UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GILA RIVER INDIAN COMMUNITY, *et al.*, Plaintiffs, v. XAVIER BECERRA, Secretary, U.S. Department of Health and Human Services, *et al.*, Defendants.	Civil Action No. 21-1401 (TSC)

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs have failed to demonstrate subject matter jurisdiction because VA benefits determinations underlie the present claim, the claim is not ripe, and Plaintiffs lack standing. Plaintiffs have also failed to state a claim, because separately or collectively, Plaintiffs threadbare allegations regarding the Complaint fail to raise a right to relief above the speculative level. The Court should therefore dismiss the Plaintiffs' Complaint under Federal Rules of Civil Procedure 12(b)(1) and (6).

ARGUMENT

I. The Court Lacks Subject Matter Jurisdiction Because VA Benefits Determinations Are Required To Resolve This Case

The predicate issue in this case is a dispute between Plaintiffs and the VA concerning benefits determinations, which cannot be decided by this Court. Plaintiffs do not refute that their dispute with the VA is subject to the Veterans' Judicial Review Act's ("VJRA's") jurisdictional bar. Instead, in their Opposition, Plaintiffs attempt to separate that underlying dispute from the present claim.

Plaintiffs assert that their claim can be adjudicated without reviewing any issue "necessary to" a VA benefits decision, erroneously relying upon the holding in *Thomas v. Principi*, 394 F.3d 970 (D.C. Cir. 2005). In *Thomas*, a pro se litigant raised claims under the Federal Tort Claims Act and the court considered whether those claims were subject to the VJRA's jurisdictional bar. The Court noted that complaints prepared by pro se litigants are held to a "less stringent standard" than those prepared by lawyers. *Id*. at 974. The Court then found that at least some of the action could proceed, "[b]ecause none of these claims alleges that the VA failed to pay for treatment (or even to provide for treatment), [and therefore,] they raise no 'questions of law [or] fact necessary to a decision by the Secretary under a law that affects the provision of benefits.'" *Id.* (quoting 38 U.S.C.

§ 511). It further clarified that, "[p]utting the issue in *Price's* terms, no denial of benefits 'underlies' Thomas's failure-to-inform allegations." *Id.* at 974-975 (quoting *United States. v. Price*, 228 F.3d 420, 421 (D.C. Cir. 2000)).

Unlike *Thomas,* Plaintiffs are not pro se litigants and they have repeatedly alleged that the VA failed to reimburse for treatment under 25 U.S.C. § 1645(c). *See, e.g.*, Compl. ¶¶ 17-19, 34; Compl. Ex. A, ECF No. 1-1, at 3; Pl's. Opp. at 10. These specific allegations "plainly" involve questions of law necessary to a decision by the VA Secretary, and the relief sought would "clearly 'affect[ ] the provision of benefits,'" as already determined by the Ninth Circuit Court of Appeals. *See Gila River Indian Cmty. v. Dep't of Veterans Affairs*, 899 F.3d 1076, 1079 (9th Cir. 2018). Furthermore, the alleged denial of VA benefits clearly "underlies" the Plaintiffs' claim in the present case, making the present case readily distinguishable from *Thomas*.

In the present case, Plaintiffs repeatedly allege that the VA failed to pay for treatment under 25 U.S.C. § 1645(c). Plaintiffs have also repeatedly attempted to draw some type of connection between their dispute with the VA and their allegations against the Defendants. Starting with their Contract Disputes Act ("CDA") claim letter, Plaintiffs alleged that "[t]he VA [r]refuses to [c]omply with § 1645(c), and IHS is [c]omplicit in the VA's [u]unlawful [c]onduct." Compl. Ex. A, ECF No. 1-1, at 3. Plaintiffs then allege, "[i]t is impossible to overstate the critical role that IHS played in enabling the Government's violation of the plain terms of § 1645(c)." Compl. Ex. A at 6. Plaintiffs further allege that the "IHS also has the ability to seek an interpretation of § 1645(c) that would be binding on the VA, by resuming the proceedings before DOJ that it abandoned." Compl. Ex. A at 6. Under the demand for relief, Plaintiffs sought the "reimbursements that should have been paid under § 1645(c) in fiscal years 2013-2018." Compl. Ex. A at 5. Plaintiffs also sought a list of actions, such as "requesting determination by the

Department of Justice on the meaning of § 1645(c)." Compl. Ex. A at 5. The Complaint continues to focus on the VA's conduct and the Plaintiffs' attempts to place the Defendants in the middle of their dispute with the VA. More specifically, Plaintiffs ask this Court to assume that the VA acted "unlawfully" and that the Defendants have "enabled" or were "complicit" in the VA's conduct. *See, e.g.* Compl. ¶ 19 ("IHS has enabled VA's unlawful conduct through IHS' dealings with the VA and the Community."); Compl. ¶ 25 ("IHS's complicity in VA's wrongful conduct directly affected the Community's ability to vindicate its rights under § 1645(c)."). In an attempt to survive the Motion to Dismiss, Plaintiffs now allege that their dispute with the VA is completely independent from the present claim. However, like their CDA letter and Complaint, Plaintiffs' Opposition continues to rely on the allegation that the VA failed to pay for treatment under 25 U.S.C. § 1645(c). *See, e.g.*, Pl's. Opp. at 10.

Plaintiffs contradict their own allegations and arguments by attempting to separate the present claim from their underlying dispute with the VA. There is no legal or factual basis for Plaintiffs' assertions regarding breach of the Compact in this case, but even if there were, the alleged conduct and damages are inextricably bound to the underlying dispute between Plaintiffs and the VA. None of the purported damages were promised under the Compact. Plaintiffs have not even alleged this or pointed to any language that would make the IHS responsible for reimbursements under 25 U.S.C. § 1645(c). The only damages asserted are the damages allegedly owed by the VA under 25 U.S.C. § 1645(c).

As stated in the Motion to Dismiss, the IHS appropriation is not available to pay for the amounts allegedly owed by the VA under § 1645(c). S*ee Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 418 (D.D.C. 2008). Furthermore, Plaintiffs are barred from seeking the same recovery twice, even if the recovery is based upon different legal theories. *See Hill v.*

Assocs. for Renewal in Educ., Inc., 897 F.3d 232, 241 (D.C. Cir. 2018). Plaintiffs should have resolved the underlying dispute with the VA first and if they had, there would be no damages to allege in the present case.

The VA is responsible for any payments owed under 25 U.S.C. § 1645(c). Plaintiffs do not dispute this, and Plaintiffs do not directly argue that this Court has jurisdiction over their underlying dispute with the VA. Nevertheless, in an attempt to circumvent the VJRA's jurisdictional bar, Plaintiffs argue that the federal government as a whole acts through the VA. Compl. ¶ 12. Plaintiffs then try to shift responsibility by referring to the VA as the "government" in their arguments. *See, e.g.*, Compl. ¶ 18 ("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."); Pl's. Opp. at 10, citing Compl. ¶ 18. Irrespective of their overgeneralizations, Plaintiffs' claim requires adjudication of issues that cannot be resolved in the present case. As further explained in the Motion to Dismiss, collateral estoppel applies to the predicate issue, which is a VA benefits determination. Plaintiffs do not refute this, focusing their arguments instead on the present claim. The predicate issue is identical to the issue decided by the Ninth Circuit, so that predicate issue cannot be resolved in this case.

Plaintiffs' dispute with the VA is a predicate issue that has direct bearing on Plaintiffs' claim in the present case. If Plaintiffs lose their claims against the VA, there would be no damages, and if Plaintiffs choose not to pursue a resolution of their disagreement with the VA, only Plaintiffs are to blame for any resulting damages. Similarly, if Plaintiffs fail to pursue a remedy against the VA or lose their dispute, the Defendants could not have "impeded," "hindered," or "frustrated Plaintiffs' reasonable expectations" of reimbursement from the VA. *See* Pl's. Opp. at 12, 20, 23,

24. The only way to tell if Plaintiffs had "reasonable expectations" in the first place is to resolve the VA benefits determinations, which cannot be resolved in this Court.

As the D.C. Circuit held in *Price*, the VJRA's jurisdictional bar extends to both direct and indirect attempts to seek "medical expense reimbursement," as well as matters where a VA determination is a "necessary predicate" question to a secondary cause of action. *See Price*, 228 F.3d at 421-422. The present matter is a direct and indirect attempt to seek reimbursement for medical care under § 1645(c). Plaintiffs argue that the IHS is indirectly responsible, while alleging that the government as a whole is directly responsible. The present matter also relies upon assumptions about VA benefits determinations, meaning that those VA benefits determinations are a necessary predicate. For these reasons, the VJRA's jurisdictional bar extends to the present case and this Court must dismiss the Complaint for lack of jurisdiction.

II. The Court Lacks Subject Matter Jurisdiction Because Plaintiffs' Claim Is Not Ripe.

Plaintiffs acknowledge that they "have a disagreement with VA," which is not before this Court. Pl's. Opp. at 7. Plaintiffs also acknowledge that VA "is not even a party to this case." Pl's. Opp. at 8. However, Plaintiffs' claim relies upon allegations against the VA, and Plaintiffs themselves continue to focus on the VA's benefits determinations, while asking this Court to treat those matters as independent.

In their CDA letter and Complaint, Plaintiffs seek to shift various responsibilities to the Defendants. Plaintiffs seek to shift their own responsibilities, since they failed to achieve an agreement with the VA or even seek a resolution of their dispute through the appropriate channels. Plaintiffs also seek to shift the VA's responsibilities by demanding that the Defendants pay reimbursements allegedly owed by the VA. In their Opposition, Plaintiffs continue to blame the Defendants for the VA's alleged wrongdoings and they have continued to cite to portions of their Complaint asserting the same. *See, e.g.*, Pl's. Opp. at 10-11, citing Compl. ¶¶ 18, 19. Moreover,

they have continued to assert the statute at issue in their dispute with the VA, 25 U.S.C. § 1645(c). Pl's. Opp. at 12.

Plaintiffs offer no plausible explanation of how the present claim could be so intertwined with and yet independent of their dispute with the VA. Plaintiffs attempt to argue that the matters involve separate legal theories, but Plaintiffs themselves cannot keep their disputes straight, stating that the present claim is against the VA. *See, e.g.*, Pl's. Opp. at 17 ("Here, in contrast, Plaintiffs' claim is asserted against VA, and it is not that VA illegally refused to pay a specific amount of benefits, but rather that IHS's conduct breached Defendants' Compact obligations."). Plaintiffs also ignore the importance of the VA benefits determinations in resolving both their dispute with the VA and the present claim.

Contrary to Plaintiffs' bare assertions, the VA's benefits determinations are the "further agency action" that is necessary to a resolution of the present claim. *See* Pl's. Opp. at 27. The VA benefits determinations could easily refute Plaintiffs' assertions and undeniably change the facts in the present case. The VA has not had an opportunity to reach a final decision in those matters, because Plaintiffs have apparently chosen not to pursue resolution of their dispute with the VA. Plaintiffs have not even alleged that they initiated resolution through the VA's administrative processes.

This matter is inextricably bound to the underlying dispute between Plaintiffs and the VA. Plaintiffs' failure to properly pursue resolution of their dispute does not shift any responsibility to the Defendants. Nor does it establish a basis for Plaintiffs to avoid the necessary administrative determinations by the VA. Instead, due to Plaintiffs' own failure to seek the necessary VA benefits determinations or otherwise pursue a resolution with the VA, the present claim is unripe and must be dismissed for lack of subject matter jurisdiction.

III. Plaintiffs Lack Standing And This Court Therefore Lacks Jurisdiction Because The Alleged Damages Are Not Fairly Traceable To The Claim.

Any purported harm to Plaintiffs would necessarily flow from the VA's alleged failure to reimburse the Plaintiffs, or from the Plaintiffs' own failure to pursue a remedy through the VA's administrative processes. Plaintiffs try to argue that this matter is independent of their dispute with the VA, but their arguments continually point back to their underlying dispute with the VA. On the issue of standing in particular, Plaintiffs assert that they have established causation between the IHS's alleged conduct and the "reimbursements" claimed, but those "reimbursements" are the VA benefits determinations at issue under 25 U.S.C. § 1645(c). *See, e.g.*, Pl's. Opp. at 30; Compl. 17-18, 25, 29, 33-34, 43. The present matter cannot be both "independent" of and "fairly traceable" to the Plaintiffs' dispute with the VA. *See* Pl's. Opp. at 18, 30.

Throughout their Opposition, Plaintiffs argue in contradictions and repeatedly undermine their own assertions in an attempt to conceal their true objective of litigating an issue that is not properly before this Court. For example, Plaintiffs are seeking the same reimbursements allegedly owed by the VA, but "Plaintiffs do not claim Defendants are responsible for VA's conduct under the Compact." Pl's. Opp. at 33. Plaintiffs have undoubtedly sought to place the Defendants in the middle of their dispute with the VA through both their CDA letter and Complaint. Now, in their Opposition, Plaintiffs argue that this matter is completely independent of that same dispute.

Plaintiffs' attempts to separate the present claim from their underlying dispute with the VA are nonsensical. Even if they are accepted though, their assertions further demonstrate that the damages alleged are not "fairly traceable" to the present claim. Assuming the VA's conduct was entirely lawful or even just irrelevant, as Plaintiffs would like this Court to believe, no "reimbursements" are actually owed under § 1645(c). Furthermore, if the VA's conduct was

lawful or irrelevant, the IHS could not have "hindered," "impeded," or "disadvantaged Plaintiffs in negotiating with VA." Pl's. Opp. at 12, 20, 33.

Plaintiffs have plainly failed to establish any plausible connection between the alleged damages and the present claim. Plaintiffs' remedy, if any, is to pursue relief through the VA's administrative process. Plaintiffs have long failed to take the necessary steps to resolve their dispute with the VA. More than three years have passed since the Ninth Circuit affirmed the dismissal of Plaintiffs' complaint against the VA, for failure to follow the jurisdictionally exclusive process under the VJRA. *See Gila River Indian Cmty. v. Dep't of Veterans Affairs*, 899 F.3d 1076 (9th Cir. 2018). Plaintiffs do not allege that they have taken any steps under that jurisdictionally exclusive process, meaning that all of the alleged harm in this matter flows directly from Plaintiffs' inaction. Since Plaintiffs only have themselves to blame at this point and since they have failed to plausibly allege causation, their Complaint must be dismissed.

IV. Even If The Claim Could Be Decided Before The VA Benefits Determination, Plaintiffs Have Not Plausibly Alleged A Breach of Contract Claim.

As discussed above, Plaintiffs' claim in this matter is necessarily predicated upon their allegation that the VA failed to pay for treatment. This is a benefits determination that must be resolved first and it cannot be resolved by this Court. However, this Court does not need to address the VA benefits determinations in order to dismiss Plaintiffs' Complaint for failure to state a claim.

To survive a Rule 12(b)(6) motion to dismiss, Plaintiffs must "provide the 'grounds'" of their "entitle[ment] to relief" and this "requires more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The courts "are not bound to accept as true a legal conclusion couched as a factual allegation" when considering a motion to dismiss. *Id*. (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Rather, the "[f]actual allegations must be enough

to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Id*.

Defendants strongly disagree with Plaintiffs' recitation of "facts," which are largely Plaintiffs' bare legal conclusions and mischaracterizations of events surrounding the IHS-VA reimbursement agreement. Even if this Court accepts the assertions as true when considering the Motion to Dismiss, Plaintiffs' contentions would still be insufficient to support any legal claim for relief in the present case.

A. Plaintiffs Have Not Plausibly Alleged Breach of Any Specific Duties Under The Compact.

Plaintiffs' threadbare allegations in the Complaint regarding the Compact "do not raise a right of relief above the speculative level." *Twombly*, 550 U.S. at 555. The Complaint has mischaracterized the Compact provisions and Plaintiffs have failed to establish how the IHS's alleged breaches—even if proven—would result in a deprivation of reimbursements from a separate federal agency. Therefore, Plaintiffs' pleadings do not "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

1. Article I of the Compact Sets Forth Mere Recitals

An Indian Self-Determination and Education Assistance Act ("ISDEAA") compact "set[s] forth the general terms of the government-to-government relationship between the Indian tribe and [IHS.]" 25 U.S.C. § 5384(b); *compare with* 25 U.S.C. § 5385(d) (describing the attached Funding Agreement, which has more specific statutory terms, including "the responsibilities of the Secretary"). Plaintiffs first refer to several provisions in the Compact, which they refer to as "overarching" provisions or terms. Pl's. Opp. at 19-20. Plaintiffs do not otherwise argue that those provisions create any specific obligation whose breach led to their current alleged damages.

Instead, Plaintiffs seem to believe that "overarching" provisions should alter normal principles of contract interpretation, in some undefined way. They do not. Promises in ISDEAA agreements "should be treated as an ordinary contract promise." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 189 (2012). The "special relationship" between the United States and Indian tribes, including any contract language memorializing that relationship, does not alter a court's treatment of normal Contract Disputes Act (CDA) claims. *See Menominee Indian Tribe of Wisc. v. United States*, 577 U.S. 250, 258 (2016) (addressing the CDA's statutory exhaustion requirement in the ISDEAA context).

Moreover, several of the "overarching provisions" are found in Article I of the Compact, which is entitled "Authority and Purpose" and is separate from, for example, Article II ("Terms, Provisions, and Conditions"). In context, Article I is more appropriately viewed as containing preliminary recitals, which "explain[] the reasons for entering into [the Compact]" and "the background of the transaction" and "show[] the existence of particular facts." Black's Law Dictionary (11th ed. 2019) (defining "recitals" and noting that traditionally recitals are introduced by "whereas," but "can simply state the background without this formality"). These recitals do not form the type of obligation or duty required to prevail on a breach of contract claim, as "courts do not interpret recitals as binding contractual obligations unless they are 'stated in the form of an undertaking.'" *Rocky Mountain Helium, LLC v. United States*, 145 Fed. Cl. 662, 666 n. 6 (Fed. Cl. 2019) (quoting *Chattler v. United States*, 632 F.3d 1324, 1330 (Fed. Cir. 2011)). Therefore, the Article I provisions cited by Plaintiffs must be considered in that light. *See Kogod v. Stanley Co. of America*, 186 F.2d 763, 765 (D.C. Cir. 1950) (finding a conflicting recital to be "immaterial" because "[i]n making contracts, people pay more attention to the promises they actually give and take than to any attempts at summarizing or describing them").

2. Article I, § 2(c)

Plaintiffs place considerable reliance on Defendants' alleged violation of Executive Order ("EO") 13,175. However, Plaintiffs ignore the distinction between incorporating *a reference* to the EO and incorporating the EO *by reference*. Even if the EO were incorporated by reference, though, it would be incorporated only for the narrow purpose of reiterating the government-to-government relationship and it would be incorporated in full, meaning section 10 of the EO would still prevent it from creating a judicially enforceable right. Moreover, Plaintiffs fail to show how the EO would even be relevant here.

Plaintiffs attempt to shoehorn arguments about the EO's requirements into their CDA case, by claiming that a reference to the EO in the Compact creates a contractual obligation. The provision upon which Plaintiffs rely for this proposition is also a recital located in Article I of the Compact, which states in relevant part that: "consistent with the President's November 6, 2000, Executive Order No. 13175 on Consultation and Coordination with Indian Tribal Governments, the Secretary hereby pledges that the IHS will conduct all relations with the Community on a government-to-government basis." Pl.'s Opp. at 42. However, a mere reference to the EO in Plaintiffs' Compact does not create any contractual obligation to consult and therefore Plaintiffs cannot show any "obligation or duty arising out of the contract." Pl.'s Opp. at 19.

The EO is not actually legally incorporated into the Compact. Instead, it is merely referenced in a sentence that includes a pledge to conduct all relations with the Community on a government-to-government basis. This is far from the requirement that incorporation by reference be "*express and clear*, so as to leave no ambiguity." *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1344 (Fed. Cir. 2008); *see also Mawakana v. Board of Trustees of Univ. of D.C.*, 113 F. Supp. 3d 340, 348 (D.D.C. 2015).

Incorporating *a reference* to something and incorporating something *by reference* are completely different both factually and legally. Merely mentioning the EO does not make it a contractual requirement. This is particularly true when it comes to, for example, statutory or regulatory provisions that are incorporated into a contract with the government. Indeed, the Federal Circuit has noted its reluctance to find that statutory or regulatory provisions are incorporated into a contract with the government unless the contract explicitly provides for their incorporation. *St. Christopher Assocs., L.P. v. United States*, 511 F.3d 1376, 1384 (Fed. Cir. 2008) (warning "that wholesale incorporation of regulations into a contract would allow the contracting party to 'choose among a multitude of regulations as to which he could claim a contract breach—and thus [a] wholly new ground of obligation would be summarily created by mere implication") (quoting *Smithson v. United States*, 847 F.2d 791, 794 (Fed. Cir. 1988)).

Even if the EO were actually incorporated by reference into the Compact, it would be incorporated only for the narrow, specified purpose of reiterating the government-to-government relationship, and not for any other reason. *See, e.g., Guerini Stone Co. v. P.J. Carlin Const. Co*, 240 U.S. 264, 277 (1916) ("[A] reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified."). There is no evidence that there was any intent by the parties to cite—much less incorporate—the EO for the purposes of establishing a contractual obligation to consult. This is not mentioned, or even implied, in the Compact. Even if that were the intent, it could not be achieved via contract. Neither the government, nor any other contractor, can contract around the EO's limitation on its own enforceability. *See Puget Sound Energy, Inc. v. United States*, 47 Fed. Cl. 506, 513(Fed. Cl. 2000) (finding that the government cannot "contract around a statutory grant of jurisdiction, nor imbue [the] Court with jurisdiction when it has none"). There is also no indication that the parties

intended to exclude section 10 of the EO. This section specifically prevents Plaintiffs from alleging a judicially enforceable right based upon the EO and if the EO had been incorporated, this section would be included with the same force and effect.[1]

Moreover, Plaintiffs have failed to explain how the EO would even be relevant here. The EO only applies to certain governmental actions and it does not require consultation on every action the government might take. For example, under the "Consultation" section, 5(b) and (c) pertain to the promulgation of regulations and they only specify prior steps "[t]o the extent practicable and permitted by law". E.O. 13,175 of Nov 6, 2000, Sec. 10; 65 FR 67249[2]. Section 5(d) also pertains to rulemaking, but the present matter does not involve the promulgation of any regulations. Rather than pointing to the consultation section, Plaintiffs only point to the definition section and they misstate both the definition and the standards communicated through the EO. Contrary to their assertion, neither the definition section nor any other part of the EO requires consultation "prior to making *any* decisions that would affect them." Pl.'s Opp. at 21 (emphasis added). The definition that Plaintiffs point to - "Policies that have tribal implications" - is much more narrow and refers to specific actions "that have substantial direct effects." Furthermore,

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[1] IHS and HHS consultation policies include language to the same effect. *See* Indian Health Service Circular No. 2006-01, Tribal Consultation Policy, *available at* https://www.ihs.gov/IHM/circulars/2006/tribal-consultation-policy/ ("Consistent with Presidential Executive Order 13175, this policy is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any persons."); U.S. Department of Health and Human Services Tribal Consultation Policy, *available at* https://www.hhs.gov/sites/default/files/iea/tribal/tribalconsultation/hhs-consultation-policy.pdf ("Nothing in the Policy creates a right of action against the Department for failure to comply with this Policy.").

[2] Available online through the Federal Register, https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-tribal-governments

while Plaintiffs fail to point to section 5(a), that section only requires the creation of consultation policies to address "Policies that have tribal implications" and Plaintiffs have not alleged that the Defendants failed to comply with that section.

Plaintiffs have also failed to point to any specific provision in HHS or IHS consultation policies in support of their allegations. Plaintiffs argue that the government must follow their own policies, but they point to no specific provision in those policies that the Defendants have allegedly violated. Plaintiffs leave the Defendants and this Court guessing as to how those consultation policies and the EO might be relevant to the present claim, since this is not apparent from the face of the Complaint.

Plaintiffs do not address the long list of consultations specified in the CDA response letter, nor do they explain how this long list could have fallen short of the EO or HHS/IHS consultation policies. Plaintiffs also fail to explain how any additional consultation would have changed their present position, since consultation is not an agreement and the agreement Plaintiffs seek is not with the Defendants. There is no reason to believe that *unlimited* amounts of consultation would have made any difference, particularly since Plaintiffs have chosen not to seek a direct resolution of this issue with the VA.

3. Article II, § 9(a)

Plaintiffs also misconstrue the plain language of several of the provisions they cite. As to Article II, § 9(a), IHS adopted no circular, policy, manual, guidance, or rule here and Plaintiffs do not even allege that IHS has. Plaintiffs broadly state that "[b]y endorsing VA's template agreements, IHS adopted a policy." Pl.'s Opp. at 20. This is patently untrue. Plaintiffs do not, and cannot, point to any agency circular, manual, or rule related to the formation of Plaintiffs' reimbursement agreement with the VA. *See* Indian Health Manual (IHM), Part 1, Chapter 1,

available at https://www.ihs.gov/IHM/pc/part-1/p1c11/ (describing the format required for IHS circulars, special general memorandums, and IHM chapters). Nor do Plaintiffs point to more informal binding guidance or policy issued by the IHS. *See Nat'l Homebuilders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) (in the Administrative Procedure Act context, finding that an agency action is non-final if it is "recommended" and "if the practical effect of the agency action is not a certain change in the legal obligations of a party" even if there may be "practical consequences"). Instead, the IHS negotiated its own reimbursement agreement with the VA and expressly noted that ISDEAA contractors are free to negotiate their own terms. Clearly, ISDEAA contractors are not "subject to" the IHS's separate agreement. *See Jamestown S'Klallam Tribe v. Azar*, 486 F. Supp. 3d 83, 93 (D.D.C. 2020) (interpreting the statutory provision that is reiterated in Article II, § 9(a)—25 U.S.C. § 5397(e)—and finding that the Tribe was not made "subject to" a policy when IHS used a methodology to form an initial estimate in negotiations, particularly where the Tribe was free to furnish additional information to support an alternative approach).

4. Article V, § 16

As to Article V, § 16, Plaintiffs would have this provision do much more than its plain language directs. In relevant part, § 16 of the Compact states that IHS will "advocate for increases in the IHS budget[.]" Pl.'s Opp. at 53. Plaintiffs take the word "advocate" out of context, when it has no relevance to the present dispute. A commitment to "advocate for increases" is very different from *assuring* increases in funding, and "the IHS budget" cannot be taken to mean reimbursements from third parties in this context. Reimbursement by third party payors is not within the IHS's control, and the choice of whether to pursue such reimbursements for themselves is one left to tribal contractors, with which the IHS does not interfere. *See* 25 U.S.C. § 1641(d) (allowing tribal health programs to elect to directly bill third party payors); *Fort McDermitt Paiute and Shoshone*

Tribe v. Becerra, 6 F.4th 6 (D.C. Cir. 2021) (interpreting 25 U.S.C. §§ 5325(a)(1) and 5388(j) and finding that third-party income is "supplemental," "expressly exclude[d]" from the funding provided by IHS, and that IHS does not "provide" reimbursements from other payors); Pl.'s Opp. at 48 (Compact Art. III, § 6) (construing "program income" from other payors as "supplemental funding to that negotiated in the funding agreement").

The IHS cannot do more than "advocate" for increases as part of the preparation of the President's Budget. *See* OMB Circular A-11, § 10, p. 4 (overview of the budget-making process). The IHS cannot control the decisions on budget requests, nor can the IHS share any information about the confidential process. *Id.* at § 22. Plaintiffs do not even allege that the IHS failed to advocate for increases to its own budget. First, that would be belied by the year-over-year increases IHS has received from Congress.[3] Second, the IHS's work with the VA did, in fact, result in additional funding in the IHS system.[4] Alternatively, even accepting Plaintiffs' creative construction of Article V, § 16, it still would not and could not impose a duty to *pay* any amounts to Plaintiffs. *See Red Lake Band of Chippewa Indians v. Dep't of Interior*, 624 F. Supp. 2d 1, 15 (D.D.C. 2009) (finding that an ISDEAA compact provision promising that Bureau of Indian Affairs would "assist the Tribe in obtaining" funds imposed no duty to pay that amount).

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[3] *See* Congressional Research Service. *Indian Health Service (IHS) FY2021 Budget Request and Funding History: In Brief*, prepared by Elayne J. Heisler (CRS Report No. R46490), Table 1, pg. 7, *available at* https://crsreports.congress.gov/product/pdf/R/R46490/2 (showing increases for 2015 through 2020); *see also* IHS Fiscal Year 2022 Justification of Estimates for Appropriations Committees at CJ-3, *available at* https://www.ihs.gov/sites/budgetformulation/themes/responsive2017/display_objects/documents/FY_2022.pdf (seeking a historic increase for Fiscal Year 2022)

[4] *See* IHS Fiscal Year 2015 Justification of Estimates for Appropriations Committees at 144, *available at* https://www.ihs.gov/sites/budgetformulation/themes/responsive2017/documents/FY2015CongressionalJustification.pdf (showing $341,000 in "VA Reimbursement" for FY 2013, $36,000,000 in FY 2014, and estimating $39,000,000 in FY 2015).

B. Plaintiffs Have Not Plausibly Alleged Breach of Any Implied Covenant of Good Faith & Fair Dealing

Plaintiffs' allegations that the IHS breached the implied duty of good faith and fair dealing "implied in the Compact as a matter of law" must also fail. Pl.'s Opp. at 22. None of the facts alleged in Plaintiffs pleadings, even if true, would rise to the level necessary to establish a violation of this duty. Plaintiffs recast the contractual provisions they relied on regarding an express breach as also being evidence of the "spirit of the bargain"—namely, an otherwise unexpressed requirement to consult and to "advocate for increases in the IHS budget." Pl.'s Opp. at 22-23. Plaintiffs also generally allege that the IHS either lacked diligence or took actions in bad faith. *Id.* at 23.

First, Plaintiffs improperly broaden the scope of the "spirit of the bargain" as it relates to these specific contracts. While the IHS does certainly advocate for, consult with, and negotiate with tribes in good faith, that cannot form the core of the "spirit of the bargain" in the parties' contracts here. *Agility Public Warehousing Co. KSCP v. Mattis*, 852 F.3d 1370, 1384 (Fed. Cir. 2017). The overarching spirit and purpose of the ISDEAA, and of the contracts at issue here, is to transfer IHS programs, and the associated funding, to Plaintiffs to carry out directly. Title I of the ISDEAA states a commitment to "a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." *See* 25 U.S.C. § 5302(b); Pub. L. 106-260, §3, Aug. 18, 2000, 114 Stat. 712 (passing Title V of the ISDEAA to "permit an orderly transition from Federal domination of programs and services to provide Indian tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer programs . . . that meet

the needs of the individual tribal communities"). Here, the IHS did transfer the programs and Plaintiffs are fully able to negotiate their own agreements with the VA.

None of the amounts at issue were promised under the Compact. Plaintiffs do not allege in this matter that the IHS failed to fully fund the ISDEAA agreements.[5] The contracts transferred all of the appropriated funds that IHS itself would have used to carry out the programs assumed by Plaintiffs, plus additional funds to reimburse costs for needs specific to Plaintiffs. *See* 25 U.S.C. §§ 5325(a)(1), (2). It is that "valuable benefit" that Plaintiff bargained for and forms the basis of an ISDEAA agreement. *Pine & Timber, Inc. v. United States*, 596 F.3d 817, 830 (Fed. Cir. 2010). Ancillary funding derived from other sources cannot be said to form the benefit promised by the IHS. *See Fort McDermitt Paiute and Shoshone Tribe*, 6 F. 4th 6 (interpreting 25 U.S.C. §§ 5325(a)(1) and 5388(j) and finding that third-party income is "supplemental," "expressly exclude[d]" from the funding provided by IHS, and that IHS does not "provide" reimbursements from other payors); Pl.'s Opp. at 48 (Compact Art. III, § 6) (construing "program income" from other payors as "supplemental funding to that negotiated in the funding agreement").

Plaintiffs' allegations also do not satisfy the bar required to show a breach of the implied duty of good faith. "Conclusory allegations that the defendant acted unreasonably will not suffice" to state a claim for breach of the implied covenant of good faith and fair dealing. *Dotcom Associates I, LLC v. United States*, 112 Fed. Cl. 594, 594 (Fed. Cl. 2013). Even accepting Plaintiffs' view of "the spirit of the bargain," Plaintiffs give too short shrift to the Restatement of Contract's use of the word "evasion." Restatement (Second) of Contracts § 205. The word "evasion" is meaningful and requires allegations of, for example, some sort of "subterfuge." *Ala.*

[5] Plaintiffs have presented separate CDA claims seeking additional Contract Support Cost. Those claims are not a part of the present litigation.

Power Co. v. United States, 137 Fed. Cl. 68, 73 (Fed. Cl. 2018). Similarly, "mere negligence" is insufficient to establish bad faith. *Camarda v. Certified Financial Planner Bd. of Standards, Inc.*, 672 Fed. Appx. 28, 29 (D.C. Cir. 2016) (quoting *Allworth v. Howard Univ.*, 890 A.2d 194, 201 (D.C. 2006)). Instead, "[c]ases in which the government has been found to violate the implied duty of good faith and fair dealing typically involve some variation on the old bait-and-switch." *Pine & Timber, Inc.*, 596 F.3d at 829. In these cases, after entering into a contract exchanging significant benefit for consideration, "the government eliminates or rescinds that contractual provision or benefit through a subsequent action directed at the existing contract." *Id.* Liability does not automatically flow from the subsequent action, though. Instead, "[t]he government may be liable for damages when the subsequent government action is specifically designed to reappropriate the benefits the other party expected to obtain from the transaction, thereby abrogating the government's obligations under the contract." *Id*. (citing *Centex Corp. v. United States*, 395 F.3d 1283, 1311 (Fed. Cir. 2005)). At most, Plaintiffs allege that the IHS failed to "appropriately" consult and "capitulated to VA's reimbursement terms" when negotiating the IHS-VA reimbursement agreement. Compl. ¶ 19-20. Plaintiffs' allegations fall far short of establishing any "specifically targeted" action to impact Plaintiffs' ISDEAA agreement. *Pine & Timber* at 829-30 (finding "no evidence that the Forest Service's slight delay in initiating formal consultations, or its initially unsuccessful attempts to formulate a satisfactory Biological Opinion, were undertaken for the purpose of delaying or hampering Precision Pine's contracts").

C. Plaintiffs Have Not Plausibly Alleged Violation Of Any Trust Responsibilities And They Have Not Identified Any Need For An Ambiguity Cannon.

Plaintiffs' bare assertions regarding trust responsibility do not constitute a plausible entitlement to relief on their breach of contract claim. *See Quechan Tribe of Ft. Yuma Indian Rsrv. v. United States*, 599 F. App'x 698, 699 (9th Cir. 2015). Like their previous case alleging breach

of trust, Plaintiffs have failed to show how the present case involves federal fiduciary obligations in managing Indian property or trust assets. *See Gila River Indian Community v. Burwell*, 2015 U.S. Dist. LEXIS 27595 (D. Ariz. Mar. 6, 2015). Plaintiffs have not pointed to any statutes or regulations wherein the United States had accepted trust responsibilities for the consultation related duties that Plaintiffs seek to enforce. Moreover, the IHS general appropriation does not include funds appropriated to fulfill trust obligations or otherwise held in trust for Plaintiffs, and Plaintiffs do not allege otherwise.

In their Opposition, Plaintiffs assert that the issues are not identical to their previous case, but Plaintiffs fail to recognize the legal standards reiterated to them in that case. Plaintiffs fell far short of those legal standards in the previous case and they fall even further short now. In the previous case, Plaintiffs "failed to identify the kind of elaborate, full-control statutes and regulations that were held necessary for a breach-of-trust claim" and they failed to identify "an underlying corpus to support its trust claim." *Id*. at *18. In this case, they have likewise failed to demonstrate that level of authority to "augment[]" their claim and they have failed to even allege an underlying corpus. *See* Compl. ¶ 41. Instead, without any legal or factual support, Plaintiffs make sweeping assertions about trust responsibility in their Complaint. *See* Compl. ¶ 13, 16. Now, in their Opposition, Plaintiffs continue to state bare assertions regarding "violation[s]" of the "federal trust responsibility" without any legal or factual support. *See* Pl.'s Opp. at 8, 24.

Any references in the Compact to a general trust responsibility do not create a judicially enforceable right to a specific or unlimited amount of consultation. *See* Pl.'s Opp. at 42 (Art. I, § 2(a)), 49 (Art. IV). There is no indication that either of the cited provisions were intended to address consultation. The first, Art. I, § 2(a), is in the purpose section and as more fully explained in section IV.A.1 above, these type of preliminary recitals do not form an obligation or duty

required to prevail on a breach of contract claim. The second, Art. IV, simply clarifies that the Compact does not waive, modify, or diminish trust responsibilities that *otherwise* exist under the law. Neither Art. I, § 2(a) nor Art. IV creates a specific trust responsibility and neither one even mentions consultation. Likewise, Plaintiffs have failed to point to any part of the ISDEAA or its implementing regulations that created a federal trust responsibility for a judicially enforceable amount of consultation in this case.

Lastly, Plaintiffs ask this Court to at least consider the "IHS's trust responsibility" in "the Court's interpretation of the Compact." Pl.'s Opp. at 33. Plaintiffs cite to paragraph 41 of their Complaint, but this paragraph does not support their claim. Instead, this section cites to a provision in the Compact, which states in full:

> Section 15 – Interpretation of Federal Law. In the implementation of this Compact, the Secretary shall interpret all Federal laws, executive orders, regulations and this Compact in a manner that effectuates and facilitates the purposes of this Compact and the achievement of the Community's health goals and objectives in accordance with section 512(a) of Title V.

Pl.'s Opp. at 53 (Art. V, § 15). No part of this section states or implies an intent to create a judicially enforceable right to a specific or unlimited level of consultation. Plaintiffs are asking this Court to create such a right, citing to cases concerning ambiguities in contract language. Pl.'s Opp. at 25-26. However, Plaintiffs' reliance on these cases is misplaced because there is no ambiguity of the Compact that needs to be resolved here, through the Indian canon of construction or otherwise. The Indian canon "does not permit reliance on ambiguities that do not exist." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 & n.16 (1986). Plaintiffs have not pointed to any language in the Compact or a relevant authority that they allege is ambiguous. There are also no provisions in the Compact that could be interpreted in support of Plaintiffs' claim, even construing the Compact liberally for the benefit of Plaintiffs. Because the Compact's

text is clear, Plaintiffs' reliance on the canon of construction requiring ambiguities to be resolved in favor of Indian tribes is misplaced.

V. Even If This Court Has Subject Matter Jurisdiction And Plaintiffs Have Plausibly Alleged A Breach of Contract Claim, The Claim is Untimely.

As stated above, the Defendants strongly disagree with Plaintiffs' speculation and recitation of "facts." Plaintiffs are plainly attempting to circumvent the VJRA's jurisdictional bar through the present matter and they have failed to state a plausible claim for relief against the Defendants. In an attempt to survive the Motion to Dismiss, Plaintiffs would now like this Court to believe that their dispute with the VA is completely "independent" of the present claim, in complete contradiction to their theories regarding damages and causation. The present matter is inextricable from Plaintiffs' underlying dispute with the VA and that underlying dispute cannot be resolved in this Court. However, if this Court disagrees and finds that (1) the present matter is not subject to the VJRA's jurisdictional bar, (2) the claim is ripe, (3) Plaintiffs have standing, and (4) Plaintiffs have plausibly alleged a breach of contract claim against the Defendants, then this Court should still dismiss the case because Plaintiffs' claim against the Defendants is untimely.

The ISDEAA provides that the CDA "shall apply to self-determination contracts." 25 U.S.C. § 5331(d). The CDA provides a six-year statute of limitations for a contractor to bring a claim against the government relating to a contract after the accrual of the claim. 41 U.S.C. § 7104(a)(4). *See also Menominee Indian Tribe of Wis. v. United States*, 764 F.3d 51, 54 (D.C. Cir. 2014) ("Federal law requires that a claim for breach of a self determination contract between an Indian Tribe and a federal agency be filed with a contracting officer at the agency within six years of the claim's accrual."). The U.S. Court of Appeals for the Federal Circuit has provided the following explanation of the CDA's limitations provision:

> A claim accrues as of "the date when all events, that fix the alleged liability of either the Government or the contractor and permit

> assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred."

Al-Juthoor Contracting Co. v. United States, 129 Fed. Cl. 599, 612 (2016), quoting *Sikorsky Aircraft Corp. v. United States*, 773 F.3d at 1320 (quoting 48 C.F.R. § 33.201).

Plaintiffs allege that the IHS violated duties under the Compact when IHS entered into an agreement with the VA. Plaintiffs specifically allege that the "Defendants did not adequately consult with Plaintiffs *before* agreeing to VA's position and endorsing VA's template agreement, thereby breaching these duties." Pl's. Opp. at 21 (citing Compl. ¶ 37 (emphasis added)). Plaintiffs also allege that the "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." Pl's. Opp. at 32 (citing Compl. ¶ 19). The Defendants strongly deny these allegations and the IHS already documented the extensive consultations held on this matter in the CDA response. *See* Compl. Ex. B, ECF No. 1-2, at 5-6. Among other consultations announced and held, on April 5, 2012, the IHS and the VA sent a letter to Tribal leaders to continue Tribal Consultation and included a copy of the draft agreement.[6] On May 7, 2012, the IHS announced that Tribal Consultation would be extended, based upon the request of Tribes.[7] The IHS then

[6] The April 5, 2012-dated Tribal Leader Letter is available online at: https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/Draft_Tribal_Letter_IHS_VA_VHA_040412_voice.pdf

[7] The May 7, 2012-dated announcement is available online at: https://www.ihs.gov/newsroom/directorsblog/may2012/vaihsreimbursementagreementconsultationupdate/

signed and announced its agreement with the VA in December 2012.[8] All of these facts occurred more than six years before Plaintiffs filed a CDA claim with the IHS.

Plaintiffs knew or should have known that the reimbursement agreement had been signed by December 2012, when the signing was announced. In fact, Plaintiffs knew or should have known that this was likely to happen long before December 2012, such as when the draft agreement was provided in May 2012. If the IHS violated the Compact with Plaintiffs before and/or at the time of signing the IHS-VA reimbursement agreement and this was independent of the VA's actions, as Plaintiffs now allege, the CDA requires that Plaintiffs should have filed their claim no later than December 2018. Yet, Plaintiffs waited until September 2019 to present a CDA letter to the IHS. For these reasons, any claim Plaintiffs might have in this matter are untimely and should be dismissed.

* * *

[8] The December 31, 2012-dated announcement is available online at: https://www.ihs.gov/newsroom/directorsblog/december2012/vaihsnationalreimbursementagreement/

CONCLUSION

For the reasons set forth above, the Court should grant Defendants' Motion and dismiss Plaintiffs' Complaint.

Dated: January 7, 2022
Washington, DC

Respectfully submitted,

MATTHEW M. GRAVES, D.C. Bar #481052
United States Attorney

BRIAN P. HUDAK
Acting Chief, Civil Division

By: */s/ Derek S. Hammond*
DEREK S. HAMMOND
D.C. Bar # 1017784
Assistant United States Attorney
555 Fourth Street, NW
Washington, DC 20530
202-252-2511
Derek.Hammond@usdoj.gov

Attorneys for the United States of America