# 11-16334

**United States Court of Appeals**
**for the Ninth Circuit**

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION
*Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, ET AL.,
*Defendants-Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA (Case No. 10-2261-PHX-FJM)

## APPELLANT'S OPENING BRIEF

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE
Frank R. Jozwiak, WSBA #9482
Thane D. Somerville, WSBA #31468
Mason D. Morisset, WSBA #273
801 Second Avenue, Suite 1115
Seattle, Washington 98104-1509
Phone: 206-386-5200
f.jozwiak@msaj.com
t.somerville@msaj.com
m.morisset@msaj.com

## CORPORATE DISCLOSURE STATEMENT

Appellant Quechan Tribe of the Fort Yuma Indian Reservation is a federally recognized Indian Tribe. Accordingly, a corporate disclosure statement is not required by Federal Rule of Appellate Procedure 26.1

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Regulations**



**Other Authorities**



**Rules**

## I. STATEMENT OF JURISDICTION

The United States District Court for the District of Arizona had jurisdiction pursuant to: (a) 28 U.S.C. § 1331 and 1362, this being an action by an Indian tribe with a government body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under federal law; (b) 5 U.S.C. § 702, this being an action seeking relief for other than money damages against agencies and officers of the United States; and (c) 28 U.S.C. § 1361, this being an action seeking mandamus to compel federal officers, employees, and agencies to perform non-discretionary duties owed to the Tribe.

The District Court entered its order granting the United States' motion to dismiss for failure to state a claim upon which relief may be granted, and judgment in favor of the United States, on March 31, 2011. Excerpts of Record (ER) 3-4. The Tribe timely filed its Notice of Appeal in this Court on May 27, 2011.[1] ER 1. This Court has jurisdiction over the Tribe's appeal pursuant to 28 U.S.C. § 1291, because the Tribe's appeal is from a final order that disposes of all claims.

## II. STATEMENT OF THE ISSUES

1. Whether the United States failed in its duty arising under the Snyder Act, 25 U.S.C. § 13, Indian Health Care Improvement Act, as amended, 25 U.S.C.

[1] This case has been in the 9th Circuit mediation program, pursuant to order, since September 2011. *See, e.g.*, 9th Cir. Dkt. # 5, 12, 15, 28, 33, 38, 46. The parties were ultimately not able to settle the case. The case was released from the mediation program, and a new briefing schedule set, on May 14, 2014. Dkt. #49.

§§ 1601 *et seq*., and the federal-tribal trust relationship, to ensure that health services provided to members of the Quechan Tribe by the Indian Health Service on the Fort Yuma Indian Reservation meet a minimum, generally-accepted, standard of professional medical care?

2. Whether the District Court erred in ruling that the Quechan Tribe's First Amended Complaint failed to state a claim for which declaratory and equitable relief can be granted?

3. Whether the District Court erred by failing to construe all allegations in the Tribe's First Amended Complaint as true, specifically including the allegation that the United States holds the Fort Yuma Service Unit facilities in trust for the Tribe?

4. Whether the District Court erred in ruling that the United States has discretion to operate its health care services and facilities at the Fort Yuma Service Unit in a manner that regularly falls below a minimum, generally accepted, standard of care and in a manner that places tribal members at risk of harm?

5. Whether the level of care provided to tribal members by the United States at the Fort Yuma Service Unit violates the Due Process and Equal Protection clauses of the United States Constitution?[2]

[2] The District Court's analysis and rulings regarding issues raised on appeal are found at ER 4-13.

## III. STATEMENT REGARDING ADDENDUM OF PERTINENT LAWS

Pursuant to Circuit Rule 28-2.7, pertinent statutes and regulations are included within a separate addendum filed with this brief.

## IV. STATEMENT OF THE CASE

Pursuant to federal law, the United States, through the Fort Yuma Service Unit (FYSU) of the Indian Health Service (IHS), provides health services to members of the Quechan Tribe at a medical clinic located on trust land within the Fort Yuma Indian Reservation. The United States is solely responsible for delivery of health services at the FYSU, as well as the maintenance, operation and upkeep of the FYSU facilities. The United States' obligation to provide health care for tribal members arises from statute and is further supported by the United States' fiduciary trust obligation to Indian tribes.

In its First Amended Complaint (ER 14), the Tribe alleges that the United States fails to operate and maintain the health-care facilities of the FYSU in accordance with its statutory and common law trust obligations to the Tribe. IHS has repeatedly acknowledged that the facility is inadequate to meet the needs of tribal patients. ER 20-23, ¶¶ 33-50. The FYSU's building infrastructure is the oldest in the IHS system. ER 20, ¶¶ 31-32. The poor physical condition of the facility poses an affirmative health hazard to tribal patients seeking care on the Reservation. *Id.*

In addition to the decrepit and unsanitary facilities themselves, the operational standards of practice at the IHS facility also place tribal members at increased risk of harm. In 2008-2009, a repeated failure to properly clean and sterilize medical instruments resulted in the exposure to blood-borne pathogens and viruses including Hepatitis B, Hepatitis C, and HIV to dozens of tribal members. ER 24, ¶¶ 58-59. The Tribe alleges that the United States provides health-care at the FYSU in a manner that regularly falls below minimum, generally accepted standards of professional medical care. ER 23, ¶ 54. The United States' actions and failures to act place the health and safety of Quechan tribal members at risk.

In this case, the Tribe seeks narrow and limited relief on its own behalf as a sovereign government and as *parens patriae* on behalf of its members who rely on the United States for medical care. The Tribe seeks a declaratory judgment that the United States has a duty, pursuant to statute and the federal-tribal trust relationship, to operate the FYSU medical facilities at a level that meets a generally-accepted minimum standard of care for medical services, and that IHS has breached its duty. ER 31, ¶ 112(A), (B). The Tribe also seeks equitable relief that would prospectively require IHS to take measures necessary to ensure that medical services provided by the FYSU do not fall below the appropriate minimum standards of care to be determined at trial. ER 31, ¶ 112(C)-(E). Appropriate

relief may include measures such as mandating sterilization of instruments, fixing floor tiles to a standard that will allow proper sanitation, fixing the worst seismic deficiencies, and recruiting and adequately training qualified personnel. This relief is necessary to prevent continued harm, and risk of harm, to tribal members.

The Tribe filed its First Amended Complaint on January 14, 2011. Dkt. #19. ER 14. On March 31, 2011, the District Court granted the United States' motion to dismiss the First Amended Complaint for failure to state a claim upon which relief could be granted. Dkt. #33. ER 4. The Court ruled that the United States had no legally enforceable obligation to provide health services to tribal members as such services were simply "a matter of grace." ER 7. The Court ruled that the United States did not need to meet any standard of care whatsoever. ER 7-8. The Tribe appealed this ruling on May 27, 2011. Dkt. # 35. ER 1.

The facilities and services provided by the United States at the FYSU affirmatively place members of the Quechan Tribe at risk of harm. The United States has statutory and common law duties to ensure that health facilities and services provided do not fall below minimum standards of care. The Tribe pled claims that entitle it to declaratory and equitable relief arising from IHS' failure to comply with its duties. The Tribe requests that this Court reverse the District Court and remand for further proceedings designed to determine the minimum standards the United States must meet to comply with the law.

## V. STATEMENT OF FACTS

### A. The Failure to Clean and Sterilize Instruments.

Between October 2008 and June 2009, the IHS repeatedly failed to clean and sterilize medical instruments in the FYSU Wound Care Clinic resulting in the exposure to blood-borne pathogens and viruses, including HIV, Hepatitis B and Hepatitis C, to tribal members. ER 24, ¶¶ 58-60. IHS estimates that at least 111 tribal members were treated at the Wound Care Clinic during that time-period, and that 44 tribal members were exposed. ER 24, ¶ 59. IHS did not inform the Tribal Council or tribal members until nearly 15 months after IHS initially learned of the exposure event and nearly two years after IHS estimated the exposure began. ER 24, ¶ 60.

### B. The Failure to Maintain the Health Care Facility.

The "exposure event" is an example of the systemic failure of the IHS FYSU to provide health care facilities and services to tribal members in a manner that meets basic minimum standards of care. ER 24, ¶ 61. The physical facilities of the FYSU are the oldest in the entire IHS system, are in a condition of significant disrepair and deterioration, and create unhealthy and unsafe conditions for tribal members seeking care. ER 20, ¶ 31. Portions of the medical facilities provided by the United States on the Fort Yuma Reservation date back to 1852, and the current clinic facility was built in 1936. ER 20, ¶ 32.

The United States affirmatively acknowledged the deficiencies in the FYSU and the need to repair and replace the facilities provided to the Tribe by the United States. ER 20, ¶ 33. More than 25 years ago, in 1988, IHS officials acknowledged that the FYSU facilities needed to be completely replaced because the buildings were too old, small, and in a deteriorating and unsafe condition. ER 21, ¶ 34. Yet, IHS has taken no action to replace or upgrade the facilities. In 2005, a seismic study evaluation of the Fort Yuma facilities reported major design and code issues that must be immediately addressed. ER 22, ¶ 43. In 2007, the inadequacies and poor condition of the facility required the FYSU to end service as a 24-hour emergency care facility and operate solely as a day-time medical clinic. ER 22, ¶ 44. In 2008, the facilities received a federal Facility Condition Index score of 11 out of a possible 100, placing it in the "very poor" category. ER 22, ¶ 45. A Facility Condition Index is a tool used by the United States to compare the relative condition of a group of facilities under federal management. *Id.*

C. IHS Officials Acknowledged the Medical Facility is Unsanitary and Inadequate and Must Be Replaced.

In 2007 and 2008, the Yuma Sun newspaper published articles about the FYSU facilities, based on interviews with IHS officials. ER 21, ¶ 35. A July 15, 2007 article reports that "Officials at the [FYSU] facility, which serves the Quechan and Cocopah tribes, say the current facility fails terribly in meeting their

needs." ER 21, ¶ 37. The article reported "crumbling tile floors that are difficult to keep sanitized" as well as the lack of basic necessary medical equipment to serve the 4,000 members of the Quechan and Cocopah Tribes who rely on Indian Health Service for health care. ER 21, ¶¶ 36-41.

In April 2008, the United States prepared a Final Environmental Assessment (EA) to evaluate construction of a new modern health facility on the Fort Yuma Indian Reservation. ER 22, ¶ 46. The Final EA states that the need for a new Fort Yuma health care center was established in 1988, "when the [existing] facility scored high on the list for IHS Healthcare Facilities Construction Priority System based on cumulative documentation of deficiencies in size, age, condition, etc." *Id.* The Final EA makes the following statements about the existing FYSU facilities:

- "The existing Fort Yuma Hospital, located on the Fort Yuma Indian Reservation, is inadequate and requires a complete replacement."
- Failure to replace the existing facility (the "No Action Alternative") "could result in adverse impacts to human health and safety as a result of the continuance of inadequate health care for the Quechan and Cocopah Tribes."
- "While many tribal members may have the means to leave the service area to obtain adequate health care when necessary, others do not. In extremely severe cases, a decline in services may result in unnecessary or prolonged illness, possibly even resulting in premature death, for those who do not have the means to go elsewhere."

ER 22-23, ¶¶ 47-49.

In the Fiscal Year 2010 budget, Congress appropriated over $3.6 billion to the United States Department of Health and Human Services/Indian Health Service. ER 23, ¶ 51. Despite receiving billions of dollars in annual appropriations and despite IHS' repeated acknowledgement of the inadequate, unsafe, and potentially life threatening facilities at the FYSU, the IHS continues to fail to provide health services or facilities to the Tribe that comport with its statutory and trust duties. The Tribe now seeks a declaration of IHS' duties and responsibilities with respect to the health care provided at the FYSU. The Tribe further seeks equitable relief requiring IHS to prospectively take appropriate steps to remedy the current unsanitary, unsafe and inadequate conditions so as to ensure health care provided to tribal members meets generally-accepted minimum standards of care as determined at trial.

## VI. SUMMARY OF ARGUMENT

The federal government has a trust or special relationship with Indian Tribes. 25 U.S.C. § 1602(1) (acknowledging the United States' "special trust responsibilities and legal obligations to Indians"). The Supreme Court has held that Indian tribes are "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). The District Court completely ignored this governing law.

As a result, the District Court rulings make a sham of health care provided to Indians. Despite statutes and legal principles directing health care to the Indian

people, the United States, said the District Court, has no legal duty to supply medical services, but may do so as a "matter of grace." ER 7. Despite the fact that federal law is clear that tribes have a special relationship to the United States, the District Court held that there was no such relationship and that tribes were "just [another] interest group." ER 12-13. It is difficult to envision a more erroneous and insulting statement.

Pursuant to federal statute and the federal-tribal trust relationship, the United States provides health care to tribal members at a federally managed and operated facility located within the Fort Yuma Indian Reservation. Having undertaken the statutory and trust responsibility to provide health care to tribal members, the United States has a fiduciary duty to ensure that the care is provided in accordance with minimum standards of care generally applicable to health care providers. Providing health care services and facilities that systemically fall below minimum acceptable standards of care is a breach of duties arising under the Snyder Act, 25 U.S.C. § 13, the Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et seq.*, and the underlying trust obligation to Indians. In this case, the Tribe seeks declaratory relief to confirm and define the United States' obligations regarding the quality of health care provided to Quechan members. The Tribe also seeks appropriate prospective equitable relief to ensure that health care provided by the

United States to Quechan members does not fall below the applicable minimum standards of care determined at trial.

The Tribe's claims arise under statutes that establish a comprehensive federal responsibility to provide health care to the Tribe's members. Affirmative statutory obligations in the Indian Health Care Improvement Act and the Snyder Act, read in conjunction with the underlying trust obligation to Indians, confirm that Congress expects that Indian health-care will conform, at least, to minimum standards of care. Because the relevant statutes are enacted expressly for the benefit of Indians, they must be construed liberally in favor of the Tribe in accordance with well-established Indian canons of statutory construction.

The Tribe seeks enforcement of the implied, but common-sense, assumption that care provided to Indians must meet, at least, minimum standards of care. The United States does not and cannot satisfy its statutory and trust obligations by providing health services to tribal members that affirmatively pose a risk of harm due to systemic and correctable deficiencies.

There exists a present and actual controversy regarding the scope of the United States' duties to the Tribe and its members and the Tribe is entitled to seek declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. In addition, because the United States lacks discretion to provide health care in a manner that falls below minimum standards of care and which poses an affirmative

risk of harm to tribal members, the Tribe may also seek mandamus under 28 U.S.C. § 1361 to compel enforcement of the United States' non-discretionary obligations. The Tribe properly pled a claim for declaratory and equitable relief based on the United States' failure to comply with its statutory obligation to provide competent health care to the Tribe's members. The Court should reverse the District Court's order dismissing the Tribe's First Amended Complaint.

## VII. STANDARD OF REVIEW

The District Court dismissed the Tribe's First Amended Complaint for failure to state a claim pursuant to FRCP 12(b)(6). This Court, in reviewing the Tribe's complaint, must accept the allegations in the complaint as true and must construe the facts alleged in the light most favorable to the Tribe. *Marceau v. Blackfeet Housing Auth.*, 540 F.3d 916, 919 (9th Cir. 2008), *citing Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). Review of the District Court's dismissal order is de novo. *Id.* at 920.

Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 555 (2007). In order to survive a motion to dismiss brought under FRCP 12(b)(6), the facts alleged in a complaint along with reasonable inferences from such facts must be plausibly

suggestive of a claim entitling the plaintiff to relief. *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009), *citing Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* A plaintiff is not required to prove probability of success to survive a motion to dismiss and "a well-pleaded complaint may proceed even if . . . a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556.

## VIII. ARGUMENT

### A. The United States, Pursuant to Statute and its Fiduciary Trust Obligation to the Quechan Tribe Has Undertaken Responsibility to Provide Medical Care to Tribal Members on the Fort Yuma Indian Reservation and It Has A Fiduciary Duty To Provide Such Care Competently.

It has long been the law that the federal government has a trust or special relationship with Indian tribes. Cohen's Handbook of Federal Indian Law (2012 ed.), § 5.04[3][a]; 25 U.S.C. § 1602(1) (acknowledging the United States' "special trust responsibilities and legal obligations to Indians"). The United States Supreme Court has held that Indian tribes are "domestic dependent nations" *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Congress and the President continue to articulate the policy of the special relationship and duties of the United States. Cohen, § 5.04[3][a], fn. 56-58. Despite this clear and governing law, the District Court found "no such special relationship" and that the Quechan Tribe was just another "interest group." ER 12-13. These incorrect, insulting and demeaning

findings serve as the bases for the Court's rulings and sully the conclusions of the Court's opinion. Without a firm and legally correct foundation, the court went seriously astray. The District Court's basic rulings on these points should be reversed.

The specific governing law as to Indian health care is clear regarding the United States' trust responsibilities to Indians. "Congress declares that it is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians – (1) to ensure the highest possible health status for Indians . . . [and] (6) . . . to ensure quality health care for all tribal members . . . ." 25 U.S.C. § 1602(1), (6). This Court has recognized the federal responsibility to provide health care to Native Americans. *Navajo Nation v. Dep't of Health and Human Services*, 325 F.3d 1133, 1139, n. 6 (9th Cir. 2003) (noting "Congress' recognition of the federal responsibility for Indian health"), citing *McNabb v. Bowen*, 829 F.2d 787, 792 (9th Cir. 1987); *United States v. Bering Strait School District*, 138 F.3d 1281, 1282 (9th Cir. 1998) (finding purpose of IHCIA is "to ensure sufficient resources to provide Indians with proper health care"). *See also White v. Califano*, 437 F. Supp. 543, 555 (D. S.D. 1977), *aff'd* 581 F.2d 697 (8th Cir. 1978) ("Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians"). The federal government's

obligations relating to Indian health care arise from statute and from the special trust relationship with Indians. *Id.*

Federal responsibility for Indian health care has a long history in the United States. *Califano*, 437 F. Supp. at 553. In the nineteenth century, federal health services to Indians consisted primarily of treatment by military physicians and focused on treatment and containment of infectious disease. Cohen, § 22.04[1]. In 1832, Congress passed its first Indian health statute, which authorized Army physicians to provide small-pox vaccinations to Indians. 4 Stat. 514 (1832). Treaties with Indian nations also promised federal health care. Cohen, § 22.04[1].

The federal responsibility for health-care on Indian reservations increased in the early twentieth century. In 1912, President Taft declared in an address to Congress: "As guardians of the welfare of the Indians, it is our immediate duty to give to the race a fair chance for an unmaimed birth, healthy childhood, and physically efficient maturity." Cohen, § 22.04[1]. In 1921, Congress passed the Snyder Act, 25 U.S.C. § 13, directing the Bureau of Indian Affairs to direct, supervise, and expend appropriated moneys "for relief of distress and conservation of health." *Id.* The District Court says, however, that this imposes no legal requirement on the United States to do anything. ER 7. In 1954, Congress transferred federal responsibility for Indian health care to the United States Public Health Service. 42 U.S.C. § 2001 *et seq.* The federal health agency dedicated to

Indians was re-named as the Indian Health Service in 1968. *Califano*, 543 F. Supp. at 553.

In 1976, Congress passed the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. § 1601 *et seq.*, finding that the "most basic human right must be the right to enjoy decent health," and that "any effort to fulfill Federal responsibilities to the Indian people must begin with the provision of health services." H.R. Rep. No. 94-1026(I), at 13 (1976). In the IHCIA, Congress declares that: "Federal health services to *maintain and improve the health* of the Indians are consonant with *and required by* the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people." 25 U.S.C. 1601(1) (2014) (emphasis added). The District Court nullified this law by holding that there was no special and unique legal relationship, the Tribes were just another "interest group," and they were not entitled to anything. According to the Court, any care provided them was simply a "matter of grace." ER 7.

The IHCIA provides a comprehensive statutory framework for provision of qualified health personnel, health services, and health facilities to Indians both on and off the reservation. 25 U.S.C. § 1601 *et seq*. The IHCIA is an express statutory "manifestation of what Congress thinks the trust responsibility requires of federal officials, with whatever funds are available, when they try to meet Indian health needs." *Califano*, 437 F. Supp. at 557; *United States v. Bering Strait School*

*District*, 138 F.3d 1281, 1281 (9th Cir. 1998) (stating "[t]he purpose of the [IHCIA] was to ensure sufficient resources to provide Indians with proper health care and adequate funding to construct modern hospitals and other health care facilities").

Amendments to the IHCIA, signed into law in 2010 as part of the Patient Protection and Affordable Care Act, re-affirm the federal government's duty to competently provide health care to Indians. Public Law 111-148, § 10221 (2010) (adopting and enacting Senate Bill 1790 (2009), the Indian Health Care Improvement Reauthorization and Extension Act of 2009, in its entirety). Signing the amendments, President Obama emphasized that: "Our responsibility to provide health services to American Indians and Alaska Natives derives from our nation-to-nation relationship between the federal and tribal governments." *Statement by the President on the Reauthorization of the Indian Health Care Improvement Act* (March 23, 2010). The United States' obligation to ensure adequate health care for Indians arises from statute and is supported by the federal-tribal trust relationship.

The United States' unique responsibility and control over Indian health care is clearly evident on the Fort Yuma Indian Reservation. The United States operates, manages, and controls the buildings, facilities, and services of the FYSU, which are located on trust land within the Fort Yuma Indian Reservation. ER 18, ¶ 16. The FYSU serves approximately 4,000 tribal members of the Quechan and the neighboring Cocopah Tribes. ER 17, ¶ 15. Some tribal members

rely solely on the FYSU for their health services, lacking the means or ability to obtain services elsewhere. ER 22-23, ¶ 49.

Having undertaken responsibility for Indian health care on the Fort Yuma Indian Reservation, the United States has a statutory and fiduciary trust obligation to provide such care in a competent manner. *McNabb v. Heckler*, 628 F. Supp. 544, 548-49 (D. Mont. 1986), *aff'd* 829 F.2d 787 (9th Cir. 1987) (stating that the Snyder Act, and IHCIA, "read in conjunction with the trust doctrine, place the burden, in the first instance, upon the IHS programs *to assure reasonable health care for eligible members*") (emphasis added); *Bering Strait School District*, 138 F.3d at 1282 (stating purpose of IHCIA "was to ensure sufficient resources to provide Indians with *proper health care*") (emphasis added).

Providing unsanitary and unsafe facilities and/or operating at levels of service that place tribal members at risk of harm, as the Tribe alleges, violates the United States' duties. *Id.; see also Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1100 (8th Cir. 1989) (finding that acts of federal government that affirmatively contributed to health hazards on the reservation violated statutory and trust duties arising under Snyder Act and IHCIA). Given the long history of malfeasance and misfeasance at the FYSU, the Tribe seeks equitable relief and a declaratory order that the United States has a statutory duty

and trust obligation to operate the health facilities in accordance with generally accepted minimum standards of care.

B. The Tribe's Claims For Declaratory and Equitable Relief Arise From A Substantive Statutory Duty; They Are Further Supported By the Federal Government's Fiduciary Trust Relationship With Indian Tribes.

The District Court dismissed the Tribe's claims for declaratory and equitable relief pursuant to FRCP 12(b)(6) because, according to the Court, the Tribe had failed to identify any "substantive source of law" requiring the United States to ensure that health care provided to Indians meets a minimum standard of care. The Court stated that the "general trust relationship" standing alone, is "insufficient to create legal obligations in the United States." ER 6. The Court's ruling is in error, because the IHCIA, Snyder Act, and their implementing regulations, as supported by the special fiduciary trust obligation to Indians, create a substantive statutory duty on the part of the United States to ensure Indians receive health care. Implicit in this statutory obligation, and consistent with the federal-tribal trust relationship, is a duty to ensure that health care provided by the United States to Indians reasonably conforms to baseline, minimum standards of care. The District Court, however, held that these statutes essentially mean nothing and any health care is simply a matter of "grace." ER 7.

The federal duty to provide health care to Indians does not arise solely from the common-law trust relationship between the United States and Indian nations.

While the federal-government's health care obligations to Indians are supported by the general trust relationship, Congress has expressly confirmed the duty to provide health care in statutes, most significantly in the Indian Health Care Improvement Act and amendments thereto, codified at 25 U.S.C. § 1601 *et seq*. An affirmative duty is also found in the Snyder Act, 25 U.S.C. § 13, which directs the United States to "relieve distress and conserve Indian health." *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569 (9th Cir. 1980); *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1100 (8th Cir. 1989). There is a current and actual controversy regarding the scope of the United States' duties to the Tribe and its members. Pursuant to 28 U.S.C. § 2201, the Tribe may seek a judicial declaration of the United States' duties and obligations with respect to its provision of health care to Indians on the Fort Yuma Indian Reservation, and appropriate equitable relief to ensure compliance with those duties.

1. The IHCIA Is A Substantive Source of Law That Mandates Declaratory and Equitable Relief.

The IHCIA, as originally passed in 1976 and as amended in 2010, is a substantive source of law that establishes a comprehensive fiduciary duty on the United States to ensure Indian people have access to health care of, at minimum, reasonable quality. Congress enacted the IHCIA, "in fulfillment of its special trust responsibilities and legal obligations to Indians - (1) to ensure the highest possible health status for Indians . . . [and] (6) to ensure quality health care for all tribal

members . . . " 25 U.S.C. § 1602(1), (6). In 25 U.S.C. § 1601(1), Congress states that "Federal health services to *maintain and improve the health* of the Indians are consonant with *and required by* the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people." (emphasis added). Goals and purposes articulated by Congress in a statute may create binding legal obligations that may be judicially enforced. *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 925 (9th Cir 2008), *citing Russell v. Landrieu*, 621 F.2d 1037, 1041 (9th Cir. 1980). The District Court held that there is no special trust responsibility, no need to ensure the highest possible health status for Indians, and no requirement to ensure quality health care. ER 7-9. The Tribe, according to the Court, is just another interest group complaining about funding. ER 13.

In the IHCIA, Congress provides for the provision and maintenance of health care services and facilities for tribal members. While no section of the IHCIA states verbatim that the United States must provide health care in accordance with minimum, generally-accepted standards of medical care, numerous sections (including those cited in the preceding paragraph) confirm that is what Congress expects, and also what the fiduciary obligation to tribal members requires. In 25 U.S.C. § 1602(1), (6), Congress declares it is "the policy of this Nation, in fulfillment of its special trust responsibilities" to "ensure the ***highest***

*possible* health status for Indians" and to "ensure *quality health care* for all tribal members." (emphasis added). Other statutory sections are consistent with this statement of Congressional policy. For example, 25 U.S.C. § 1621(a) authorizes expenditure of funds for the purposes of: "(1) eliminating the deficiencies in health status and health resources of all Indian tribes . . . and . . . (3) meeting the health needs of Indians in an efficient and equitable manner." Congress directs that funds appropriated under the IHCIA "shall be used . . . to improve the health status and reduce the resource deficiency of each Indian tribe served by such Service unit . . . ." 25 U.S.C. § 1621(c)(1). IHS also has a responsibility "to eliminate existing backlogs in unmet health care needs [of Indians]." 25 U.S.C. § 1621(h). The District Court's ruling that no standards of care apply to the provision of health care in Indian country violates the clear intent of Congress, the rulings of this and other federal courts as to the status of Indians, and is inconsistent with the statutory text.

Many other provisions of the IHCIA confirm Congress' expectation that the United States will provide health care services to Indian tribes in, at minimum, a reasonable and competent manner. For example, 25 U.S.C. § 1645(a)(1) authorizes the Secretary to enter into agreements to share medical facilities and services with other federally operated medical facilities, such as Veterans Affairs hospitals, but the Secretary is prohibited from such sharing agreements if they

would "*impair – (2) the quality of health care services* provided to any Indian through the Service." 25 U.S.C. § 1645(b)(2) (emphasis added). Similarly, Congress prohibits the right to payment or reimbursement for health services rendered to Indians if the facility seeking payment "has been excluded from participation in any Federal health care program or for which a license is under suspension or has been revoked by the State." 25 U.S.C. § 1647a(b)(1). These provisions show that Congress expects health care will be provided to Indians in accordance with a minimum baseline level of quality. *See also* 25 U.S.C. § 1616(b)(1) (mandating a standard of training for community health practitioners serving Alaskan native villages "to ensure that such aides and practitioners provide *quality health care*, health promotion, and disease prevention services to the villages served by the Program") (emphasis added). According to the District Court, these statutory words are just a sham and United States need do nothing.

Congress has also directed that IHS services and facilities be managed competently. 25 U.S.C. § 1661(c)(2) requires the IHS Director to ensure "all agency directors, managers, and chief executive officers have appropriate and adequate training, experience, skill levels, knowledge, abilities, and education . . . to competently fulfill the duties of the position and the missions of the Service." Other provisions "assure an adequate supply of trained health professionals necessary to maintain accreditation of . . . Indian health programs." 25 U.S.C.

§ 1616a(1). Congress requires that health facilities serving Indians must be adequately designed, constructed, and maintained. The IHCIA demands development of standards for the "planning, design, construction, and operation of health care or sanitation facilities serving Indians." 25 U.S.C. § 1638e(c)(1). Congress also intends that health service facilities constructed or renovated with Snyder Act funds meet minimum standards of the Joint Commission on Accreditation of Health Care Organizations. 25 U.S.C. § 1631(a)(2).

Regulations implementing the IHCIA also show that health services provided to Indians must meet baseline standards of care. Applicants for grants relating to Indian health care must provide assurances to the Secretary that the applicant will "provide such [health-care] services at a level and range which is not less than that provided by the Indian Health Service or that identified by the Service after negotiation with the applicant, as *an appropriate level, range, and standard of care*." 42 C.F.R. § 136.104(c)(1) (emphasis added). Similarly, 42 C.F.R. § 136.105(a), (f) requires projects supported by grants for delivery of Indian health services to have sufficient, adequately trained staff and to provide services in accordance with "*an appropriate . . . standard of care*." (emphasis added). Grant recipients must also "conform to the minimum requirements of construction and equipment specified in the grant award or in HHS documents specified in the grant award." 42 C.F.R. § 136.110(b)(4).

Read as a whole, and in conjunction with the federal government's underlying trust obligation to Indians, the IHCIA and the Snyder Act repeatedly evidence Congress' intent that Indians receive health care that meets basic minimum standards of quality. 25 U.S.C. § 1602 (stating Congressional intent to "ensure the highest possible health status for Indians" and "to ensure quality health care for all tribal members"); *United States v. Bering Strait School District*, 138 F.3d 1281, 1282 (9th Cir. 1998) (noting purpose of IHCIA to ensure "proper" health care for Indians); *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569 (9th Cir. 1980) (holding that IHS violated duties under Snyder Act by failing to rationally allocate health-care funds to California Indians); *McNabb v. Heckler*, 628 F. Supp. 544, 549 (D. Mont. 1986), *aff'd* 829 F.2d 787 (9th Cir. 1987) (stating that the Snyder Act, and IHCIA, in conjunction with the trust doctrine place burden on IHS to assure "reasonable health care for eligible members"). *See also Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1100 (8th Cir. 1989) (holding that, at minimum, the Snyder Act and IHCIA commit the United States to "refrain from contributing to poor health conditions on the Reservation") Here, the District Court effectively nullified these Congressional Acts, holding that the United States could do what it wanted, as a matter of "grace."

Pursuant to 28 U.S.C. § 2201, the Tribe is entitled to seek a declaratory order defining IHS' minimum duties and obligations with respect to its provision

of health-care on the Fort Yuma Indian Reservation. *Rincon Band of Mission Indians*, 618 F.2d at 575 (affirming declaratory order requiring United States to ensure that health services provided to California Indians are comparable to those provided to other Indians); *White v. Califano*, 543 F. Supp. at 560 (granting declaratory judgment "to serve the vital purpose of defining rights and responsibilities in the area of Indian health care"). The Tribe is also entitled to pursue appropriate equitable relief to ensure the United States' compliance with its duties. This Court should reverse the District Court and remand this action for further proceedings on the Tribe's claims for declaratory and equitable relief.

2. Congress Intends That IHS Provide Health Care Competently, In Safe Facilities, And In Accordance With Generally Accepted Minimum Standards of Medical Care.

The United States argued, and the District Court accepted, that the Tribe's claims should be dismissed because no treaty, statute, or regulation expressly states verbatim that health care services and facilities provided to Indian people by the United States must comport with a minimum standard of care. ER 7-8 (finding that IHCIA does "not impose a duty on defendants to provide a certain level of health care"). This Court should reject the District Court's interpretation of the law, which would lead to the absurd conclusion that no standards of conduct apply when the United States undertakes its affirmative statutory duty and trust obligation to provide health care to Indian people.

Based on its statutory duties and its fiduciary trust obligation, the United States has, in fact, undertaken health care services on the Fort Yuma Reservation. The corresponding duty to provide such service in a safe, competent, manner, in accordance with a baseline standard of care need not be expressly stated; rather, it can be implied by the Court. *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 737-39 (2011) (explaining that once a statutory duty is found, the court may look to common law and fiduciary trust obligations to interpret the duty and that "the language of [a trust-creating] statute ultimately does not cabin [the United States'] fiduciary obligations").

In interpreting the United States' statutory obligations to Indians, the United States Supreme Court has repeatedly inferred rights and duties that are not expressly stated in statutory text. For example, in *Mitchell II*, after finding an express statutory duty to manage Indian timber resources and land for the benefit of the Indians, the Supreme Court inferred that the United States, in the role of trustee, may be held accountable for damages for breach of its duties. *United States v. Mitchell*, 463 U.S. 206, 226 (1983) (*Mitchell II*). *See also County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233-236 (1985) (affirming Indian nation's common law right to sue to enforce aboriginal land rights, despite lack of express statutory authorization).

Similarly, in *United States v. White Mountain Apache*, 537 U.S. 465 (2003), the Supreme Court found a substantive source of law requiring that the United States hold certain property in trust for the Tribe. Although statutory language said nothing on the topic, the Supreme Court inferred that the United States had a duty to preserve and maintain the property in good repair. *Id.* at 475-476. The Court also implied a remedy in damages although the statutory text said nothing about a remedy of any kind. In finding a duty owed to the Indians, the Court relied not on express statutory text, but instead on general common law principles that confirmed "the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. *Id.* In this case, the Tribe relies on the Snyder Act and IHCIA as substantive sources of law supporting its "commonsense" argument that IHS has a duty to ensure health care provided to Indians comports with, at least, minimum standards of care. *United States v. Jicarilla Apache Nation*, ___U.S. ___, 131 S. Ct. 2313, 2325 (2011) ("once federal law imposes such duties, the common law 'could play a role'" and the Supreme Court has "looked to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed").

Like the Supreme Court in *Mitchell II* and *White Mountain Apache Tribe*, other courts have properly recognized that the United States may have fiduciary obligations to Indian nations that are not articulated verbatim in the statutory text.

In *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001), the Court explained that "it is no doubt true that the government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations . . . This does not mean that the failure to specify the precise nature of the fiduciary obligation or to enumerate the trustee's duties absolves the government of its responsibilities." *Id.* at 1098-99. Once a substantive source of law is identified, the courts may fill in the "interstices" of the express statutory language. *Id.* at 1101.

More recently in *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726 (2011), the Court of Federal Claims soundly rejected the United States' contention that all fiduciary duties owed to Indian tribes must be expressly stated verbatim in the relevant statutory text. In rejecting the United States' cramped view of its fiduciary obligations, the Court stated:

> Defendant would have this court blithely accept what so many courts have rejected – that for breach of a fiduciary duty to be actionable in this court, that duty must be spelled out, in no uncertain terms, in a statute or regulation. But to conclude this, this court would have to perform a logic-defying feat of legal gymnastics . . . . Indeed, while egging the court on, defendant never quite comes to grip with the fact that if the government's fiduciary duties are limited to the plain dictates of the statutes themselves, such duties are not really 'fiduciary' duties at all. *See Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996) ("[i]f the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose").

*Id.* at 738. In support of this conclusion, the Court cited the Supreme Court's decision in *Jicarilla*, the Court's previous decisions in *Mitchell* and *White*

*Mountain Apache*, as well as other decisions that had "repeatedly dismissed the notion that [the United States'] fiduciary duties must be specifically enumerated by statute." *Id.* at 737, *citing Duncan v. United States*, 667 F.2d 36, 42-43 (Ct. Cl. 1981), *cert. denied*, 463 U.S. 1228 (1983) (applying *Mitchell I* while rejecting defendant's claim that "a federal trust must spell out specifically all the trust duties of the Government"); *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 988 (Ct. Cl. 1980) ("Nor is the court required to find all the fiduciary obligations it may enforce within the express terms of an authorizing statute . . . ."). *See also Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274 (2013) (finding the United States liable for violation of fiduciary duties relating to management of tribal trust assets, including duties not expressly stated verbatim in statutory text). Here, the Court should reasonably find that Congress intends that health care provided to beneficiary Indians by the federal government must meet minimum standards of care. The fact that Congress did not expressly state this commonsense fiduciary obligation verbatim in the statutory text is no bar to relief sought here.

The Tribe has identified substantive statutes, including the IHCIA and the Snyder Act, which establish a statutory fiduciary obligation of the United States towards Indian nations and their members. *McNabb v. Bowen*, 829 F.2d 787 (9th Cir. 1987); *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 570 (9th Cir. 1980); *White v. Califano*, 437 F. Supp. 543 (D. S.D. 1977). The government's

obligation to ensure that health care services provided to Indian people comports with minimum, generally-accepted standards of care is a reasonable and permissible inference, even if not expressly stated verbatim in the statutory text.

In the context of Indian health care, this Court and other courts have previously inferred duties that are not expressly stated verbatim in the statutory text. In *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 570 (9th Cir. 1980), California Indians sought a declaratory judgment that the IHS system for allocating funds among its service units violated constitutional, statutory, and trust duties. This Court acknowledged that "the explicit language of the Snyder Act contains no provisions regarding eligibility criteria or distribution guidelines for any program." *Id.* at 571. Nevertheless, in light of the underlying purpose of the Snyder Act and the inequities shown by the California Indians (who were consistently allocated less than 2% of available funds despite making up 10% of the total service population), the Court inferred that the United States had a duty under the Snyder Act to develop and implement a rational and equitable system for distributing IHS program funds.

In *McNabb v. Bowen*, 829 F.2d 787 (9th Cir. 1987), an indigent Indian child sought a declaration of whether the United States or a local County government were responsible for payment of his health bills. Although "Congress failed to outline the role it wished the federal government to play vis a vis state and local

agencies in providing Indian health care," the court looked to "three sources which provide insight into congressional intent." *Id.* at 791. Those sources were the Snyder Act, the IHCIA, and the "overriding trust relationship between the federal government and the Indians." *Id*. This Court affirmed the District Court's ruling that the federal government was ultimately responsible for the Indians' health bills if the County failed to pay them. "Any other result is inconsistent with the trust doctrine." *Id.* at 794.

The court also inferred health-care duties owed to Indians in *White v. Califano*, 437 F. Supp. 543 (D. S.D. 1977), where the plaintiff Indian argued that the federal government had an affirmative obligation to provide her with mental health care. Although "no statute states with specificity that the IHS must provide care for persons requiring involuntary commitment," the Court agreed that such duty implicitly arose under the IHCIA in conjunction with the general trust obligation to Indians. *Id.* at 553, 557. The Court granted the plaintiff's request for a declaratory judgment to prospectively define the rights and responsibilities of IHS towards plaintiff. *Id.* at 560.

In this case, it is a "commonsense assumption" that Congress intended that IHS provide health services to Indians in accordance with appropriate minimum standards of care. *White Mountain Apache Tribe*, 465 U.S. at 475-76 (inferring "commonsense assumption" regarding management of trust properties). Congress'

failure to specify the precise nature of IHS' obligations verbatim or to more clearly enumerate the duties does not absolve the government of its basic responsibility to provide health care in a reasonably competent and safe manner. *See Jicarilla*, 100 Fed. Cl. at 738-39 (finding that court had jurisdiction over tribe's claims that United States violated its obligation to maximize trust income by prudent investment, despite lack of specific express statutory language to that effect).

3. Indian Canons of Construction Require The Court To Liberally Construe the IHCIA and Snyder Act In Favor of the Indians.

Statutes expressly enacted for the benefit of Indians must be liberally construed in their favor, with all ambiguities in such acts resolved in favor of the Indians. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1082 (9th Cir. 2001). "The rule of liberally construing statutes to the benefit of the Indians arises not from ordinary exegesis, but 'from principles of equitable obligations and normative rules of behavior,' applicable to the trust relationship between the United States and the Native American people." *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001). Construing Indian statutes liberally in the Indians' favor "is a principle deeply rooted in . . . Indian jurisprudence." *County of Yakima*, 502 U.S. at 269.

This case involves the interpretation of statutes expressly enacted to benefit Indians; specifically, to provide health care to Indians. This Court has held that the

"assistance programs established under the Snyder Act are for the special benefit of Indians and Indian communities and must be liberally construed in their favor." *Rincon Band of Mission Indians*, 618 F.2d at 572 (9th Cir. 1980), *quoting Fox v. Morton*, 505 F.2d 254, 255 (9th Cir. 1974). *See also McNabb v. Bowen*, 829 F.2d 787, 792 (9th Cir. 1987) ("the canon of liberal construction controls in determining congressional intent under the Snyder Act's general assistance program").

In the *Bowen*, *Rincon Band* and *Fox* cases, this Court emphasized that the federal government has an "overriding duty of fairness when dealing with Indians, one founded upon a relationship of trust for the benefit of these '. . . dependent and sometimes exploited people.'" *Rincon Band of Mission Indians*, 618 F.2d at 572 (9th Cir. 1980), *quoting Fox v. Morton*, 505 F.2d 254, 255 (9th Cir. 1974). The Court further emphasized that "the Snyder Act was enacted with this principle in mind, and its programs must be administered accordingly." *Id.* Like the Snyder Act, the IHCIA was also enacted with the trust principle in mind and for the purpose of benefiting Indian people. These statutes, expressly designed to provide health care to Indians, should be liberally interpreted to require the United States to provide such care in accordance with a minimum, generally-accepted, standard of care. *See also Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d at 1100 (holding United States has affirmative obligation under Snyder Act, IHCIA, and trust doctrine to not knowingly contribute to health hazards on the reservation).

Here, the District Court held that the United States has no obligation to ensure that health care provided to Indians comports with any minimum standard of care. The Court apparently believes that any level of care, no matter how deficient, unsanitary, and dangerous to tribal patients, conforms with Congressional intent in the IHCIA and Snyder Act, and its trust obligation to Indians. The Court further believes that it is powerless to render prospective equitable relief that would direct IHS to take action to remedy below-standard levels of care. This Court should reverse these erroneous interpretations by the District Court. Cohen (2012 ed.), § 5.05[1][a] (explaining that federal courts read Indian statutes liberally in accordance with Indian canons of construction to determine existence of claim for equitable relief).

The Court must construe the IHCIA and Snyder Act liberally in the favor of the Tribe and should find that Congress intends that the United States, at minimum, ensure that health care provided to tribal members is safe, competent, and in conformance with generally-accepted standards of care, and that the Tribe may pursue declaratory and appropriate equitable relief to ensure compliance. *See A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 787 (9th Cir. 1986) ("until Congress repeals or amends the Indian . . . statutes . . . we must give them a 'sweep as broad as [their] language' and interpret them in light of the intent of the Congress that enacted them").

4. Cases Relied Upon By The District Court Are Distinguishable and Not Dispositive of the Tribe's Claims.

The District Court relies on *Marceau v. Blackfeet Hous. Authority*, 540 F.3d 916 (9th Cir. 2008) and *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006), in determining that the Tribe failed to state a claim. Both cases are factually and legally distinguishable and do not dispose of the Tribe's claims here.

In *Gros Ventre*, the plaintiff tribe argued that the United States had breached the general trust obligation by approving expansion of two cyanide heap-leach gold mines located upriver from, but outside the boundaries of, the Tribe's reservation. *Id.* at 803. Although the United States had acted in compliance with generally applicable permitting statutes and regulations, the Tribe nevertheless argued that the approval should be overturned. This Court affirmed summary judgment in favor of the United States, dismissing the Tribe's breach of trust action.

In *Gros Ventre*, the plaintiff Tribe's cause of action for breach of trust was defective because it was "wholly separate from any statutorily granted right." *Id.* at 810. The *Gros Ventre* Court found nothing in any treaty, statute, or agreement that imposed either "expressly, *or by implication*," a duty to regulate conduct of non-Indians off the reservation for the benefit of the Tribe. *Id*. (emphasis added). In contrast, here, Quechan's claims are grounded in the IHCIA and the Snyder Act. The Tribe does not rely solely on a general trust theory. It supports its claims for

declaratory and equitable relief through statutes expressly enacted to fulfill and implement the federal government's trust obligation.

The District Court also relied on *Gros Ventre* for the proposition that "unless there is a specific duty that has been placed on the government with respect to Indians, the government's general trust obligation is discharged by the government's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Gros Ventre*, 469 F.3d at 810. This statement is not applicable here, as this case does not involve "regulations and statutes not specifically aimed at protecting Indian tribes." *Id*. The IHCIA and Snyder Act are expressly enacted for the benefit of tribal members and create an affirmative duty to ensure that the quality health care required by Congress is provided in accordance with a minimum standard of care.

Unlike in *Gros Ventre*, the plaintiff Quechan Tribe is not trying to force the government to regulate non-Indians or off-reservation properties for the benefit of the Tribe. *Id.* at 811. Instead, it simply seeks to ensure that the health care provided to its members by the United States on the Fort Yuma Indian Reservation meets appropriate minimum standards of care.

Although Gros Ventre's breach of trust claims were dismissed for failing to state a claim, the Tribe is not required to identify an express cause of action in the IHCIA or Snyder Act in order to support its breach of trust claim. *White Mountain*

*Apache Tribe*, 465 U.S. at 477. In *White Mountain Apache Tribe*, the United States argued that the Tribe's cause of action should be dismissed because no statute expressly authorized the damages suit. As the Supreme Court explained, the United States' demand for a "plain and explicit statement" providing a cause of action would "leave *Mitchell* a wrongly decided case." *Id.; see also County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233-236 (1985) (affirming the Tribes' federal common law right to sue to enforce aboriginal land rights). In addition, here, the Tribe has satisfied the requirements of the Declaratory Judgment Act, 28 U.S.C. § 2201, and may seek relief under that statute.

The claims in *Gros Ventre* failed because there was no substantive source of law of any kind that either expressly or by implication supported the duty alleged by the Tribe or its breach of trust claims. That is not the case here. Congress has enacted statutes providing federal responsibility for Indian health care "in fulfillment of its special trust responsibilities and legal obligations to Indians – (1) to ensure the highest possible health status for Indians . . . [and] (6) to ensure quality health care for all tribal members." 25 U.S.C. § 1602(1), (6). The Tribe may seek declaratory and equitable relief to ensure that the federal government fulfills its statutorily-based trust duties to the Tribe.

The District Court also relies on *Marceau v. Blackfeet Housing Auth.*, 540 F.3d 916 (9th Cir. 2008) as support for its opinion that no enforceable fiduciary

obligation exists here. In *Marceau*, tribal members sought relief related to defects in housing constructed with money provided by the United States Department of Housing and Urban Development (HUD) and constructed by a HUD-approved tribal housing authority. The plaintiffs alleged a breach of trust obligations flowing from HUD's "comprehensive and pervasive control of the monies, the property, the standards for constructing the homes, the standards for providing mortgages for the homes, [and] the standards for who qualified to live in the homes." *Id.* at 921. Plaintiffs also cited to HUD statutes, which applied generally to all HUD housing as support for their breach of trust argument. *Id.* at 924-25.

For a number of reasons, *Marceau* is distinguishable and not dispositive of the Tribe's arguments here. First, similar to *Gros Ventre* (and different from the Quechan's claims), the substantive source of law relied upon by plaintiffs in *Marceau* was not a statute enacted for the benefit of Indians. The regulatory standards cited by the *Marceau* plaintiffs applied to all HUD-housing, not just Indian housing. *Id.* at 925. The relevant regulations were not enacted specifically to benefit Indians or to implement the general trust relationship. In contrast here, Congress has expressly stated that the Indian health-care statutes were enacted for the purpose of fulfilling the United States' special trust obligations to Indians. 25 U.S.C. § 1602(1), (6) (enacting IHCIA "in fulfillment of its special trust responsibilities and legal obligations to Indians - (1) to ensure the highest possible

health status for Indians . . . [and] (6) to ensure quality health care for all tribal members . . . .").

Second, the federal agency had no actual managerial control over the construction or maintenance of the native housing. The statutory scheme was designed to "giv[e] the lead role to an entity other than the government." *Id.* at 927. In *Marceau*, the entity with responsibility over the defective housing was the native housing authority, not the federal government. In *Marceau*, "the federal government did not build, manage, or maintain any of the housing." Here, the federal government has exclusive control over the operations and maintenance of the Fort Yuma facilities in addition to managerial and administrative control over the health services provided to tribal members.

The Quechan tribal government has no authority or control over the management, operations, or maintenance of the IHS operations in the Fort Yuma Service Unit. Unlike the situation in *Marceau*, IHS has control, both legally and as a matter of fact, in how health care is provided at IHS facilities on the Fort Yuma Indian Reservation. In addition to the federal government's actual control of the facilities, Congress has expressly provided by statute that this control over the health care provided to Indian tribes by the government is done so in fulfillment of the special trust responsibilities. 25 U.S.C. § 1602(1). The United States has a

fiduciary duty to ensure the quality health care required by Congress meets minimum standards of care, and that duty may be enforced here.

C. The Tribe Is Entitled to Seek Declaratory and Equitable Relief Relating to the United States' Violation of Its Statutory and Common Law Trust Duties.

The Tribe, in this case, does not seek money damages. Rather, it seeks only declaratory and equitable relief pursuant to 28 U.S.C. § 2201 and 2202. In the alternative it seeks a writ of mandamus pursuant to 28 U.S.C. § 1361 to compel performance of the United States' non-discretionary duties. The scope of relief sought by the Tribe is exceptionally narrow. The Tribe does not seek an order requiring the United States to provide tribal members with health care in the first instance. Nor is the Tribe asking the Court to order the United States to provide Indians with health care of exceptional quality. Rather, the Tribe simply alleges that any health care that the United States does provide must, at minimum, conform with minimum standards of care. *Blue Legs*, 867 F.2d at 1100 (8th Cir. 1989) (finding that when the United States "engages in injurious conduct toward the intended statutory beneficiaries, [its] duty to remedy the wrong is absolute"). Instruments must be sanitized, floors fixed, seismic improvements made, and the facilities improved above their currently designated "very poor" status.

The Tribe has properly alleged claims to support its request for a declaratory order under 28 U.S.C. §2201 that the United States has statutory and federal common law duties to ensure that its medical services and facilities on the Fort

Yuma Indian Reservation do not fall below generally accepted minimum standards, and that the United States has breached its duty. Once the Tribe establishes the existence of such duty and breach, the District Court has the power under 28 U.S.C. § 2202, 28 U.S.C. § 1361, and its general equitable powers under 28 U.S.C. § 1331 to enforce the United States' compliance with its duties. *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 575 (9th Cir. 1980) (affirming declaratory order that United States violated duties owed to California Indians under Snyder Act and IHCIA); *see also White Mountain Apache Tribe v. United States*, 46 Fed. Cl. 20, 27 (1999) (noting that acts, like the Snyder Act, which "impose upon the Secretary general mandates to aid Native Americans . . . may be enforceable through a suit for injunctive relief"); Cohen (2012 ed.), at § 5.05[1] (discussing availability of equitable relief to enforce statutory duties to Indians).

The Tribe's action meets all requirements of the Declaratory Judgment Act and the Tribe may proceed with its claims under the authority of that statute. There is an existing dispute between the Tribe and the United States about the extent of the duties owed to the Tribe and whether a duty has been breached. 28 U.S.C. §2201. The Tribe has no adequate alternative remedy and is entitled to proceed with its claims for the purpose of obtaining declaratory and other appropriate equitable relief. *Eric v. Secretary*, 464 F. Supp. 44 (D. Alaska 1978) (denying motion to dismiss claims of Alaska natives that sought a declaratory

order that United States breached statutory and trust responsibilities in administering Bartlett Act, which provides federal funds for native housing, by providing houses that were allegedly unsafe and unhealthy); *White v. Califano*, 437 F. Supp. 543, 560 (finding that a declaratory judgment would "serve the vital purpose of defining rights and responsibilities in the area of Indian health care"); *Chemehuevi Indian Tribe v. Wilson*, 987 F. Supp. 804 (N.D. Cal. 1997) (granting declaratory judgment that United States had mandatory duty to file suit on behalf of Indian tribe to protect rights under Indian Gaming Regulatory Act). This Court should reverse the District Court and rule that the Tribe may pursue its claims for declaratory and equitable relief.

In addition to statutes authorizing declaratory and mandamus relief, the District Court has authority to review the Tribe's equitable claims pursuant to its general equitable powers under 28 U.S.C. § 1331. *Simmat v. United States Bureau of Prisons*, 413 F.3d 1225 (10th Cir. 2005) (recognizing 28 U.S.C. § 1331 provides jurisdiction for exercise of court's equitable powers). *See also* Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 147-48 (1998) (noting § 1331 provides a statutory basis for issuing specific equitable orders against federal agency officers to enforce federal rights).

The District Court also erred by requiring the Tribe, in this equitable action, to show that the IHCIA "'unambiguously provides that the United States has

undertaken full fiduciary responsibilities' as to the management of Indian health care." ER 7. This "full fiduciary relationship" language comes from the *Mitchell* cases where the Court was asked to evaluate whether statutes could support the inference of a damages remedy against the United States. No damages are sought here. Thus, the "somewhat sharper focus on the statutory basis for a claim is not required." Cohen, § 5.05[3][c]; *see also* Cohen, § 5.05[1][b] (explaining distinctions in breach of trust cases seeking equitable and monetary remedies). Further, the Congress has specifically directed the United States to provide medical care.

The United States has conceded in past cases that equitable relief is an appropriate remedy to address breaches of their fiduciary and trust obligations. In *Mitchell*, the United States argued that "violations of duties imposed by [Indian statutes] may be cured by actions for declaratory, injunctive, or mandamus relief against the [United States]." *Mitchell II*, 463 U.S. at 227. Likewise, in *White Mountain Apache Tribe*, the United States again argued that "the inference of a damages remedy is unsound simply because damages are inappropriate as a remedy . . . , *prospective injunctive relief being the sole relief tailored to the situation*." 537 U.S. at 478 (emphasis added).

As the United States has argued at least twice to the Supreme Court, claims for equitable relief are available to rectify breach of the United States' statutory

and common law trust duties owed to Indian tribes. *See also United States v. Testan*, 424 U.S. 392, n.5 (1976) (noting United States' concession that it would not contest the district court's jurisdiction to entertain respondents' claim for prospective equitable relief); *Rincon Band of Mission Indians*, 618 F.2d 569, 575 n.8 (9th Cir. 1980) (noting that the "jurisdictional dilemma" that confronted the Court in *Mitchell* is not present in a case where the Indians are not seeking money damages against the United States); *Eric v. Secretary*, 464 F. Supp. 44 (D. Alaska 1978) (denying motion to dismiss Alaska natives' claims for declaratory and equitable relief alleging violations of duties owed under Bartlett Act). The Tribe should be permitted to pursue its claims for declaratory and equitable relief here.

D. The Court Erred By Failing to Construe Factual Allegations in the First Amended Complaint as True And In the Light Most Favorable to the Tribe.

When a court considers a motion to dismiss for failure to state a claim under FRCP 12(b)(6), "all allegations of material fact are taken as true and considered in the light most favorable to the non-moving party." *Cahill v. Liberty Mutual Insurance Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). In this case, the Tribe alleged in its First Amended Complaint that the buildings and facilities of the Fort Yuma Service Unit are located on land held in trust by the United States within the Fort Yuma Indian Reservation. ER 18, ¶ 16; ER 26, ¶ 75-76.[3] The Tribe further alleged

[3] Whether the United States holds the land on which the FYSU facilities in trust is not relevant to the Tribe's claims that the United States has a fiduciary duty

that the United States has the legal, fiduciary, and trust obligation to preserve and maintain those facilities in good and safe repair. ER 20, ¶ 29; ER 26, ¶ 77. *White Mountain Apache Tribe*, 465 U.S. at 475-76.

The District Court erroneously failed to accept the Tribe's factual assertion that the FYSU facilities are located on tribal trust land. Page 5 of the Court's order states: "Here, the United States does not even hold the Ft. Yuma facility in trust. It belongs to the United States. It is not held in 'trust' for the tribe." ER 8. On page 6, the Court states in response to the Tribe's second cause of action: "But Ft. Yuma is not a tribal asset that defendants are holding in trust . . . Absent a trust asset there is no fiduciary duty to preserve and maintain as plaintiff alleges." ER 9.

The Court erroneously dismissed the Tribe's second cause of action by failing to construe the factual allegations relating to that cause of action as true and in the light most favorable to the Tribe. Instead, the Court accepted unsupported representations made by the United States in its brief. If the FYSU facilities are held in trust for the Tribe and if the United States has failed to preserve those facilities in good repair, the Tribe has a cause of action against the United States regarding that failure. *White Mountain Apache Tribe*, 465 U.S. at 475-76.

---

to provide health care services in accordance with a minimum, baseline, standard of care. The ownership of the property in trust for the Tribe is relevant only to the claims that United States has failed to preserve and maintain that property in adequate condition for the health-care purposes that it is intended to serve.

E. IHS Has A Clear and Non-Discretionary Duty to Ensure Health Services Provided to Tribal Members At the FYSU Satisfy Minimum Standards, And Such Duty May Be Equitably Enforced Through A Writ of Mandamus.

IHS lacks any discretion to knowingly operate its health care facilities in a manner that affirmatively endangers the health of tribal patients. Failure to maintain a crumbling hospital facility or to ensure that staff are properly trained in basic health-care procedures, such as sterilization of equipment, is a violation of Congressional mandates and the United States' duties and is adequate grounds for declaratory and equitable relief. As stated by the Eighth Circuit Court of Appeals in *Blue Legs*, 867 F.2d 1094, 1100 (8th Cir. 1989):

> Insofar as the Snyder Act imposes affirmative obligations on BIA to relieve distress and conserve Indian health, BIA's conduct on the Reservation in knowingly contributing to health hazards violated BIA's statutory duty. While BIA is vested with some discretion in deciding how to expend fixed sums toward fulfilling statutory goals, where BIA engages in injurious conduct toward the intended statutory beneficiaries, BIA's duty to remedy the wrong is absolute . . . .

Failure to maintain facilities and adequately train staff is directly inconsistent with legal duties. *White Mountain Apache*, 537 U.S. at 475 (failure to adequately maintain federally controlled facility on trust land violated trust duties to Tribe).

The United States' duty to provide health care to the Tribe's members in accordance with basic generally accepted minimum standards of care is a mandatory, non-discretionary duty that may be enforced through a writ of mandamus under 28 U.S.C. §1361. An analogous case is *Simmat v. United States*

*Bureau of Prisons*, 413 F.3d 1225 (10th Cir. 2005), where a federal prisoner sought injunctive relief and a writ of mandamus against prison dentists in their official federal capacities. The prisoner argued that the United States "deprived him of adequate medical care by deliberate indifference to his serious dental needs." *Id.* at 1231. The Court found that a mandamus action will lie even where an official's duty entails some discretion; that is: "the duty may be discretionary within limits. [The official] can not transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them." *Id.* at 1235, *quoting Work v. United States ex rel Rives*, 267 U.S. 175, 177 (1925). Like the prisoner in *Simmat*, the Tribe's claim is not intended to "control or override the discretion of [the agency]," but is simply to ensure that tribal patients are treated in accordance with basic minimum standards of care for medical facilities. *Id.* at 1235.

The District Court relied on the Supreme Court's decision in *Lincoln v. Vigil*, 508 U.S. 182 (1993), but *Lincoln* is distinguishable and does not address the claims brought by the Tribe here. *Lincoln* involved a challenge to IHS's decision to discontinue the "Indian Children's Program," which provided diagnostic and treatment services to handicapped Indian children in the Southwest and to re-allocate that funding to a nationwide effort to assist such children. *Id.* at 184. Acknowledging that the case presented only "narrow questions," the Court in *Lincoln* held that IHS' decision to re-allocate program funding from a regional to a

national scope was absolutely committed to agency discretion by law. *Id.* at 190-91. In other words, the Court found there was no meaningful standard against which to judge the agency decision in that case. *Id.* at 191-92. In contrast to *Lincoln*, the United States has no discretion to operate its health care facilities in a manner that falls below generally-accepted minimum standards of care. IHS has a non-discretionary duty to ensure its buildings are safe for patients to be treated in, maintained in a sterile condition, and that its staff are adequately trained to provide medical services without causing or increasing the risk of harm to tribal patients.

IHS must allocate its funds from appropriations in accordance with permissible statutory objectives. *Lincoln*, 508 U.S. at 193. Operating an unsafe facility that affirmatively puts tribal patients at risk of harm is not a permissible statutory objective. Congress demands that IHS meet the health needs of Indians in an equitable manner, especially the needs of those Indian tribes with the highest level of health status deficiencies and resource deficiencies. 25 U.S.C. § 1621(a). Congress also demands that available funds be used to "improve the health status and reduce the resource deficiency of each Indian Tribe served by such Service unit." 25 U.S.C. § 1621(c)(1). All IHS directors, managers, and officers must be competent to provide adequate health care to the Indian patients. 25 U.S.C. §1661(c)(2). These requirements are designed to implement Congressional policy to "ensure the highest possible health status for Indians" and to "ensure quality

health care for all tribal members." 25 U.S.C. § 1602(1), (6). IHS acknowledges the unsanitary, unsafe, and inadequate condition of the Fort Yuma facilities, but has failed to correct the problems. Any discretion enjoyed by IHS is constrained by statutory and trust obligations to ensure that its operating facilities meet minimum standards of care. IHS has breached its duty in regard to the FYSU.

If this Court determines, as it should, that the United States has a duty to ensure health care to Indians does not fall below a minimum standard of care, the Court should remand the case to the District Court with a direction to take evidence on what minimum standards of care apply, and to determine whether the United States' practices at the FYSU meet those standards and what corrective action may be appropriate. This type of inquiry is within the proper scope of judicial function. *See Gila River Pima-Maricopa Indian Community v. United States*, 427 F.2d 1194 (Ct. Cl. 1970) (ruling in a pre-IHCIA case that if the United States had a fiduciary duty to provide health services to Indians, the court could judicially determine the applicable standard of care). The District Court's dismissal order should be reversed, and this case should be remanded for further proceedings.

F. The Health Care Services Provided by the United States Endanger The Lives of Tribal Members, Violating Their Rights to Due Process and Equal Protection Under the United States Constitution.

1. Providing Federal Health-Care Services That Affirmatively Place Tribal Members At Risk of Harm, or Loss of Life, Violate Constitutional Due Process Guarantees.

The Tribe's First Amended Complaint alleges that the IHS puts tribal patients at risk of harm, and potentially loss of life, due to the fact that the health facility is not kept sanitary, could not withstand an earthquake, and is not otherwise adequate to treat patients suffering from life-threatening conditions. ER 20-23, ¶¶ 33-50. In specific instances, such as the 2008-09 "exposure event," the inadequate care has affirmatively and directly exposed tribal patients to potentially life-threatening diseases. *Id.* at ¶¶ 58-62.

The District Court erred in ruling that tribal members failed to state a viable claim for violation of their due process rights. Where the government is responsible for medical care, the Due Process guarantees of the United States Constitution apply to ensure that the care is provided in accordance with minimum constitutional standards. *Gibson v. Washoe County, Nevada*, 290 F.3d 1175, 1187-88 (9th Cir. 2002) (denying County's motion for summary judgment on § 1983 claim alleging that County violated substantive due process rights of arrestee through deliberate indifference to his serious medical needs); *Frost v. Agnos*, 152 F.3d 1124 (9th Cir. 1998) (reversing summary judgment in favor of County on § 1983 claim alleging that County violated substantive due process rights of pre-trial detainee by failing to provide him with accessible shower facilities). Similarly

here, the standard of care provided by the United States to Quechan tribal members is constitutionally deficient.

Persons also have a liberty interest in avoiding the unwanted administration of substances into their bodies. *Washington v. Harper*, 494 U.S. 210, 221-22 (1990); *McKinney v. Anderson*, 924 F.2d 1500 (9th Cir. 1991) (finding that prisoner in federal facility had constitutional right to be free from large levels of second-hand smoke). Here, the unnecessary exposure of tribal patients to communicable diseases, such as Hepatitis and HIV violates protections of life and liberty guaranteed by the Due Process Clause.

Tribal members' rights to procedural due process are also implicated, since "the benefits at issue here, health care services, are sufficiently similar to welfare benefits . . . to qualify as an 'entitlement' to a constitutionally protected 'property interest.'" *Rincon Band of Mission Indians v. Califano*, 464 F. Supp. 934, 939, n.6 (N.D. Cal. 1979). The manner in which the United States administers and operates the FYSU unconstitutionally deprives the Tribe's members of their statutory right to health care. The District Court erred in ruling that the Tribe failed to allege a viable claim for violation of due process under the Constitution.

2. Providing Grossly Inadequate Care To Quechan Tribal Members Without A Rational Basis Violates the Equal Protection Clause.

The District Court also erred in dismissing the Tribe's claims alleging violations of the Equal Protection Clause. The District Court relied on *Dandridge*

*v. Williams*, 397 U.S. 471 (1970), which held that a State's decision to cap the amount of aid a large family could receive under the federal AFDC program did not violate the Equal Protection Clause by discriminating on the basis of family size. The Supreme Court found that the State's decision had a reasonable basis and was thus constitutional. *Id.* Here, the Tribe is arguing that there is no reasonable basis or justification for the United States to provide medical care to Indians served by the FYSU in a manner that falls below minimum standards of care. As stated above, the United States does not have the discretion to knowingly operate facilities that are facially unsafe and that place patients at risk of harm, while providing other similarly situated Indians with adequate health care facilities. If the United States has a reasonable justification for its failure to operate the FYSU in accordance with basic minimum standards of professional medical care, that is a question for trial.

In *Rincon Band of Mission Indians v. Califano*, 464 F. Supp. 934 (N.D. Cal. 1979), *aff'd on other grounds*, 618 F.2d 569 (9th Cir. 1980), the Court found, in an analogous case, that the United States' deprivation of adequate medical care to California Indians violated those Indians' rights to equal protection. In *Rincon Band*, the California Indians argued that IHS had, "for no rational reason, denied Indians living within California their fair share of federal funds allocated under the Snyder Act." *Id.* at 935. The Court agreed that IHS violated its constitutional obligation to the Indians:

> [IHS] has, without a rational basis, denied the vast majority of California Indians health services comparable to those available to Indians in other parts of the country. The IHS's explanations and unsuccessful attempts to justify its history as a health care provider for California Indians are inadequate. The burden of providing a rational basis for the disproportionate funding of health care programs for Indians in California has not been met. Consequently, the Court finds that defendants' past and present allocation system for the distribution of IHS funds violates the California Indians' right to equal protection of the law as guaranteed by the due process clause of the Fifth Amendment. There is no rational basis to justify defendants' long history of minimal funding of California Indians health service programs.

*Id.* at 939. There is no rational basis for IHS to operate the FYSU below a minimum, generally-accepted, standard of care. This Court should reverse the District Court and permit the Tribe to proceed with its constitutional claims.

The District Court acknowledged that due process does require that the government provide certain services, such as health care, when a person is imprisoned. ER 12, *citing DeShaney v. Winnebago Co. Dept. of Soc. Serv.*, 489 U.S. 189, 196 (1989). But this requirement, said the District Court, applies only where there is a "special relationship." ER12. And here, said the Court, "no such special relationship exists." *Id*. This statement, as noted *supra*, is wrong. Under the District Court's reasoning, Indian people seeking health care from the United States would be better off as Federal prisoners.

## IX. CONCLUSION

The United States has affirmatively undertaken the obligation to provide health care to the Tribe's members, as directed by statute, and in fulfillment of the

United States' special trust responsibilities to the Tribe. The United States has breached its statutory and fiduciary trust obligations to the Tribe and its members by operating and administering health care facilities on the Fort Yuma Indian Reservation in a manner that falls below minimum, generally accepted, standards of professional medical care, and which affirmatively places tribal members at risk of harm. The Tribe's First Amended Complaint states cognizable legal claims and the Tribe is entitled to seek declaratory and specific injunctive relief to remedy the United States' breach of its legal obligations. The Tribe requests that this Court reverse the District Court's order dismissing the Tribe's First Amended Complaint and remand for further proceedings.

## X. STATEMENT OF RELATED CASES

There are no known related cases pending in this Court.

Respectfully submitted this 16th day of June, 2014.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

*/s Frank R. Jozwiak*
Frank R. Jozwiak, WSBA #9482
Thane D. Somerville, WSBA #31468
Mason D. Morisset, WSBA #273
801 Second Avenue, Suite 1115
Seattle, Washington 98104-1509
Phone: 206-386-5200
f.jozwiak@msaj.com
t.somerville@msaj.com
m.morisset@msaj.com
Attorneys for Quechan Indian Tribe

## XI. CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(2)(7)(B) because: this brief contains 13,647 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief compiles with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

Executed this 16th day of June, 2014, at Seattle, Washington.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

s/*Frank R. Jozwiak*
Frank R. Jozwiak

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document – Appellant's Opening Brief – with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 16, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system on June 16, 2014.

Executed this 16th day of June, 2014, at Seattle, Washington.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

s/*Frank R. Jozwiak*
Frank R. Jozwiak

T:\WPDOCS\0267\10108\Pleadings\9th Cir\9th Cir Brief_FILE.docx
kfn:6/16/14