UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20-1484

DONNA M. GILBERT, ET AL.,

Plaintiffs -Appellants

vs.

RADM MICHAEL D. WEAHKEE, PRINCIPAL DEPUTY DIRECTOR OF INDIAN HEALTH SERVICE (IHS), ET [1] AL.,

Defendants -Appellees.

Appeal from U.S. District Court for the District of South Dakota - Western (5:19-cv-05045-JLV)

APPELLEES' BRIEF

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[1] Rear Admiral Weahkee is now the Director of the Indian Health Service, having been confirmed by the Senate on April 21, 2020. See Comm. on Indian Affairs, U.S. Senate, Hoeven: Senate Confirms Rear Admiral Michael Weahkee As Indian Health Service Director (Apr. 21, 2020), https://go.usa.gov/xv7EC

SUMMARY OF CASE AND STATEMENT REGARDING ORAL ARGUMENT

In their pro se complaint, plaintiffs sought to rescind a self-determination contract between the Indian Health Service ("IHS") and the Great Plains Tribal Chairmen's Health Board ("Health Board") for the assumption of services. The government successfully moved to dismiss the lawsuit, which they now appeal.

The district court properly dismissed their complaint. First, although the district court did not analyze the issue, plaintiffs lack Article III standing to challenge the self-determination contract. The district court correctly reasoned that plaintiffs' claims were not within the zone of interests protected by the Indian Self-Determination and Education Assistance Act ("ISDEAA") or the Treaty of Fort Laramie of 1868. This Court should affirm the dismissal of the complaint solely on these grounds. Although the district court also held that the Health Board was an indispensable party under Federal Rule of Civil Procedure 19, which could not be joined because it has sovereign immunity, this Court need not reach that issue in this appeal. The absence of Article III standing, coupled with the reality that their claims do not fall within the zones of interest protected by the statute or the treaty, is dispositive. The judgment of the district court should be affirmed.

The facts and the legal arguments are adequately presented in the briefs and record. The decisional process would not be significantly aided by oral argument. Accordingly, the government does not request oral argument.

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JURISDICTIONAL STATEMENT[2]

Gilbert, Mohney, and White Face appeal the final judgment of the district court dismissing their pro se complaint, denying their motion for summary judgment, and denying their motion for class certification. The district court's order was entered on February 18, 2020. DCD 44. The district court entered its judgment on February 18, 2020. DCD 45. Gilbert, Mohney, and White Face timely filed their Notice of Appeal on March 6, 2020. DCD 47. Plaintiffs invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331, although plaintiffs' standing under Article III is contested, *see infra* pt. I. This court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER GILBERT, MOHNEY, AND WHITE FACE HAVE ARTICLE III STANDING.

Miller v. Redwood Toxicology Lab., Inc., 688 F.3d 928 (8th Cir. 2012)
Lujan v. Def. of Wildlife, 504 U.S. 555 (1992)

II. WHETHER THE DISTRICT COURT CORRECTLY DISMISSED GILBERT, MOHNEY, AND WHITE FACE'S ISDEAA AND TREATY CLAIMS FOR LACK OF STANDING

Bank of Am. Corp. v. City of Miami, Fla., 137 S. Ct. 1296 (2017)

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[2] References to the record will be as follows: Gilbert, Mohney, and White Face's Appellants' Brief will be called "AB" followed by the appropriate page numbers. The district court record will be denoted by the letters "DCD" followed by the appropriate docket number.

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III. WHETHER THIS COURT SHOULD REACH THE QUESTION WHETHER THE HEALTH BOARD WAS AN INDISPENSABLE PARTY UNDER RULE 19 WHERE THE JUDGMENT BELOW MAY BE AFFIRMED SOLELY ON STANDING GROUNDS.

Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affairs, 932 F.3d 843 (9th Cir. 2019)

IV. WHETHER THE DISTRICT COURT CORRECTLY DENIED APPELLANTS' MOTIONS FOR CLASS CERTIFICATION AND SUMMARY JUDGMENT AS MOOT.

STATEMENT OF THE CASE

A. Factual Background.

On April 29, 1868, the United States entered into the Treaty of Fort Laramie with the bands of the Great Sioux Nation in an attempt to end warfare on the Northern Plains caused by the influx of American settlers onto tribal land. DCD 44 at 5. Under its terms, the Treaty of Fort Laramie of 1868 required the United States to provide "a physician" for the tribe, along with other positions, "and that such appropriations shall be made from time to time, on estimate of the Secretary of the Interior, as will be sufficient to employ such persons." *Id.* art. XIII. In addition, the United States promised to construct "a residence for the physician." *Id.* art. IV. The United States also had the right to withdraw the physician after a period of ten years in exchange for a payment of $10,000 per year. *Id.* art. IX. The United States made similar promises to other tribal nations during its effort to secure tribal lands for its westward expansion. DCD 44 at 6. Today Congress has declared that it is the policy

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of the United States "to ensure the highest possible health status for Indians and . . . to provide all resources necessary to effect that policy[.]" 25 U.S.C. § 1602(1).

The modern Great Sioux Nation is composed of multiple descendant nations. DCD 44 at 6. Three of those tribes, the Oglala Sioux Tribe, the Cheyenne River Sioux Tribe, and the Rosebud Sioux Tribe, have many citizens residing in Rapid City, South Dakota. *Id.* In order to serve those people, the IHS established the Rapid City Service Unit. *Id.* Slightly over seventy-nine percent of the Rapid City Service Unit's patients are members of the Oglala Sioux Tribe, the Cheyenne River Sioux Tribe, or the Rosebud Sioux Tribe. *Id.; see also* DCD 18-10 at 2.

The IHS's principal mission is to provide primary healthcare for the approximately 2.56 million American Indians and Alaska Natives throughout the United States. *See* IHS Fact Sheet (April 2020), http://www.ihs.gov/newsroom/factsheets/ihsprofile/. The IHS provides healthcare to American Indians and Alaska Natives through three separate mechanisms: (1) by administering healthcare services directly through IHS facilities and with IHS's own employees; (2) by contracting with tribes and tribal organizations, at their request, to allow tribes to independently operate healthcare delivery programs previously operated by IHS; and (3) by funding contracts and grants to organizations operating health programs for urban Indians. S. Rep. No 102-392, at 4. This case is a challenge to the IHS's use of the second mechanism to transfer partial control of the

Rapid City Service Unit to the Great Plains Tribal Chairmen's Health Board ("the Health Board").

Tribal nations in North Dakota, South Dakota, Iowa, and Nebraska organized the Health Board "to make known the needs and desires of the Indian people for assistance of the [IHS] in formulating programs and establishing priorities in delivering services which it is incumbent upon the United States to provide pursuant to the solemn treaty and legal obligations to the Indian people." DCD 44 at 7; DCD 18-12 at 4-5, 8. The organization provides public health support and healthcare 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]." *See About GPTCHB*, http://gptchb.org/about/. The Health Board is incorporated as a nonprofit corporation under South Dakota law. DCD 44 at 7. The Oglala Sioux Tribe, Cheyenne River Sioux Tribe, and Rosebud Sioux Tribe are all members of the Health Board. *Id.*

In 2018, the three tribes authorized the Health Board to enter into a self-determination contract with IHS to assume the functions of the Rapid City Service Unit. DCD 44 at 7. Each tribe's authorization provided it would only take effect if the other two tribes also enacted authorizations. *Id.* Thus, using the authority granted by the three tribes, the Health Board transmitted its assumption proposal to the IHS on September 26, 2018. *Id.* In accordance with the ISDEAA's 90-day limit

for considering a self-determination contract, IHS responded it would accept or decline the proposal by December 26, 2018. *Id.* at 8.

On December 18, 2018, the Rosebud Sioux Tribe rescinded its authorization. *Id.* Consequently, because the Health Board no longer had authority to enter into an ISDEAA contract for the assumption of the Rapid City Service Unit, IHS canceled negotiations on December 20, 2018, and denied the Health Board's proposal on December 21, 2018. *Id.*

In January 2019, the Oglala Sioux Tribe and Cheyenne River Sioux Tribe, amended their prior authorizations to remove the requirement that the three tribes consent to the Health Board's assumption of IHS functions. *Id.* at 9. On February 14, 2019, the Health Board submitted a new proposal to IHS to partially assume functions at the Rapid City Service Unit on behalf of the Oglala Sioux Tribe and Cheyenne River Sioux Tribe only. *Id.* In April and May of 2019, the Health Board and IHS negotiated various aspects of the proposal. *Id.* During negotiations, IHS officials consulted with members from each of the three tribes and employees of the Rapid City Service Unit. *Id.* Notably, during the consultation process, IHS officials communicated with Appellants Gilbert and White Face. *Id.*

On May 31, 2019, IHS and the Health Board entered into a contract permitting partial assumption of the Rapid City Service Unit on behalf of the Oglala Sioux Tribe and Cheyenne River Sioux Tribe. *Id.* On June 1, 2019, IHS granted in part and

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denied in part the Health Board's proposal. *Id.* The declined portions of the contract related to certain types of costs and the provisions of oncology and alternative medicine services. *Id*. at 10. The majority of the Health Board's proposal, as amended through negotiations between the Health Board and IHS, was accepted. *Id.*

On July 21, 2019, the contract went into effect. *Id.* The Rapid City Service Unit currently operates jointly between the Health Board and IHS. *Id.* While the Health Board receives funding to provide services to Oglala Sioux Tribe citizens and Cheyenne River Sioux Tribe citizens, IHS retains funding to serve Rosebud Sioux Tribe citizens and citizens of other tribes. *Id.* Both the Health Board and IHS, however, have an "open door" policy and receive funding to serve Native Americans from any tribe. *Id.*

B. Proceedings in this Case.

Gilbert, Mohney, and White Face are Native Americans residing in Rapid City, South Dakota. DCD 44 at 1. They filed a pro se lawsuit challenging the IHS's decision to enter into a self-determination contract with the Health Board. *Id.* Plaintiffs asserted that the contract violates the Fort Laramie Treaty of 1868 between the United States and the Great Sioux Nation and the ISDEAA. *Id.* In their complaint, they asked the court to enjoin the contract and reinstate IHS's control over the Rapid City facilities. *Id.*

Both Gilbert and Mohney filed affidavits with the district court regarding their experiences with the assumption process; White Face did not. *Id.*; *see also* DCD 20 (Gilbert Affidavit); DCD 21 (Mohney Affidavit). Gilbert stated she refused to sign an Intergovernmental Personnel Act (IPA) agreement that would enable her to continue to work at the Rapid City Service Unit under the Health Board's management. DCD 44 at 10. On December 17, 2018, Gilbert received a termination notice. *Id.* Because the Health Board's first proposal for a self-determination contract was rescinded, Gilbert's termination was rescinded. *Id.* In June 2019, Gilbert was offered "one of the 35 jobs they were keeping[s.]" *Id.* at 11 (quoting DCD 20 at 5). Gilbert did not state whether she accepted the job or whether she is still employed at the Rapid City Service Unit. *Id.* Mohney asserted she was "released from employment with the IHS" on August 6, 2019. *Id.* (quoting DCD 21 at 1). Mohney did not explain why she was terminated or whether it was connected to the assumption process. *Id.* She did allege that "had the appropriate procedures and lawful practices been followed by the IHS in this matter, she would still be employed with the IHS," but did not provide any additional detail. *Id.*

The plaintiffs also filed affidavits from ten members of the Rapid City Native American community who alleged that the assumption harmed them in some way. *Id., see also* DCD 22-29. In addition, approximately 167 people consented to be part

of a class action, but they did not provide any individualized information about themselves or their connection to the Rapid City Service Unit. DCD 44 at 11.

The district court dismissed plaintiffs' claims on multiple grounds. First, although the court declined to resolve questions about Article III standing, the court held that they fell outside the zone of interests protected by the ISDEAA. The court held that the ISDEAA is concerned with the relationship between tribes and federal agencies and does not confer rights to individuals who may be dissatisfied with self-determination contracts between tribes and agencies. DCD 44 at 13-20. That conclusion, the court explained, is consistent with the ISDEAA's statutory cause of action in 25 U.S.C. § 5332(a), which, like the ISDEAA more generally, facilitates the ability of "tribes and tribal organizations to assume federal functions" and does not expand the statute's zone of interests to protect third-party individuals like Gilbert, Mohney, and White Face. DCD 44 at 15-16. The court likewise rejected their argument that consultation with individuals was required, finding that it had no support in the statute. *Id.* at 17-20.

Second, the court held that plaintiffs do not have standing to attempt to enforce the Fort Laramie treaty. DCD 44 at 21-25. The court explained that the treaty can only be enforced by the sovereigns that entered into the treaty, as it does not create rights for individual tribal members. *Id.*

Finally, the district court held that plaintiffs' claims should be dismissed under Rule 19 of the Federal Rules of Civil Procedure. DCD 44 at 25-29. The court stated that the Health Board was a required party under Rule 19(a) because its absence would impede or impair its interest in the self-determination contract that is the subject of this action. *Id.* at 26. The court adhered to a ruling of another district court holding that the Health Board was entitled to sovereign immunity. *Id.* at 27 (citing *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1171-77 (D.S.D. 2012)). And the court held that dismissal was warranted under Rule 19(b) because the Health Board would be prejudiced by an adverse judgment. *Id.* at 28.

Plaintiffs appealed. Their opening brief argues: (1) that the Health Board is not entitled to sovereign immunity and is not a tribal organization entitled to enter into a self-determination contract; (2) that the district court erred in failing to uphold plaintiffs' right to community participation in tribal health policy when it ruled that they lacked standing to assert claims under the ISDEAA; (3) that a class should have been certified; (4) that plaintiffs have standing because their rights to individual health care and their rights as employees were harmed; (5) that the rights of tribal members who do not live within their designated reservations were harmed because they cannot vote in tribal elections and thus they have standing under the ISDEAA;

(6) that the district court committed a procedural error by failing to grant summary judgment; and (7) that they are entitled to an injunction.

SUMMARY OF ARGUMENT

Plaintiffs lack Article III standing to challenge the self-determination contract between the Health Board and IHS. Similarly, after a careful analysis, the district court concluded that their claims were not within the zone of interests protected by the ISDEAA or the Treaty of Ft. Laramie of 1868. These threshold issues are dispositive. Thus, this Court need not reach Appellants' challenge to the district court's finding that the Health Board was a required party under Rule 19 of the Federal Rules of Civil Procedure.

ARGUMENT

I. BECAUSE GILBERT, MOHNEY, AND WHITE FACE LACK ARTICLE III STANDING, THE DISTRICT COURT'S DISMISSAL SHOULD BE AFFIRMED.

Although the district court declined to resolve the question of whether Gilbert, Mohney, and White Face had Article III standing, this Court may independently affirm the district court's dismissal of their complaint on that basis. *See Dicken v. Ashcroft*, 972 F.2d 231, 233 (8th Cir.1992). The Supreme Court has noted that "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review[.]" *Arizonans for Official English v. Ariz.,* 520 U.S. 43, 73 (1997) (quotation and

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internal quotations omitted). "Whether there is Article III standing is always an antecedent question." *Miller v. Redwood Toxicology Lab., Inc.,* 688 F.3d 928, 933 (8th Cir. 2012) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–96, 101 (1998)).

A plaintiff bears the burden of showing (1) that she has suffered an "injury in fact" that is "actual or imminent, not 'conjectural or 'hypothetical'"; (2) that the injury is causally connected to the defendant's allegedly illegal conduct and not to the "independent action of some third party not before the court;" and (3) that "it [is] 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, (1992) (citations omitted). "A plaintiff's burden to establish standing depends on the stage of litigation, and at the pleading stage, general factual allegations . . . may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Wieland v. U.S. Dep't of Health & Human Servs.*, 793 F.3d 949, 954 (8th Cir. 2015) (quotations omitted).

Gilbert, Mohney, and White Face cannot meet this burden. Gilbert, Mohney, and White Face assert they have interests in obtaining adequate healthcare, but they have not plausibly alleged that the self-determination contract has harmed the quality of their healthcare. The vague assertions of harm in their complaint are no more

than the mere "general averments" and "conclusory allegations" that were insufficient to establish injury in fact in *Lujan*, 504 U.S. at 588.

Their alleged employment-related harms are similarly unclear. Gilbert asserts that she refused to sign an IPA agreement and was offered one of the federal jobs remaining, but does not state whether she accepted it or not. *See* DCD 44 at 11. Mohney asserts that she was released from employment at IHS and would not have been if "the appropriate procedures and lawful practices" had been followed by IHS, but does not substantiate that assertion. *Id.* White Face did not submit an affidavit and does not allege that she was personally injured by the assumption contract. In a previous case that White Face filed as sole plaintiff to challenge the self-determination contract, the district court found she did not have standing to represent Rapid City Service Unit employees. *See White Face v. Church*, Civ. 18-5087- JLV (D.S.D. 2018), Docket 31 at pp. 62-63. Regardless, reliance on those alleged harms is foreclosed by the Civil Service Reform Act. *See, e.g., Elgin v. Dep't of Treasury*, 567 U.S. 1, 9 (2012) (Civil Service Reform Act precludes district court jurisdiction over federal employees' claims even though they were constitutional claims for equitable relief).

In addition to failing to demonstrate an injury in fact, Gilbert, Mohney, and White Face also cannot show that the rescission of the self-determination contract would cure these alleged healthcare deficiencies or employment harms as is required

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for the redressability element. *See Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006) (stating that redressability must be established by a more than "merely speculative" showing that the court can grant relief to redress the plaintiff's injury) (citing *Planned Parenthood of Mid–Missouri & E. Kansas, Inc. v. Ehlmann*, 137 F.3d 573, 576–77 (8th Cir.1998)). Thus, Gilbert, Mohney, and White Face have failed to meet their burden to establish constitutional standing and this Court may affirm the district court's dismissal of their complaint on that basis.

II. THE DISTRICT COURT CORRECTLY DISMISSED GILBERT, MOHNEY, AND WHITE FACE'S CLAIMS BECAUSE THEY DO NOT FALL WITHIN THE ZONE OF INTERESTS PROTECTED BY THE ISDEAA AND TREATY OF FT. LARAMIE.

A. Standard of Review.

This Court reviews the district court's grant of a motion to dismiss for lack of standing de novo. *Wieland v. U.S. Dep't of Health & Human Servs.,* 793 F.3d 949, 953 (8th Cir. 2015). The Court accepts as true all factual allegations in the complaint and draws all reasonable inferences in favor of the nonmoving party. *Hastings v. Wilson*, 516 F.3d 1055, 1058 (8th Cir. 2008).

B. Gilbert, Mohney, and White Face Have Not Alleged Harms That Fall Within the Zone of Interests Protected by the ISDEAA.

In addition to constitutional standing under Article III, a plaintiff who seeks to sue under a particular statute must demonstrate that the statute grants her "the cause of action [s]he asserts." *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct.

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1296, 1302 (2017). Federal courts "presume that a statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014). This Court has explained that the zone of interests test "'is to be determined not by reference to the overall purpose of the Act in question . . . but by reference to the particular provision of law upon which the plaintiff relies.'" *Rosebud Sioux Tribe v. McDivitt,* 286 F.3d 1031, 1036 (8th Cir. 2002). Thus, this Court must look to the ISDEAA to determine whether Gilbert's, Mohney's, and White Face's claims fall within the zone of interests that ISDEA protects.

The ISDEAA, 25 U.S.C. § 5301 *et seq*., allows Tribes and Tribal organizations 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 IHS previously operated for the benefit of Indians. The purpose of the ISDEAA is to establish a meaningful self-determination policy that would decrease federal domination of programs for Indians and effectuate meaningful participation by Indian tribes in the planning, conduct, and administration of Indian programs and services. *See* 25 U.S.C. §§ 450, 450a. The ISDEAA directs the Secretary, "upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract . . . with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs[.]" 25 U.S.C. § 5321(a)(1); 25

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C.F.R. § 900.112(a). If authorized by a Tribe via Tribal resolution, a Tribal organization may also submit a proposal for a self-determination contract. 25 U.S.C. § 5321(a)(2). The agency may only refuse a proposed self-determination contract for five specified reasons. *Id.* at § 5321(a)(2). The law's definition of a "self-determination" contract is limited to contracts "between a tribal organization and the appropriate Secretary." *Id.* at § 5304(j). The only references to individuals within the context of furthering the ISDEAA's goals of promoting self-determination contracts. *See, e.g.*, *id.* at § 5332(e) (permitting federal employees to keep their federal benefits under certain circumstances); *id.* at § 5321(d) (permitting tort claims against employees of tribes or tribal organizations operating under self-determination contracts as if they were federal employees). While Appellants assert that the district court erred in failing to analyze 25 U.S.C. § 5302, nothing in that section undermines the district court's conclusion that the text of the ISDEAA does not "open the courthouse doors to individual litigants concerned with self-determination contracts." DCD 44 at 15.

As the district court noted, case law interpreting the ISDEAA confirms that it is primarily concerned with interactions between tribes and federal agencies. *See* DCD 44 at 16; *see also Colbert v. United States*, 785 F.3d 1384, 1391 (11th Cir. 2015) (holding that Federal Tort Claims Act coverage under the ISDEAA is only applicable when tortfeasor was employee of tribe or tribal organization, not a private

party); *Demontiney v. United States*, 255 F.3d 801, 807 (9th Cir .2001) (holding that ISDEAA does not "contemplate suits by private parties" in rejecting lawsuit by private subcontractor); *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1234-35 (8th Cir. 1995) (finding that private subcontractor was not an "Indian contractor" permitted to sue under ISDEAA for breach of self-determination contract). Appellants cite no case law to the contrary. Based upon the statutory text and the case law interpreting the ISDEAA, the district court correctly held that private individuals seeking to cancel a self-determination contract under the ISDEAA do not fall within the zone of interests protected by the statute. DCD 44 at 13, 14-17.

In so holding, the district court explicitly rejected plaintiffs' arguments that the ISDEAA's community-participation requirements reflect that they fall within the statute's zone of interests. *See* DCD 44 at 17-18. They raise no new arguments before this Court to justify departing from the district court's well-reasoned finding that individuals seeking to challenge a self-determination contract do not fall within the zone of interests protected by the ISDEAA. Similarly, the district court also refuted plaintiffs' argument that their interests are not adequately represented by their tribal governments, noting that the ISDEAA only requires that a self-determination contract be authorized by "any Indian tribe by tribal resolution" and does not specify how or why the tribe should consult the population to be served. DCD 44 at 20 (citing 25 U.S.C. § 5321(a)(1)). Nothing in Appellants' brief justifies

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departing from that finding based upon the statutory text. Thus, even if plaintiffs had Article III standing, the district court would have properly dismissed their ISDEAA-based claims.

C. Gilbert, Mohney, and White Face Have No Cause of Action under the Treaty of Fort Laramie of 1868.

Plaintiffs also argue that the district court erred in dismissing their breach of trust claims under the Treaty of Fort Laramie of 1868. But they present nothing to justify disturbing the district court's well-supported holding that they lack standing as individuals to attempt to enforce a treaty duty.

"A treaty is essentially a contract between two sovereign nations." *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019). Here, Gilbert, Mohney, and White Face assert that the self-determination contract violates their rights under the provision of the treaty where the United States agreed to provide a physician to the Sioux people. As the district court noted, the Treaty of Fort Laramie was negotiated between two sovereigns – the United States and the Great Sioux Nation – not between the United States and individual tribal members. DCD 44 at 22. Nothing in the treaty language creates an enforceable treaty as to individual members as plaintiffs. *Id.* at 23. And while plaintiffs again cite to case law holding that individual tribal members could state a treaty claim for hunting rights, *see* AB at 23, the district court rejected that same argument. "[T]he affected persons in those cases were protected by individually enforceable treaty provisions guaranteeing the right to hunt or fish"

while the Treaty of Fort Laramie "does not guarantee an individual Indian the right to health care provided by the United States, as opposed to a tribal organization." DCD 44 at 23. Plaintiffs have not presented any authority to justify departing from this reasoning. Accordingly, the district court's finding that plaintiffs lack standing to assert a claim under the Treaty of Fort Laramie of 1868 should likewise be affirmed.

III. BECAUSE THE DISTRICT COURT'S JUDGMENT MAY BE AFFIRMED ON THRESHOLD STANDING GROUNDS, THIS COURT NEED NOT CONSIDER THE MERITS OF THE COURT'S ALTERNATE HOLDING THAT THE HEALTH BOARD WAS AN INDISPENSABLE PARTY UNDER RULE 19.

Because plaintiffs lack Article III standing and have not alleged harms that fall within the zone of interests protected by the ISDEAA and cannot enforce the Fort Laramie Treaty, this Court can and should affirm the dismissal of their claims solely on these grounds. *Cf. Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 88-89, 94-102 (1998) (federal courts must normally resolve Article III standing before passing on non-jurisdictional matters).

In addition to the foregoing arguments, the government also argued in district court, in the alternative, that the Health Board was a required party under Rule 19(a) of the Federal Rules of Civil Procedure because the Board's absence could impair its ability to protect its interest in the self-determination contract at issue in this case. DCD 17 at 17. The government further argued that joinder was infeasible because

the Board (a tribal entity) has sovereign immunity from suit, and, absent such joinder, dismissal under Rule 19(b) was warranted. *Id.* at 16, 18. The district court agreed with all three points, holding that (1) the Board was a required party under Rule 19(a), DCD 44 at 26; (2) the Board possessed sovereign immunity, *id.* at 27; and (3) dismissal was warranted under Rule 19(B) because the Board would be prejudiced by an adverse judgment. *Id.* at 28. On appeal, plaintiffs do not address the first or third points: They fail entirely to address whether the Board is a required party under Rule 19(a) or whether dismissal is warranted under Rule 19(b) if the Board cannot be joined as a party. *See* Br. for Appellants 9-13. Plaintiffs instead limit their relevant appellate argument to the contention that their claims should not have been dismissed because the Board lacks sovereign immunity (and thus could be joined). *See id.*

With respect to Rule 19, in *Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affairs,* 932 F.3d 843 (9th Cir. 2019), *cert. denied*, No. 19-1166 (June 29, 2020), the United States argued that, in an action for judicial review of a federal agency action under the Administrative Procedure Act (APA), a tribal entity that is the direct beneficiary of the challenged agency action is not a required party under Rule 19(a). Br. For the United States as Amicus Curiae 8-14, *Diné Citizens, supra.* The government explained that in such judicial review of agency action, the lawfulness of the federal action at issue is judged only on the basis of the justification

provided by the agency itself, and that in such judicial review – pursuant to Congress's express waiver of federal sovereign immunity to authorize court review – a federal agency is normally the only required party (*i.e.,* except possibly where an actual conflict of interest would exist between the United States and the Tribe). *Id.* at 9-13. The government further argued that, even if the tribal entity were a required party, dismissal would not be warranted under Rule 19(b) because such a court-rule-based dismissal of a statutory claim for judicial review of federal action under the APA (for which relief lies only against the federal agency) would deprive plaintiffs of any forum for their claim for review merely because a tribal entity benefitted from that action, unduly limiting Congress's statutory provision of judicial review to determine the lawfulness of federal agency action. *Id.* at 16-17. Although the Ninth Circuit disagreed with the United States' arguments by holding that judicial review could *not* proceed in the absence of the tribal entity, 932 F.3d at 857-58, the question whether the government is the only required party in a suit challenging agency action under the APA is significant and unsettled. Cf. *Vann v. U.S. Dep't of Interior*, 701 F.3d 927, 929-30 (D.C. Cir. 2012) (holding that suit could proceed against tribal officer in his official capacity with tribe as a party).

In this case, the precise nature of plaintiffs' *pro se* claims is unclear. Plaintiffs assert "federal question jurisdiction" over their allegations that the contract awarded by defendants would violate various federal laws and regulations and thus violate

plaintiffs' "Civil and Treaty rights." DCD 5 at. 1, 3. But plaintiffs do not specify whether they seek judicial review under the APA, *see* 5 U.S.C. 702, 706, under that grant of federal-question jurisdiction, 28 U.S.C. 1331, or whether they instead present a "claim against [the Secretary of Health and Human Services] arising under [ISDEAA]" for which ISDEAA grants jurisdiction to district courts, 25 U.S.C. 5331(a). Moreover, it is unclear whether a claim arising under ISDEAA – even if ISDEAA's cause of action would extend to individuals like plaintiffs, but see DCD 44 at 15-16 – might implicate Rule 19 considerations different from APA contexts in light of ISDEAA's provisions that are particularly protective of the tribal rights.

As a result, this appeal would provide a particularly poor vehicle for the Court to assess the application of Rule 19 to plaintiffs' claims: Plaintiffs have made no arguments addressing either whether the Board is a "required" party in this case under Rule 19(a) or whether dismissal would be warranted under Rule 19(b) if the Board cannot be joined; the precise nature of plaintiffs' cause of action for review remains unclear; and if plaintiffs' claims were to arise under ISDEAA's review provision rather than the APA, the parties have not addressed whether ISDEAA's Tribe-friendly provisions might counsel in favor of a Rule 19 analysis different from that in APA contexts, where it has been the government's position that the government is the only "required" party and that dismissal is unwarranted on Rule 19 grounds. In addition, the district court had no occasion to consider the Rule 19

arguments pressed by the government in *Diné Citizens* in the context of APA judicial review, much less determine whether this case presents different considerations, because the parties did not address those matters below. The government currently takes no position in this Court on how those issues may apply to this case and thus does not rely on Rule 19 to defend on appeal the dismissal of plaintiffs' claims. In these circumstances, this Court need not, and should not, address the Rule 19 issue – including whether there are features of the ISDEAA that might distinguish it from claims for APA review in the Rule 19 setting. The Court instead should simply affirm the judgment below on the alternative grounds articulated above.

IV. THE DISTRICT COURT CORRECTLY DENIED APPELLANTS' MOTION FOR CLASS CERTIFICATION AND MOTION FOR SUMMARY JUDGMENT AS MOOT.

A. Standard of Review.

The district court's denial of plaintiffs' motion for summary judgment and motion for class certification as moot is reviewed de novo. *See Bell v. Kansas City Police Dep't*, 635 F.3d 346, 347 (8th Cir.2011) (per curiam) (de novo standard of review for summary judgment); *D. L. by Landon v. St. Louis City Sch. Dist.*, 950 F.3d 1057, 1063 (8th Cir. 2020) (issues of subject matter jurisdiction, including mootness, are review de novo); *see also In Re St. Judge Medical, Inc.*, 425 F.3d 1116, 1119 (8th Cir. 2005) ("The district court's rulings on issues of law are reviewed de novo, and the court abuses its discretion if it commits an error of law." *Blades v.*

Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005) (citing *Emery v. Hunt,* 272 F.3d 1042, 1046 (8th Cir. 2001)).

B. The district court's denial of the remaining motions as moot was appropriate.

Following the dismissal of Gilbert's, Mohney's, and White Face's complaint, the district court denied their motions for class certification and summary judgment as moot. Because they lack both constitutional and prudential standing as set forth above, the district court correctly found that both the class certification and summary judgment motions were moot.

CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court affirm the district court's dismissal of Gilbert's, Mohney's, and White Face's amended complaint.

Dated this 1st day of July, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Eighth Circuit Rule 10.6.3, I certify that this brief was prepared using Microsoft Word 2010.

I further certify that I have provided the foregoing brief to the Court via electronic filing of a PDF version of the brief. The PDF file has been scanned for viruses using virus-scanning software approved by the United States Attorney's Office and is virus free.

I further certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached appellee's brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,545 words.

Dated this 1st day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by first-class mail, postage prepaid, to the following non-CM/ECF participant(s) as follows:

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