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CASE N0. 20 – 1484

In the

UNITED STATES COURT OF APPEALS

for the Eighth Circuit

Donna M. Gilbert, Pro Se; Julie Mohney, Pro Se;

Charmaine White Face, Pro Se

Plaintiffs - Appellants

FILED
APR 16 2020
MICHAEL GANS
CLERK OF COURT

v.

RADM Michael D. Weahkee, Principal Deputy Director of Indian Health Service (IHS); James Driving Hawk, Great Plains IHS Area Director; William P. Barr, United States Attorney General

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH DAKOTA AT RAPID CITY

BRIEF OF APPELLANTS

RECEIVED
APR 16 2020
U.S. COURT OF APPEALS
EIGHTH CIRCUIT

SUMMARY OF THE CASE

On June 28, 2019, a Complaint was filed in South Dakota Western District Federal Court by Donna M. Gilbert, Pro Se, and amended on July 16, 2019, to add additional Plaintiffs: Julie Mohney, Pro Se, and Charmaine White Face, Pro Se, Case No. 5:19-cv-05045-JLV. The Appllants filed an Injunction against Indian Health Service (IHS) Appellees Weahkee and Driving Hawk for not following the law in approving a P.L. 93-638 Indian Self Determination and Education Assistance Act (ISDEAA) contract that allowed a non-profit state corporation to administer a treaty right to health care for American Indian people at the Sioux San IHS Health Facility (henceforth Sioux San) in Rapid City, SD.

On Oct. 4, 2019, the U.S. Attorney General's (USAG) office, as counsel for the Appellees, filed a Motion to Dismiss with prejudice stating the Court lacked jurisdiction over the Gilbert et al. claims. (Doc. 16) A series of Motions, Responses, and Replies followed and are located in the Original File which has been electronically sent to the Court of Appeals. Among these were Appellants Motions for Class Certification, and a Motion for Summary Judgment. On Feb. 18, 2020, the District Court granted the Appellees' Motion to Dismiss for Lack of Jurisdiction and denied as moot all other motions. Gilbert et al. timely filed a Notice of Appeal on March 6, 2020.

Gilbert et al. request a waiver to present oral argument before the Court as we are proceeding pro se, are not attorneys, and are confident in the written record.

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CORPORATE DISCLOSURE STATEMENT

The Appellants are not a corporation.

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JURISDICTIONAL STATEMENT

The United States District Court for the Western District of South Dakota (District Court) has original jurisdiction over the parties and the claims asserted as follows under 28 U.S.C. § 1331. The civil action arose under the laws and treaties of the United States, specifically the following:

- the Fort Laramie Treaty of 1868, Article 13; Article VI, U.S. Constitution; March 3rd Act of 1871. The Appellants are all members of federally recognized tribes and descendants of signatories to the 1868 Treaty which is protected by Article VI of the U.S. Constitution and the March 3rd Act of 1871.

- the Indian Self-Determination and Education Assistance Act, (ISDEAA) 25 CFR 450(c) which was editorially changed to 25 U.S.C. § 5301; 25 CFR § 900: Section 900.3 Policy Statements (a)(1)(2); Section 900.3(b) Secretarial Policy (3) (4); Section 900.4 Effect on existing tribal rights (b); Subpart B – Definitions Section 900.6 Indian/Tribal Organization; and Subpart E – Declination Procedures Section 900.22(b)(e). The Appellants have been adversely and directly affected by this federal action by the Appellees under the ISDEAA.

- The Indian Health Care Improvement Act (IHCIA) 25 U.S.C. Ch. 18 § 1602 Declaration of national Indian health policy. The Appellants are patients of the Sioux San and have been adversely and directly affected by the Appellees' approval of the ISDEAA contract and in non compliance with the IHCIA.

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The Appellants have no other form of redress or appeal, and/or have exhausted the appeal processes. This case involves federal officials acting "under the color" of federal law. (18 U.S.C.§ 242.Deprivation of rights under color of law)

The 8th Circuit Appellate Court has jurisdiction to review the District Court's decision under 28 U.S.C. § 1291 because this Appeal is from a final decision of a District Court of the United States which entered its final decision on Feb. 18, 2020, with prejudice on many of the issues raised by the Appellants and closed the case. This Appeal was timely filed on March 6, 2020.

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STATEMENT OF THE ISSUES

1. Whether the District Court erred when it ruled that "the Health Board is an indispensable party that cannot be joined due to sovereign immunity."

a. Indian Self Determination & Education Assistance Ace, 25 U.S.C. § 5304 (l). Definition of a Tribal Organization

b. White Face v. Great Plains Tribal Chairmen's Health Board, Oglala Sioux Tribal Court CIV-18-0409

c. False Claims Act, 31 U.S.C. §§ 3729 – 3733

d. Hunter Malasky, Tribal Sovereign Immunity and the Need for Congressional Action, 59 B.C.L. Rev. 2469 (2018)

2. Whether the District Court erred when it dismissed this Case regarding an ISDEAA Contract by the IHS without addressing the portions of the law mandating community participation and involvement.

a. ISDEAA, 25 U.S.C. § 900.3 Policy Statements. (a) Congressional Policy (1) "...by assuring maximum Indian participation.."

b. Title 25 – Indians, 25 U.S.C. Chapter 18 – Indian Health Care, § 1602 Declaration of national Indian health policy (3) "...to ensure maximum Indian participation..."

c. Title 42 – The Public Health & Welfare Chapter 22 Indian Hospital & Health Facilities Subchapter I. Maintenance & Operation § 2001 Hospitals and health facilities transferred to Public Health Service: restriction on closing hospitals (b) "...the Secretary is authorized, with the consent of the Indian people served,..."

d. ISDEAA, 25 U.S.C. § 5302 Congressional declaration of policy (a) Recognition of Obligation of United States "...by assuring maximum Indian participation… as to render such services more responsive to the needs and desires of those communities."

3. Whether the District Court erred when it dismissed the Appellants' Motion for Class Certification.

a. Federal Rule of Civil Procedure Rule 23 (a)
b. *Cobell v. Salazar*, 679 F.3d 909, 400 U.S. App. D.C. 428, 82 Fed. R. Serv. 3d 758 (D.C. Cir. 2012)
c. *West v. Randall* (29 F. Cas. 718 (R.I. 1820))
d. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. ___ (2016)

4. Whether the District Court erred when it ruled "the plaintiffs do not have zone-of-interest standing to sue for relief under the ISDEAA."

a. 5 CFR § 2635.101 - Basic obligation of public service. (b) General principles. (11) "Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities."
b. 42 U.S.C. Section 1983- Civil Action for Deprivation of Rights
c. U. S. Constitution, Bill of Rights
d. RST v USA Dept. of Health & Human Services et al., 3:16-CVO-03038-RAL

5. Whether the District Court erred when it ruled that "the Fort Laramie Treaty does not provide a private right of action under these circumstances."

a. Antoine v. Washington, 420 U.S. 194 (1975)
b. Herrera v. Wyoming, No. 17–532. May 20, 2019, Supreme Court of the United States
c. State v. Tinno, Supreme Court of Idaho, 1972, 94 Idaho 759, 497 P2d 1386

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d. RST v USA Dept. of Health & Human Services et al., 3:16-CVO-03038-RAL

6. Whether the District Court erred when it denied the Appellants' motion for Summary Judgment as moot.

a. FRCP 56 (a)

b. Mary C. Smith v. UHS of Lakeside, Inc., et al. W2011-02405-SC-R11-CV

7. Whether the District Court erred when it denied "injunctive relief" as requested by the Appellants.

a. 42 U.S. Code § 2000a–3. Civil actions for injunctive relief

b. 42 U.S.C. 2000 (a)

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STATEMENT OF THE CASE

Statement of Facts

The following are the Statement of Facts:

--The Sioux San IHS Rapid City Service Unit (hereafter Sioux San) is not located on any American Indian Reservation but is located on federal Indian property in Rapid City, SD, which is forty-five miles from the nearest Indian Reservation. The Sioux San began as an Indian Residential school in 1889 and was called the Rapid City Indian School.

-- The U.S. Indian Health Service (IHS) entered into a P.L. 93-638 Indian Self Determination and Education Assistance Act (ISDEAA) contract with a state non-profit corporation which was established by IHS in 1992 as presented in the Original Record. (Doc. 18-12 P. ID# 345)

--The chairmen from the eighteen (18) area tribes were initially on the Board of Directors and the state non-profit corporation was called the Aberdeen Area Tribal Chairmen's Health Board which has been changed to the Great Plains Tribal Chairmen's Health Board (GPTCHB) on Sept. 3, 2010. (Doc. 18-12 P. ID# 343)

--In 2018, the tribal chairmen were replaced by three (3) employees of the state no-profit corporation who are now the governors-directors on the Board of Directors. (Doc. 52 P. ID# 865)

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--In 2018, the Appellees solicited and accepted Tribal Resolutions from the Oglala Sioux Tribe, the Cheyenne River Sioux Tribe, and the Rosebud Sioux Tribe which authorized the state non-profit corporation to enter into an ISDEAA contract for the management and administration of the Sioux San. (Doc. 18-3 P. ID# 223)

--Tribal Resolutions have no legal authority outside of the exterior boundaries of the Reservations according to their Tribal Constitutions.

--On Dec. 4, 2018, the Oglala Sioux Tribal Court determined that the GPTCHB is in fact a state entity and not under the jurisdiction of the Oglala Sioux Tribe. (Doc. 19.3 P.ID# 386)

--The Oglala Sioux Tribal Court decision could not and did not grant 'sovereign immunity' to a state entity.

--The Rapid City American Indian Community was never consulted or allowed participation by the IHS as required in the ISDEAA (Doc. 1 P.ID# 3), the Indian Health Care Improvement Act, 25 U.S.C. Ch 18 § 1602(3), and the Transfer Act, Title 42 Ch 22 Sub. 1 § 2001 (b) .

--The American Indian Community of Rapid City in 1966 established the Sioux San as a general hospital as stated in the Federal Register (**Federal Register** /Vol. 84, No. 81 / Friday, April 26, 2019 /Notices **17843**).

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--The Appellants, members of the Rapid City American Indian community, began this lawsuit to stop the illegal contract which went into effect on July 21, 2019.

--The Rapid City American Indian community, patients and employees, have been greatly harmed by the illegal, multimillion dollar, ISDEAA contract between IHS and their state non-profit corporation with no appeal process available to the community other than the federal judicial system.

--On Feb. 18, 2020, the District Court granted the Appellees' motion to dismiss, and dismissed with prejudice the Appellants' contentions under the ISDEAA and the 1868 Fort Laramie Treaty. (Doc. 44 P. ID# 816)

--The District Court ordered as moot the Appellants motions for Class Action Certification (Doc. 12 P. ID# 33).

--The District Court ordered as moot the Appellants motion for Summary Judgment (Doc. 37 P. ID# 776).

--The Appellants submitted their Notice of Appeal on March 6, 2020.

--The Appellants submitted Doc. 52, a Motion and Brief under FRCP 62.1 (changed to 12.1) on March 13, 2020, which was forwarded to the Court of Appeals by the District Court.

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SUMMARY OF THE ARGUMENT

The District Court erred when it ruled that "the Health Board is an indispensable party that cannot be joined due to sovereign immunity." The District Court erred when ruling this Case regarding an ISDEAA contract by the IHS, a federal agency, without addressing the portions of the law allowing community participation and involvement. The District Court erred when it dismissed the Appellants' Motion for Class Certification. The District Court erred when it ruled "the plaintiffs do not have zone-of-interest standing to sue for relief under the ISDEAA." The District Court erred when it ruled that "the Fort Laramie Treaty of 1868 does not provide a private right of action under these circumstances." The District Court erred when it denied the Appellants' motion for Summary Judgment as moot. The District Court erred when it denied "injunctive relief" as requested by the Appellants.

ARGUMENT

1. Sovereign Immunity

1. Standard of Review

"**Abstract:** Native American Indian tribal sovereign immunity is a judicially created doctrine that provides immunity from suit for Indian tribes in the United States. Although judicially created, the United States' courts have repeatedly emphasized that only Congress has the power to limit Indian tribal immunity. As a

result, tribal sovereign immunity has become a seemingly boundless means of avoiding lawsuits and liability. Moreover, tribal sovereign immunity has created a gap in the United States judicial system in which an individual may avoid certain lawsuits by entering into a favorable transaction with an Indian tribe... Without congressional action, tribal sovereign immunity and the judicial loophole it creates will continue to be exploited." (Boston College Law Review, Vol. 59, Issue 7, Article 7, Hunter Malasky, Oct. 25, 2018)

1. Argument

The District Court gravely erred when it ruled that "the Health Board is an indispensable party that cannot be joined due to sovereign immunity." Our position is that 1) the Health Board is not a legal party to the ISDEAA contract, and 2) does not possess 'sovereign immunity' in any form, therefore it cannot be a party in this Case. The Appellees are the only persons with authority to contract out government services.

The GPTCHB is a South Dakota non-profit Corporation and was established and incorporated on Jan. 21, 1992, by the U.S. Indian Health Service. (Doc. 18-12 P. ID# 344) Appellant White Face sought an Oglala Sioux Tribal injunction to stop the contracting process on Nov. 13, 2018. (White Face v. Great Plains Tribal Chairmen's Health Board, Oglala Sioux Tribal Court, CIV-18-0409) The decision rendered by the Oglala Sioux Tribal Court on Dec. 4, 2018, stated:

"...4. Defendant [GPTCHB] is a nonprofit corporation registered with the State of South Dakota. It is an organization representing the eighteen (18) tribal communities in the four-state region of South Dakota, North Dakota, Nebraska, and Iowa. The purpose of the organization is to serve as a liaison between the Great Plains Tribes and various Health and Human Services divisions within the area. Defendant is not an entity or organization of the Oglala Sioux Tribe.

"5. Plaintiff's Petition alleges that Defendant is attempting to assume administative functions of the Sioux San Indian Health Rapid City Service Unit and all allegations of the Petition relate directly to this initial allegation. Therefore, all actions of Defendant that Plaintiff seeks to restrain occurred or are occurring outside the exterior boundaries of the Pine Ridge Indian Reservation.

"6. The Oglala Sioux Tribal Court does not have personal jurisdiction over Defendant.

"7. The Oglala Sioux Tribal Court does not have subject matter jurisdiction over actions of Defendant [GPTCHB] occurring outside the exterior boundaries of the Pine Ridge Indian Reservation.

"8. Plaintiff's Petition for Temporary Injunction is dismissed for lack of jurisdiction."

On Dec. 4, 2018, Appellant White Face sought a federal injunction in South Dakota (SD) Federal Western District Court citing the OST Court decision that GPTCHB is a state non-profit corporation. The District Court had jurisdiction to make a determination under 28 U.S.C. § 1331. However, the District Court dismissed the case without prejudice without ever acknowledging the OST Court decision which proved that the GPTCHB was NOT a Tribal Organization but was a state (SD) non-profit corporation. (White Face v. Church et al. CIV18-5087-JLV)

The District Court erred in that decision. The District Court also erred in this instant case in not upholding the full significance of the OST Court ruling. This is a violation of the Pullman Abstention Doctrine which states:

> "The eleventh amendment to the United States Constitution provides: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State...."

Legitimate Tribal Organizations are considered "foreign entities" when incorporated as non-profit corporations under the state of South Dakota. (SDCL 47-22-1(5)) The GPTCHB is incorporated as a domestic non-profit corporation in SD under the jurisdiction of SD. (Doc. 52 P. ID# 865) The District Court violated the Pullman Abstention Doctrine by NOT upholding the decision of the Oglala Sioux Tribal Court which ruled that GPTCHB was a state entity, not a Tribal Organization and therefore could NOT be a party to an ISDEAA contract.

The District Court cited the J.L. Ward case (J.L. Ward, Inc. v. Great Plains Tribal Chairmen's Health Board CIV 11- 4008-RAL) which is a violation of 8th Circuit Rule 32.1A as the case concerned a contract dispute, not a sovereign immunity dispute, and the case did not set precedent for sovereign immunity.

Since 2018, the tribal chairmen have not been the Directors or Governors of the GPTCHB. However, the District Court erred by recognizing that the tribal chairmen are still the governing body and granting a state non-profit corporation

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the status of 'sovereign immunity.' The tribal chairmen were replaced by three (3) GPTCHB employees as shown in the 2018, 2019, and 2020 Non-profit Reports to the state of South Dakota. These documents were sent to the 8th Circuit Appellate Court under the FRCP 62.1, Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal, on March 13, 2020. (FRCP Rule 62.1 was changed to Rule 12.1.) (Doc. 52)

A state non-profit organization cannot be granted tribal 'sovereign immunity' by any state, tribal, or federal court. Sovereign immunity can only be granted by the laws of the people.

The District Court further erred as GPTCHB was originally established by Appellee IHS to act as a liaison between the Appellee and the tribes as stated in the Incorporation documents. (Doc. 18-12 P. ID# 345) Only a Tribe can charter a Tribal Organization whereupon that Tribal Organization is under the jurisdiction of the chartering Tribe. The GPTCHB was established by the IHS and is under the jurisdiction of the state of South Dakota. Therefore, the IHS cannot enter into an ISDEAA contract with an organization that is NOT a Tribal Organization or a Tribe. (25 U.S.C. § 5329 Section 1 (a)(1)) ISDEAA Contract Number: HHS-241-219-01111 is unlawful and needs to be declared null and void. (Doc. 18-9)

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2. Community Participation under ISDEAA

2. Standard of Review

The United States Congress recognized their obligation

> "to respond to the strong expression of 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." (25 U.S.C. Sect. 5302)

2. Argument

The District Court erred when it dismissed this Case regarding an ISDEAA Contract by the IHS without addressing the portions of the law providing for community participation and involvement. The Appellees are in direct violation of 25 U.S.C. § 5302 by excluding the Rapid City American Indian community from participation in actions that clearly affect their health and well being. The District Court erred when it found that the Appellants did not have a "zone of interest standing to sue for relief under the ISDEAA."

The Appellees, representing the federal contracting agency, are responsible for insuring the participation of the local American Indian community who are the "people served" at the Sioux San especially regarding any 'contracting' of the health facility. In addition, Appellant RADM Michael Weahkee, the Deputy Director for IHS, issued a "Delegation" letter on Nov. 29, 2017, to ALL of his employees which Appellants presented in Doc. 19-1 P. ID# 383 which stated:

> " Pursuant to the authorities delegated to the Director, Indian Health Service (IHS), as specified in the Reorganization Order of January 4, 1988 (52 Federal Register 47053), which elevated the IHS to a Public Health Service Agency, I hereby delegate the authority under 42 *United States Code*, Section 2001(b), with the consent of the Indian people served, to contract..."

Both Appellee Weahkee and Appellee Driving Hawk in their official capacities as Directors within the IHS, did not acquire "the consent of the Indian people served," and did not consult with the local Rapid City American Indian community or allowed participation. The number of Rapid City American Indian patient charts at Sioux San Hospital exceeds 28,000 (twenty-eight thousand) according to the former CEO, Joseph Amiotte. The Appellees failed to acquire "the consent of the Indian people served" to contract the Sioux San. The Appellees sought the consent of three (3) tribes who are not located within the Rapid City Service Unit service area which is Pennington County, South Dakota.

In addition, the Appellees also a violated the Indian Health Care Improvement Act, 25 U.S.C. Ch 18 § 1602. The Declaration of National Indian Health Policy states:

> "Congress declares that it is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians...
> **(3)** to ensure maximum Indian participation in the direction of health care services so as to render the persons administering such services and the services themselves more responsive to the needs and desires of Indian communities;..."

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This is the policy that the IHS Appellees are mandated to follow which they did not. Therefore, the Court erred when dismissing the Appellants' Complaint based on the lack of community participation as stated in federal laws.

3. Class Action

3. Standard of Review

The Federal Rule of Civil Procedure, Rule 23 (a), provides that an action requires four conditions to qualify for class treatment: (i) the class must be so numerous that joinder of all members is impracticable, (ii) there must be questions or law or fact common to the class, (iii) the claims of the representative parties must be typical of the claims of the class, and (iv) the representative parties will fairly and adequately protect the interests of the class.

3. Argument

The Distict Court erred when it dismissed the Appellants' Motion for Class Certification. FRCP Rule 23 (a) specifically lists what is required of Class Certification: numerosity, comminality, typicality, and adequacy. The Original Record contains Document 30 which specifically shows that one-hundred sixty-seven (167) community members requested participation in this case. Also in the Original Record are numerous Affidavits in Documents 25-29 which substantiates medical harm that occurred to community members, who are and continue to be harmed by this fraudulent contract. The relief requested is the cancellation of the

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fraudulent ISDEAA contract and the resumption of the management of the Sioux San by IHS employees as it was on Sept. 1, 2018. These documents clearly show that Class Certification should have been granted.

4. Standing

4. Standard of Review

The Supreme Court created a three-part test to determine whether a party has standing to sue:

1. The plaintiff must have suffered an "injury in fact," meaning that the injury is of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent;
2. There must be a causal connection between the injury and the conduct brought before the court;
3. It must be likely, rather than speculative, that a favorable decision by the court will redress the injury.

4. Argument

The District Court erred when it ruled "the plaintiffs do not have zone-of-interest standing to sue for relief under the ISDEAA."

The Appellees have stated that this case be dismissed on the grounds that the Appellants do not have standing under the ISDEAA. However, there is no provision in the ISDEAA that forbids individuals from suing under the ISDEAA.

In this Case, where individual health care is at stake, and a fraudulent contract is impairing that health care by a state non-profit corporation which is not a health management system, an individual's Constitutional Right to Life comes to the forefront thereby superceding any supposed prohibition in the ISDEAA.

The Appellants do have standing as they all have been greatly harmed by the Appellees signing the fraudulent ISDEAA contract. In addition, the Court erred as numerous people, excluding the Appellants, have standing and have also been greatly harmed as evidenced by the Affidavits in the Original Record, Documents 20-29. These detailed affidavits show the medical harm that occurred, or no medical treatment provided at the Sioux San by the state non-profit corporation. In many cases the affidavits state that the harmful action would not have occurred without the ISDEAA contract. All of these meet the requirements of 'standing' as they are injuries in fact, they show a causal connection between the injury and the conduct brought before the court, and a favorable decision by the court in many cases will redress the injury.

'Standing' also includes harm to rights, the Civil and Constitutional Rights of federal employee as cited in the Original Record. The federal employee affidavits exhibit not just the violation of rights but the losses in employment, income, and benefits. The affidavits include Doc. 20: Appellant Donna M. Gilbert, Doc. 21: Appellant Julie Mohney, Doc. 24: Michael Long, Doc. 26: Aaron K.

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Circle Bear, Ed. H. Banley, Evaline M. Murphy, Howard Herman, and Doc. 27: Lynn Pourier.

Many employees were forced to take early retirement, were released through Reduction In Force procedures, or sought employment elsewhere during the chaos created by the contracting process which started in September, 2018. The reduction in force of federal employees affected the health care of their patients as accessibility and continuity of care was greatly diminished when the exodus of IHS employees began Sept. 1, 2018.

An example of the treatment of the federal employees at the Sioux San prior to the contract being signed, and their lack of an appeal process as federal employees occurred as follows.

In 2018, Appellant Julie Mohney was a government employee working at Sioux San. The following is a summary of her Affidavit from the Original Record:

> "As a government employee, I was required to report fraud and misconduct in the federal government. When I became aware that the GPTCHB was not a legal entity to receive funding for a P.L. 93-638 contract, I contacted the federal labor union and was told that the union could not help me as they could not interfere with a P.L. 93-638 contract and a tribe's right to self-determination. The union did not listen to or understand my explanation that the tribes were not involved as they were not the governing body of GPTCHB.
>
> "Per my RIF appeal process, I filed with the Office of Special Council (MA-1903945) regarding my termination of employment, who denied my appeal and instructed me to file an appeal with the federal Merit System Protection Board (Appeal Number: 201904050). My appeals have been denied in all of the processes available to me,

> and as a consequence, my job with the federal government was terminated. It was terminated because of an ISDEAA contract with a state non-profit corporation. None of these actions would have occurred if IHS had followed proper and legal procedures.
>
> "I have been directly and greatly harmed by this action on the part of the Appelles, both IHS directors. Further I have "standing" under the "something to lose" doctrine as I lost my federal job on August 6, 2019. The court erred when it failed to acknowledge my "zone of interest" as the RIF procedure gave me an appeal process which was denied."

The Appellants and the people have all suffered 'injuries in fact' caused by the actions of the Appellees in illegally contracting the medical services of the Sioux San with a state non-profit corporation that does not meet the eligibility requirements to enter into a P.L. 93-638 contract, and does not have the credentials for hospital administration or health management systems. In the recent Rosebud Sioux Tribe v. USA Dept. of Health & Human Services et al. Case No. 3:16-cv-03038-RAL, the SD Central Division District Court ruled:

> "...the Defendants [IHS] owe the Tribe a duty to provide competent physician-led health care to the Tribe and its members."

If the Appellate Court will reverse the SD Western District Court's decision, declare the ISDEAA contract to be null and void, and remand the Sioux San back to the condition it was on Sept. 1, 2018, under the administration of the IHS, some of the injuries can be redressed and more harm and injuries can be avoided.

5. TREATY AND CONSTITUTIONAL RIGHTS

5. Standard of Review

25 CFR § 900.4 (b) Effect on existing tribal rights.

> "Nothing in these regulations shall be construed as:....Terminating, waiving, modifying, or reducing the trust responsibility of the United States to the Indian tribe(s) or individual Indians. The Secretary shall act in good faith in upholding this trust responsibility;..."

Argument

5. The District Court erred by denying individual American Indian people the right to protect their health care as a Treaty protected obligation of the U.S. Government, and also as a Consitutional Right, the Right to Life. Without health care, the Right to Life is jeoparized. Individual Indian people do have the Constitutional and Human Right to protect their health care and lives.

The "Tribes" meaning the three nearest tribes, the Oglala Sioux, the Rosebud Sioux, and the Cheyenne River Sioux Tribes DO NOT and CAN NOT serve their tribal members who do not live within the confines of their designated reservations. The Tribes are prohibited by their own Tribal constitutions which were created by the U.S. Government under the Wheeler-Howard Act on June 18, 1934. (25 U.S.C.) Therefore, their tribal members who do not live within the confines of the reservations are not allowed to vote in tribal elections, or have any voice in issues or actions of the tribal governments. Furthermore, tribal members do not carry "sovereign immunity" with them when residing off of a reservation. We must also rely solely on our American citizenship.

For the American Indian people living in Rapid City and other parts of western South Dakota, who are members of the Great Sioux Nation, not living on the reservations is not a problem as we are still living within the confines of the Great Sioux Reservation as stated in the Fort Laramie Treaty of 1868.

The Sioux San is located on federal Indian land in western South Dakota in Rapid City, not on any reservation. Article 13 of the Treaty provides for health care for the Sioux people by the U.S. Government specifically the Indian Health Service (...under the 1868 Treaty of Fort Laramie…). (Rosebud Sioux Tribe v. U.S.A. Dept. of Health and Human Services et al., 3:16-CV0-03038-RAL, Dist. Of SD Central Division, March 30, 2020)

Indeed, the Western District Court agreed with the Treaty obligation by the U.S. government when it stated:

> "Today, the federal government "declares that it is the policy of this nation, in fulfillment of its trust responsibility and legal obligations to Indians 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 policy states "Indian" not Tribe or Tribal Organization and this is important as there were no "Tribes" or "Tribal Organizations" when the Treaty was established. There were individual "Indians" and it was these individual Indians who made up the Great Sioux Nation, and who negotiated the terms of the Treaty

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which is protected by Article VI of the U.S. Constitution and the March 3rd Act of 1871.

Individual Indian people have been invoking their Treaty rights in many cases as shown in Document 19. State v. Tinno, Supreme Court of Idaho, 1972, 94 Idaho 759, 497 P.2d 1386 is a case where an individual won his right to fish based on the Fort Bridger Treaty Article 4. The point relevant to this case is not the fishing aspect but that an individual Indian can use his Treaty right.

Another case, the Supreme Court case of Herrera v. Wyoming No 17-532., May 20, 2019, regarding a hunting case in which Herrera, an individual Indian, invoked his treaty right under the Treaty with the Crows, 1868, to hunt and his treaty right was upheld by the U.S. Supreme Court. Again the point important to this case is not the hunting aspect but that an individual Indian person can invoke a Treaty right. These are two cases who exhibit that the District Court erred when it denied individual American Indian people the right to protect their health care as a Treaty protected obligation of the U.S. Government.

6. SUMMARY JUDGMENT

6. Standard of Review

FRCP 56 (a) Summary Judgment: Under Rule 56, in order to succeed in a motion for summary judgment, a movant must show 1) that there is no genuine dispute as

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to any material fact, and 2) that the movant is entitled to judgment as a matter of law.

6. Argument

The District Court erred when it did not complete the process of a Summary Judgment.

The facts that led the Appellants to request a Summary Judgment from the District Court were not disputed. The response from the Appellee was to submit a motion rather than answer the motion for Summary Judgment. Without a factual denial to the motion from the Appellees opposing the facts brought forth by the Appellants, the District Court should have found in favor of the Appellants. Instead the District Court erred by not abiding by the Local Rule 56.1 D.

> "Effect of Omission: Sanction. All material facts set forth in the movant's statement of material facts will be deemed to be admitted unless controverted by the opposing party's response to the moving party's statement of material facts."

The District Court erred when it did not follow its own Local Rules and declared the motion for a Summary Judgement as moot when the Appellees responded with a Motion rather than material facts in opposition to the Motion for Summary Judgment.

7. INJUNCTIVE RELIEF

7. Standard of Review

5 U.S.C. § 702 (1982).

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations or judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

7. Argument

The Appellants have sought Injunctive Relief with the first submission of the Complaint, seeking a Permanent Injunction to halt the contract issued by the Appellees. The harm being inflicted on the Rapid City Indian Community is of such a vast nature and includes deaths, maimings, mentally ill persons being incarcerated, and mortally ill people being deprived of needed medication. This case is about providing good health care to the entire Rapid City American Indian Community and is definitely not about disgrunteled employees. The Affidavits in the Original Record tell only a sample of the amount of harm that has already been

inflicted upon the American Indian people in Rapid City as a consequence of the illegal contract which is the responsibility of the Appellees. The Appellate Court has the duty and responsibility to correct this unlawful situation, to declare this P.L. 93-638 Contract No. HHS-241-219-01111 null and void, and order the Secretary of Health and Human Services and other authorities as needed to investigate the actions of the Appellees.

CONCLUSION

For all the reasons set forth in the preceding, the Appellants respectfully request the 8th Circuit Appellate Court not to remand this case back to the Western District Court of South Dakota but to order the following:

A. That Contract No. HHS-241-219-01111 signed by Appellee IHS Great Plains Area Director James Driving Hawk be declared null and void;

B. That the Sioux San IHS Rapid City Service Unit Health Facility be completely restored to its original operating status under the management and administration of the Indian Health Service prior to Sept. 1, 2018, providing full medical services to the Rapid City American Indian Community;

C. That all federal employees as of Sept. 1, 2018, be restored to their positions with all benefits that they held at that time, and mitigated for any losses to date;

D. That any federal employee of the Sioux San Health Facility as of Sept. 1, 2018, that chooses not to return to the Sioux San Health Facility will be mitigated for any

loss of salary or benefits they would have accrued from the date of their release to the date of this Order;

E. That any patient whose medical conditions were not adequately treated since Sept. 1, 2018, and/or who received bills for medical treatment referred by medical personnel of the Sioux San Health Facility or the Oyate Health Center, shall have their medical conditions mitigated and their expenses paid by the Indian Health Service.

Dated April 15, 2020.

Respectfully submitted by:

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