**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**GILA RIVER INDIAN COMMUNITY**, a federally-recognized Indian tribe,
525 West Gu u Ki
Sacaton, Arizona 85247

and

**GILA RIVER HEALTH CARE CORPORATION,** a wholly-owned and subordinate tribal entity of the Gila River Indian Community,
483 West Seed Farm Road
Sacaton, AZ 85147

**Plaintiffs,**

**v.**

**XAVIER BECERRA**, in his official capacity as Secretary, U.S. Department of Health & Human Services,
U.S. Department of Health & Human Services
200 Independence Ave, S.W.
Washington, DC 20201

**ELIZABETH A. FOWLER**,
in her official capacity as Acting Director, Indian Health Service,
Indian Health Service
5600 Fishers Lane
Rockville, MD 20857

**and,**

**UNITED STATES OF AMERICA,**
c/o Attorney General of the United States Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530-0001

**Defendants.**

**CASE NUMBER** _____

# COMPLAINT

Plaintiffs Gila River Indian Community ("the Community") and Gila River Health Care Corporation ("GRHC") (collectively "the Tribal Plaintiffs"), for their Complaint against the Defendants named above, allege as follows:

1. This is a suit against the United States for violation of the Indian Self-Determination and Education Assistance Act ("ISDEAA") Compact and Funding Agreements by the Indian Health Service ("IHS"), an agency of the U.S. Department of Health and Human Services ("HHS"). The Tribal Plaintiffs seek money damages under the Contract Disputes Act ("CDA"), 41 U.S.C. § 7101 *et seq*., based on Defendants' interference with the funding for Community-member veterans in violation of the Tribal Plaintiffs' contractual and statutory rights. Defendants' wrongful conduct interfered with the Tribal Plaintiffs' performance of Compact obligations and threatened the Tribal Plaintiffs' ability to provide the highest level of healthcare to the Community's members.

**JURISDICTION AND VENUE**

2. This action arises under agreements between the United States and the Community for operation of Indian health programs carried out pursuant to the ISDEAA. This Court has subject matter jurisdiction under the ISDEAA, which provides for original jurisdiction in United States district courts, concurrent with the Court of Federal Claims, over civil actions for money damages arising under ISDEAA contracts. 25 U.S.C. § 5331(a).
3. In a letter dated and sent September 25, 2019 ("the 2019 CDA Letter"), the Tribal Plaintiffs requested an IHS Contracting Officer's decision on the Tribal Plaintiffs' claims set forth herein. A true and accurate copy of the 2019 CDA Letter is attached hereto as Exhibit A.
4. In a letter dated May 22, 2020, IHS denied the Tribal Plaintiffs' claims (the "2020 IHS Letter"). The letter expressed the "final decision" of IHS, and confirmed the Tribal Plaintiffs' right to seek judicial review of the decision in this Court. A true and correct copy of the 2020 IHS Letter is attached hereto as Exhibit B.

5. This Court has jurisdiction to review IHS's decisions with respect to the Tribal Plaintiffs' claims under the CDA and the ISDEAA. 41 U.S.C. § 7104(b); 25 U.S.C. §§ 5331(a), 5331(d).

6. Venue is proper in this Court because Defendant Xavier Becerra, in his official capacity as Secretary of the U.S. Department of Health and Human Services, is located in the District of Columbia.

**PARTIES**

7. Plaintiff Gila River Indian Community is a federally-recognized Indian tribe with its headquarters in Sacaton, Arizona. The Community occupies the Gila River Indian Reservation on lands located in Pinal and Maricopa Counties in Arizona. The Community is home to members of both the Akimel O'odham (Pima) and the Pee-Posh (Maricopa) tribes.

8. The Community is an "Indian tribe" eligible to contract and compact with IHS under the ISDEAA. *See* 25 U.S.C. § 5304(e). The Community is party to a Compact of Self Governance with the United States, effective October 1, 2002 (the "Compact," No. 62G030075), and associated Funding Agreements authorized by Title V of the ISDEAA, 25 U.S.C. § 5381 *et seq*., in force from that date forward, to provide health care services to eligible Indians and other eligible beneficiaries. Most recently, the Community and the United States Department of Health and Human Services entered into a multi-year Funding Agreement for fiscal years 2018 through 2022, dated March 2, 2018.

9. Plaintiff Gila River Health Care Corporation is a wholly-owned and subordinate tribal entity of the Community, and is responsible, as a tribal organization, for providing health care services pursuant to ISDEAA and the Community's Compact and Funding Agreements. The

Community provides a portion of the compacted health care services directly, *i.e.*, not through GRHC.

10. Defendant Xavier Becerra, the Secretary of HHS ("Secretary"), has overall responsibility for carrying out all the functions, responsibilities, authorities, and duties of the U.S. Department of Health and Human Services, including oversight of IHS, an agency within the Department. He is sued in his official capacity.

11. Defendant Elizabeth A. Fowler is the Acting Director of IHS ("the Director"), the agency responsible for implementing the ISDEAA and other health laws benefiting American Indians and Alaska Natives, on behalf of the United States. 25 U.S.C. § 1661(c)(3). She is sued in her official capacity.

12. Defendant the United States of America is a party to the Community's ISDEAA agreements, which include the Compact and the Funding Agreements between the Community and the United States of America in force from the date of the Compact to present. The United States acts through both IHS and the Department of Veterans Affairs ("VA") with regard to the matters alleged in this Complaint.

## INTRODUCTION AND STATEMENT OF THE CASE

13. This case will decide whether federal agencies can side-step tribal consultation and federal trust responsibilities by entering into side-deals that prioritize individual agency budgets at the expense of tribal reimbursement and funding rights.

14. In this case, IHS knew that the Tribal Plaintiffs and other tribes were entitled to broad reimbursement rights for native-veteran care. IHS attorneys documented these rights and mapped out what IHS needed to do in order to protect them. Instead, IHS met behind closed

doors where tribal rights were bargained away in order to further an inter-agency agreement putting agency interests ahead of tribal health care.

15. These actions by Defendants violated express contractual and statutory duties to consult with tribes, to work toward improving federal funding for tribal health care, and to construe federal statutes in favor of Indian tribes.

16. Through this action, the Tribal Plaintiffs seek to ensure that IHS and other federal agencies address tribal health funding and Native-veteran care on a government-to-government basis with the transparency, duties and trust responsibilities to which tribes are entitled.

## FACTUAL ALLEGATIONS

### *VA Refuses to Comply with 25 U.S.C. § 1645(c), and IHS is Complicit in VA's Unlawful Conduct*

17. The United States (the "Government"), through VA, has a statutory obligation to reimburse IHS and tribal health programs for care provided to veterans. 25 U.S.C. § 1645(c).

18. VA opposed enactment of this law and has resisted complying with it. Although § 1645(c) took effect in 2010, VA did not begin reimbursing IHS until December 2012, and the Government has not reimbursed the Community for services the Tribal Plaintiffs provided to veterans over the past decade.

19. IHS has enabled VA's unlawful conduct through IHS's dealings with VA and the Community. When § 1645(c) took effect, IHS should have immediately sought reimbursement from VA for itself and assisted self-governance tribes like the Community in doing the same. Instead, IHS accepted VA's decision to withhold all reimbursements pending the development of what are referred to as "template" reimbursement agreements. IHS negotiated with VA on the terms of reimbursement under § 1645(c), without appropriately

consulting with the Community and other tribal governments regarding the interpretation of § 1645(c), the scope of reimbursement it requires, or the content of the template agreements.

20. On information and belief, VA sought to include provisions in its template agreements specifically designed to limit tribal reimbursement rights guaranteed by the statute. Upon information and belief, IHS initially opposed such limitations, and even submitted the dispute over interpretation of § 1645(c) to the Department of Justice ("DOJ"), but IHS capitulated to VA's reimbursement terms before receiving guidance from DOJ.

21. By capitulating to VA's improper interpretation of § 1645(c), IHS compromised its own rights and budget. Worse, IHS endorsed template agreements VA sought to impose on tribes in violation of their statutory reimbursement rights.

22. On information and belief, IHS was aware that the VA position on reimbursements violated tribal funding and veteran reimbursement rights.

23. On information and belief, however, IHS placed the interests of competing agency budgets ahead of tribal funding and reimbursement rights.

24. IHS compromised these rights without Community input or consultation required by Executive Order 13175.

25. IHS's complicity in VA's wrongful conduct directly affected the Community's ability to vindicate its rights under § 1645(c). Once IHS had already agreed to VA's "national template agreement," VA insisted that the Community enter into the same compromise IHS had endorsed. The template agreement included terms that would improperly limit VA's obligations under § 1645(c), including, *inter alia*, terms providing that: (a) reimbursement would be limited to prospective services and would not be retroactive to the statute's effective date; (b) reimbursement would be limited to direct care services only and would not

include Purchased/Referred Care ("PRC") services; (c) reimbursement would not include non-Native veterans receiving care from the Tribal Plaintiffs; and (d) the Tribal Plaintiffs would be required to submit disputes with VA for resolution by VA's own contracting officer.

26. Moreover, IHS made matters worse by actively promoting the template agreement as a "good deal" for tribes, while keeping tribes in the dark about what rights IHS initially sought, what rights were being waived, and why those rights were waived.

27. The IHS public relations campaign never mentioned, for example, that a primary goal of the template agreement was to reduce reimbursement rights to "direct care" services only, despite the fact that the statute itself contained no such limitation. IHS never mentioned that the template structure glossed over years of statutory reimbursement rights for care provided before the template was put in force. Nor did IHS efforts to promote the VA template alert tribes to the real differences between IHS and VA on how § 1645(c) should be construed. For example, IHS never mentioned its clear disagreement with VA over whether "shall be reimbursed" in Section 1645(c) could be read as "permissive."

28. The Community disagreed with the limitations VA sought to impose through its template agreement. In fact, the Community made many of the very same arguments that IHS legal counsel had made before IHS capitulated to VA's demands. The Community pointed out that nothing in §1645(c) limited reimbursements to "direct care" services as provided in the template, and that PRC should be included as well. The Community also argued that "shall be reimbursed" as used in § 1645 cannot reasonably be read as permissive, or to require reimbursement only if agreed to by VA.

29. VA refused to negotiate, stating it had already resolved the scope of reimbursements under § 1645(c) in its negotiations with IHS, and that the agreement reached with IHS would define the Community's substantive rights.

30. The Community then sought to do what IHS should have done in the first place. The Community attempted to secure confirmation on how Section 1645(c) should be construed. The Community sought a federal court declaration that "shall be reimbursed" is not permissive, and that Section 1645(c) was not limited to direct service care.

31. VA was able to prevent the Community from receiving a review on the merits, however, arguing that these issues must be heard through an administrative claim process that VA itself estimated would take years to complete.

32. Given the urgent funding needs that tribal health programs faced, and little help from the agencies at hand, efforts turned once again to Congress to clarify what should have already been clear to both VA and IHS.

33. On January 5, 2021, Congress amended § 1645(c) to "clarify the requirement of the Department of Veterans Affairs and the Department of Defense to reimburse the Indian Health Service" for health services within the scope of the statute. Proper and Reimbursed Care for Native Veterans Act, 116 P.L. 311 (2021). As amended, the statute provides that IHS, or the relevant tribe or tribal organization, "shall be reimbursed by [VA] where services are provided through [IHS], an Indian tribe, or a tribal organization to beneficiaries eligible for services from [VA], notwithstanding any other provision of law, *regardless of whether such services are provided directly by [IHS], an Indian tribe, or tribal organization, through purchased/referred care, or through a contract for travel described in section 1621l(b) of this title.*" 25 U.S.C. § 1645(c) (emphasis added).

34. The amendment "to clarify" the scope of reimbursement under § 1645(c) confirms the improper limitations VA sought to impose on the Tribal Plaintiffs, with the complicity of IHS, are and always have been contrary to the meaning of the statute and the obligations it imposes on the Government.

***IHS Breached its Compact Duties to the Tribal Plaintiffs by Agreeing to VA's Improper Interpretation of § 1645(c) and Endorsing Template Agreements that Compromise the Rights of the Community and Other Self-Governance Tribes***

35. IHS owes certain duties to the Tribal Plaintiffs pursuant to the Compact and applicable law. IHS breached those duties by entering into the above-referenced reimbursement agreements with VA, and by endorsing VA's template agreements for tribal providers.

36. The purpose of the Compact is to enable the Tribal Plaintiffs "to provide health programs, functions, services and activities according to the Community's priorities; and to enhance the effectiveness and long-term financial stability of the Community and its health programs." Compact Art. I, Section 2(b). IHS also committed through the Compact to "allow[ing] the Community to exercise meaningful authority to plan, conduct, and administer programs, services, functions and activities to meet the health care needs of eligible individuals in the Community's service area." *Id.* Section 2(c). IHS violated these duties by taking actions that undermined, rather than enabled, the Tribal Plaintiffs' ability to provide and administer healthcare programs according to its own priorities.

37. The Secretary of HHS, through the Compact, "pledge[d] that HHS will conduct all relations with the Community on a government-to-government basis," and the Compact incorporates Executive Order No. 13175 on Consultation and Coordination with Indian Tribal Governments. Compact Art. I, Section 2(c). The Secretary is further required by § 1645(a) to consult with Indian tribes that will be significantly affected by an agreement with VA. The

Secretary did not discharge these obligations before entering into the agreement with VA and endorsing VA's template agreements.

38. The Compact provides that "[u]nless expressly agreed to in this Compact, or a funding agreement incorporated herein, the Community is not subject to any agency circular, policy, manual, guidance or rule adopted by the IHS." Compact Art. II, Section 9(a). By endorsing VA's template agreements, IHS adopted guidance and/or policy in regard to § 1645(c), which have improperly limited the Tribal Plaintiffs' ability to obtain reimbursement.

39. IHS is required by the Compact to "interpret all Federal laws, executive orders, regulations, and [the] Compact in a manner that effectuates and facilitates the purposes of [the] Compact and the achievement of the Community's health goals and objectives." Compact Art. V, Section 15. IHS violated this duty by agreeing to and endorsing an interpretation of § 1645(c) that is contrary to the meaning of the statute—as IHS itself originally recognized—and that frustrates the purpose of the Compact and wrongfully deprives the Tribal Plaintiffs of reimbursement to which it is entitled by law.

40. IHS committed in the Compact "to advocate for increases in the IHS budget to further the ability of the Community to provide the full range of services that are the responsibility and obligation of the United States to make available to American Indian and Alaska Native people and meet the goals of the Indian Healthcare Improvement Act." Compact Art. V, Section 16. IHS violated this obligation and commitment by capitulating to VA's provision of less than the full reimbursement required by law, thereby *decreasing* IHS's own funding. Further, by endorsing VA's template agreements, IHS wrongfully impeded the Tribal Plaintiffs' ability to access a critical source of supplemental funding from VA.

41. IHS owes the Tribal Plaintiffs a duty of good faith and fair dealing under the Compact, which is augmented by the federal trust responsibility owed to the Community and other Indian tribes. The Compact itself confirms the Compact "shall be liberally construed to achieve its purposes," which include furtherance of national Indian health policies established by Title 25 of the U.S. Code and the ISDEAA. IHS breached these duties by agreeing to VA's wrongful interpretation of § 1645(c) and its template agreements.

42. Through its breaches of express and implied duties under the Compact and other applicable law, IHS wrongfully contributed to the deprivation of critical healthcare funding to which the Tribal Plaintiffs are entitled, and wrongfully interfered with the Tribal Plaintiffs' ability and obligation as federal contractors to operate the Compact programs and provide healthcare to Community members and other eligible patients.

43. As a direct result of IHS's wrongful conduct, the Tribal Plaintiffs were deprived of significant reimbursements that should have been paid under § 1645(c) starting with the passage of the Affordable Care Act in 2010. The total amount of the Tribal Plaintiffs' lost reimbursements will be determined at trial. However, per the 2019 CDA Letter, the Tribal Plaintiffs are owed reimbursements for fiscal years 2013-2018 amounting to at least $2,581,104.62.

## CAUSES OF ACTION

### COUNT I – BREACH OF CONTRACT

44. The Tribal Plaintiffs incorporate all prior allegations by reference as if fully set forth herein.

45. The Compact and Funding Agreements impose upon IHS express and implied duties to advance the fundamental purposes of the Compact, provide and support funding of the Tribal Plaintiffs' healthcare programs as required by law, and not interfere with the Tribal

Plaintiffs' execution of those programs and ability to obtain funding to which the Tribal Plaintiffs are legally entitled.

46. IHS breached its duties under the Compact, Funding Agreements, and applicable law as detailed above.

47. As a direct result of IHS's breaches, the Tribal Plaintiffs have been wrongfully deprived of reimbursements in an amount to be determined at trial, but believed to be in excess of $2,581,104.62.

48. The Tribal Plaintiffs therefore seek an award of damages under the ISDEAA, 25 U.S.C. § 5331(a) & (d), and the Contract Disputes Act, 41 U.S.C. § 7101 *et seq*.

**PRAYER FOR RELIEF**

49. Plaintiffs Gila River Indian Community and Gila River Health Care Corporation respectfully request the Court grant relief as follows:

(a) Awarding Plaintiffs damages in an amount to be determined at trial;

(b) Ordering payment of interest on these claims pursuant to the Contract Disputes Act, 41 U.S.C. § 7109, and the Prompt Payment Act, 31 U.S.C. § 3901;

(c) Awarding Plaintiffs their costs and disbursements herein, including reasonable attorneys' fees; and

(d) Granting Plaintiffs such other and further relief as the Court deems appropriate.

Dated: May 21, 2021

Respectfully submitted,

/s/ Vernle Charles Durocher Jr.
Vernle Charles Durocher Jr.MI0006(SBN 0208966)
durocher.skip@dorsey.com
Dorsey & Whitney LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402
Telephone: (612) 340-2600
Fax: (612) 340-2868

Robert R. Yoder (AZ0021)
Yoder & Langford, P.C.
4835 East Cactus Road, Suite 260
Scottsdale, Arizona 85254
Telephone: (602) 808-9578

Attorneys for Plaintiffs Gila River Indian Community and Gila River Health Care Corporation