoring the local Indian community has caused irreparable harm because the lawful rights of the community members to be involved in the choice of its care providers is denied, and legal action at this time is the only remedy available to the local Indian community.

In addition, there is a paragraph in the Annual Funding Agreement of the contract (see Exhibit No. 6, Attachment 3 to Contract No. HHS-1-241-2019-01111, par.6.1.3) that would cause irreparable harm to the Oglala and Cheyenne River Sioux Tribes and to all the other tribes who have members who are patients at Sioux San Hospital, except for the Rosebud Sioux Tribe, as follows:

> "Earmarked funds will be provided to the GPTCHB in the future, to the same extent as they have been provided, and consistent with applicable law and funding formulas agreed to by the Tribes in the Great Plains Area. IHS Headquarters shares are allocated according to IHS Headquarters methodologies. **In addition to the funding amounts, the GPTCHB is entitled to additional IHS Headquarters' tribal shares, to the extent that they are appropriated and allocated.** Increases associated with pay costs, mandatories and other increases resulting from increases in appropriations

shall be made available to GPTCHB on the same basis as other tribes and tribal organizations."

The GPTCHB is NOT a Tribe or a Tribal Organization as verified by the Oglala Sioux Tribal Court, and this contract is supposed to be a Title I Contract. Yet the Indian Health Service is complicit in all of these illegal activities. Surely the IHS knows that under a Title I contract, there can be NO 'Tribal Shares.' That Procedure can only be utilized in a PL 93-638 Title V Compact by a Tribe. (25CFR Sect. 1001.2)

Therefore, the above statement would allow I.H.S. to give to GPTCHB all of the more than 300 tribes' IHS' 'Headquarters' tribal shares' as IHS has allowed GBTCHB to claim to be providing health care to members of all the tribes, except the Rosebud Sioux Tribe. This would diminish the amount I.H.S. would be sending to the tribes for their own health care facilities on their own reservations, Rancherias, or Native Corporations in Alaska, and cause irreparable harm to the health care services being provided in their own IHS health care facilities.

In addition, irreparable harm has been caused by the GPTCHB having assumed services at Sioux San through this illegal contract with the Defendants. The attached Affidavits from several members of the Indian Community are evidence of the economic and health injury that has been inflicted upon them.

CONCLUSION

WHEREFORE, the Plaintiffs respectfully ask this Honorable Court to order the following pursuant to the statements made herein and supportive documentation attached hereto:

A. That this Court affirm the subject matter jurisdiction in this matter as valid and subsequently dismiss the Defendants' Memorandum Brief in Support of Their Motion to Dismiss with prejudice;

B. That this Court concede the irreparable harm suffered by Plaintiffs, as evidenced by the several Affidavits attached hereto as supporting documentation, and restore Sioux San to its original operating status prior to September 1, 2018 to provide full medical services once again to the Indian community and to restore all federal employees to their positions with all benefits that they held prior to the reduction in force due to the unlawful contract;

C. That this Court allow the Plaintiffs' legal right to enjoin the indispensable parties named herein and named in the Class Action Lawsuit Consent forms attached hereto; and

D. That this Court award the relief requested in Plaintiffs' original and amended Complaints and any further relief the Court deems equitable in this matter.

Dated this 23 day of October, 2019.

Respectfully submitted by,

Patrick G. Lee

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WORD COUNT CERTIFICATION

The undersigned attorney hereby certifies that in accordance with local rules, the foregoing Plaintiffs' Response consists of 16 pages and so does not exceed the court's page limit of 25 pages, and this Response also does not exceed the word count limit of 12,000 words. According to Microsoft Word software, the word count for this Response is 4691.

Patrick G. Lee

Patrick A. Lee, Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I served copies of this Plaintiffs' Response to Defendants' Motion to Dismiss, all exhibits noted herein, and an attached Exhibit List upon the following individuals:

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