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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

SUSANVILLE INDIAN RANCHERIA, )  
)  
)  
Plaintiff, )  
)  
v. )  
)  
MIKE LEAVITT, Secretary of the )  
United States Department of )  
Health and Human Services; )  
CHARLES W. GRIM, Director of )  
the Indian Health Service; and )  
MARGO KERRIGAN, Area Director of )  
the California Area Office of )  
the Indian Health Service; )  
)  
Defendants. )  
\_\_\_\_\_ )

2:07-cv-259-GEB-DAD

ORDER

Plaintiff moves for a preliminary injunction under Federal Rule of Civil Procedure 65(a) and 25 U.S.C. § 450m-1, in which it seeks to enjoin Defendants "from excluding [Plaintiff]'s pharmacy services component from the programs authorized under [Plaintiff]'s self-governance Compact and Calendar Year 2007 Funding Agreement . . . and [a court order] directing Defendants to sign the Compact and CY 2007 Funding Agreement and provide such funding as is authorized under these agreements without imposing any condition that would prevent [Plaintiff] from charging beneficiaries for services." (Pl.'s Mot.

1 for Preliminary Inj. ("Mot. for PI") at 1-2.) Defendants conceded at  
2 the hearing on Plaintiff's motion for preliminary injunction held on  
3 February 26, 2007 that a preliminary injunction should issue  
4 preserving the status quo, but oppose the scope of Plaintiff's  
5 requested preliminary injunction. (February 26 Hearing; see also  
6 Defs.' Opp'n to Mot. for PI at 3.)

7 Background

8 Susanville Indian Rancheria is a federally-recognized Indian  
9 tribe that provides health care and pharmacy services to eligible  
10 Indians in its service area in rural Northeastern California through a  
11 series of contracts with the Indian Health Service ("IHS"). (Pl.'s  
12 Mem. of Law in Supp. of TRO and PI ("Pl.'s Mem.") at 3.) The IHS is  
13 an agency of the United States Department of Health and Human Services  
14 whose principal mission is to provide health care for American Indians  
15 and Alaska Natives throughout the United States. (Defs.' Opp'n to  
16 Mot. for TRO at 2.)

17 Plaintiff's contracts with the IHS have been authorized  
18 under Title I of the Indian Self-Determination and Educational  
19 Assistance Act ("ISDEAA"), 25 U.S.C. §§ 450 et seq. Plaintiff has  
20 operated, under Title I contracts, a tribal health clinic known as the  
21 Lassen Indian Health Center, which provides health care and pharmacy  
22 services. (Id. at 3-4.) Plaintiff asserts that in order to operate  
23 its pharmacy in a fiscally sound manner, in July 2006, it began  
24 charging a co-pay and the acquisition cost of drugs to those customers  
25 who could afford it (exempting indigent and elderly customers), and  
26 informed the IHS of this policy. (Pl.'s Mem. at 4.)

27 In the spring of 2006, Plaintiff and the IHS began  
28 negotiating a self-governance Compact and Funding Agreement ("FA")

1 pursuant to Title V of the ISDEAA, 25 U.S.C. §§ 458aaa (1)-(18). (Id.  
2 at 5.) Among the programs that Plaintiff requested be included in its  
3 2007 FA is the pharmacy program, which has been included for many  
4 years in Plaintiff's Title I agreements. (Id.) The parties were able  
5 to agree on the terms of the Compact and FA, except for the pharmacy  
6 provisions in the FA. (Id.) During the negotiations, Defendants  
7 insisted that as a condition precedent to Plaintiff's inclusion of the  
8 pharmacy provision in the FA, Plaintiff had to expressly state it  
9 would not bill eligible Indian customers for pharmacy services;  
10 otherwise, Plaintiff had to delete the pharmacy provision from the FA.  
11 (Opp'n to Mot. for TRO at 3; Decl. of Jim Mackay ¶ 12, Ex. D ("Grim  
12 Letter") at 2.)

13 Plaintiff rejected both of those options and on December 15,  
14 2006, presented its final offer on the Compact and FA, which included  
15 the pharmacy program (but was silent as to whether Plaintiff would  
16 bill eligible Indians), to the IHS. (Mackay Decl. ¶ 11; Ex. C.)  
17 Since the existing ISDEAA Title I FA was set to expire on December 31,  
18 2006, the IHS and Plaintiff agreed to extend the existing FA for 45  
19 days (until February 15, 2007), while the IHS considered its response  
20 to Plaintiff's final offer on the Title V Compact and FA. (Id.)

21 On January 29, 2007, the IHS formally communicated to  
22 Plaintiff that it would not approve the pharmacy program because the  
23 program involves a co-pay feature, and the IHS therefore could not  
24 agree to that program. (Pl.'s Mem. at 5; Grim Letter at 6.)

25 On February 9, 2007, Plaintiff commenced this action,  
26 asserting that Defendants' rejection of its final offer violates the  
27 ISDEAA. (Complaint ¶¶ 26-37.) Also, on February 9, 2007, Plaintiff  
28 filed a motion for a temporary restraining order ("TRO") and the

1 motion for preliminary injunction sub judice. After Defendants filed  
2 an opposition and a TRO hearing was held on February 14, 2007, a TRO  
3 issued extending the parties' 2006 Annual Funding Agreement, which  
4 expired on February 15, 2007, until a ruling on Plaintiff's motion for  
5 a preliminary injunction issued. (Feb. 14, 2007 Order at 2-3.) The  
6 TRO expires on March 1, 2007.

7 Standard

8 Typically, to obtain a preliminary injunction, a Plaintiff  
9 must show "either: (1) a combination of probable success on the merits  
10 and the possibility of irreparable harm; or (2) that serious questions  
11 are raised and the balance of hardships tips in [his] favor."

12 Preminger v. Principi, 422 F.3d 815, 823 (9th Cir. 2005). Plaintiff  
13 initially argued that it is entitled to a preliminary injunction  
14 because it would suffer irreparable harm without the injunction, the  
15 injunction would have no impact on Defendants, the injunction would  
16 benefit the public interest, and Plaintiff is likely to succeed on the  
17 merits. (Pl.'s Mem. at 2.) However, at the February 14 hearing,  
18 Plaintiff argued that because Plaintiff seeks a statutorily authorized  
19 injunction (under 25 U.S.C. § 450m-1(a)), rather than an equitable  
20 injunction, Plaintiff need only establish a likelihood of success on  
21 the merits to be entitled to an injunction.<sup>1</sup> (See also Reply at 1-3.)

22 Plaintiff seeks an injunction under 25 U.S.C. § 450m-1(a),  
23 which provides:

24 \_\_\_\_\_  
25 <sup>1</sup> Defendants have not responded to this argument. At the  
26 February 26 hearing, when probed about the standard Plaintiff must  
27 meet to be entitled to a preliminary injunction, Defendants' counsel  
28 responded by conceding that an injunction should issue and contended  
that the standard is irrelevant since the issue is determining what  
constitutes the status quo because that will define the scope of the  
injunction.

1 [D]istrict courts may order appropriate relief  
2 including . . . injunctive relief against any  
3 action by an officer of the United States or any  
4 agency thereof contrary to this subchapter or  
5 regulations promulgated thereunder, or mandamus to  
6 compel an officer or employee of the United  
7 States, or any agency thereof, to perform a duty  
8 provided under this subchapter or regulations  
9 promulgated hereunder (including immediate  
10 injunctive relief to reverse a declination finding  
11 under section 450f(a)(2) of this title or to  
12 compel the Secretary [of the United States  
13 Department of Health and Human Services] to award  
14 and fund an approved self-determination contract).

9 25 U.S.C. § 450m-1(a) (made applicable to Title V by 25 U.S.C.  
10 § 458aaa-10(a)). "The traditional requirements for equitable relief  
11 need not be satisfied [when a statute] expressly authorizes the  
12 issuance of an injunction." U.S. v. Estate Preservation Servs., 202  
13 F.3d 1093, 1098 (9th Cir. 2000) (citing Trailer Train Co. v. State Bd.  
14 of Equalization, 697 F.2d 860, 869 (9th Cir. 1983)); Atchison, Topeka  
15 & Santa Fe Ry. v. Lennen, 644 F.2d 255, 260 (10th Cir. 1981) (per  
16 curiam); Star Fuel Marts, LLC v. Sam's East, Inc., 362 F.3d 639,  
17 651-52 (10th Cir. 2004); Nat'l Wildlife Fed. v. Burlington N. R.R.,  
18 Inc., 23 F.3d 1508, 1511 (9th Cir. 1994) (finding that in order to get  
19 an injunction under the Endangered Species Act ("ESA"), a "plaintiff  
20 must make a showing that a violation of the ESA is at least likely in  
21 the future"); Crownpoint Inst. of Tech. v. Norton, Civ. No. 04-531  
22 JP/DJS, Findings of Fact and Conclusions of Law at 26, ¶ 30 (stating,  
23 in an ISDEAA case involving Title I, that where a tribal organization  
24 sought an injunction pursuant to 25 U.S.C. § 450m-1(a), "[t]he  
25 specific mandamus relief authorized by ISDA relieves [the plaintiff  
26 tribal organization] of proving the usual equitable elements including  
27 irreparable injury and absence of an adequate remedy at law.").

28

Likelihood of Success on the Merits

1  
2 Plaintiff contends that it is likely to succeed on its claim  
3 that Defendants' rejection of its final offer violates the ISDEAA  
4 because Defendants have not met their burden of showing by clear and  
5 convincing evidence that they had a valid reason, from one of the four  
6 rejection criteria in 25 U.S.C. § 458aaa-6(c)(1)(A), for rejecting  
7 Plaintiff's final offer. (Pl.'s Mem. at 10-12.) Defendants rejoin  
8 that Plaintiff is not likely to succeed on the merits because "[t]he  
9 dispute herein centers on the interpretation of [25 U.S.C. § 458aaa-  
10 14(c), and that] statute . . . prohibits tribes and tribal  
11 organizations from billing Indians." (Opp'n to Mot. for TRO at 9.)  
12 Defendants contend that, therefore, they were legally obligated to  
13 reject Plaintiff's final offer since "the IHS cannot agree to  
14 [Plaintiff's] proposal to bill or charge eligible Indian patients for  
15 pharmacy services." (Id. at 2.)

16 Under Title V of the ISDEAA, "[i]f the Secretary rejects [a  
17 final offer], the Secretary shall provide . . . a timely written  
18 notification to the Indian tribe that contains a specific finding that  
19 clearly demonstrates, or that is supported by a controlling legal  
20 authority, that [one of four criteria is met]." 25 U.S.C. § 458aaa-  
21 6(c)(1). The "Secretary shall have the burden of demonstrating by  
22 clear and convincing evidence the validity of the grounds for  
23 rejecting the offer (or a provision thereof)." Id. § 458aaa-6(d).

24 The Secretary rejected Plaintiff's final offer on two  
25 grounds. First, the Secretary relied on the third criterion in  
26 § 458aaa-6(c)(1)(A), which provides that a final offer can be rejected  
27 if "the Indian tribe cannot carry out the program, function, service,  
28 or activity (or portion thereof) in a manner that would not result in

1 significant danger or risk to the public health." (Grim Letter at 6  
2 (citing 25 U.S.C. § 458aaa-6(c)(1)(A)(iii).) In rejecting Plaintiff's  
3 final offer, the IHS stated:

4 [E]nforcement of [Plaintiff's] Pharmacy Policy  
5 could jeopardize health care services to the  
6 eligible [American Indians/ Alaska Natives] who  
7 are otherwise eligible for health care services.  
8 Therefore, the proposed language is rejected on  
9 the grounds that [Plaintiff] cannot "carry out the  
10 program, function, service or activity (or portion  
11 thereof) in a manner that would not result in  
12 significant danger or risk to the public health."

13 (Grim Letter at 6.) Defendants have not addressed this criterion in  
14 their opposition papers. Instead, Defendants focus on the Secretary's  
15 second ground for denying Plaintiff's final offer - 25 U.S.C.  
16 § 458aaa-14(c).

17 Plaintiff argues that reliance on the risk to the public  
18 health criteria is misplaced because not imposing a fee for pharmacy  
19 services would actually pose a greater risk to health since without  
20 it, Plaintiff would not be able to operate its pharmacy, would be  
21 forced to close it, and that closing would adversely affect its  
22 customers. Plaintiff also contends that Defendants have not met their  
23 burden under 25 U.S.C. §§ 458aaa-6(c)(1) and 458aaa-6(d). (Pl.'s Mem.  
24 at 11; Reply at 10.)

25 The Secretary's conclusory statement that public health is  
26 at risk if the pharmacy provision is approved as Plaintiff requests is  
27 not likely to satisfy the Secretary's burden of specifically setting  
28 forth, by clear and convincing evidence, why Plaintiff could not carry  
out its pharmacy program "in a manner that would not result in  
significant danger or risk to the public health."

The Secretary also rejected Plaintiff's final offer on the  
ground that the IHS cannot sign the Compact with the co-pay feature

1 because the IHS cannot bill or charge beneficiaries for services under  
2 the ISDEAA and cannot contract with tribes under the ISDEAA to carry  
3 out activities that IHS itself has no legal authority to carry out.  
4 (Grim Letter at 4 (citing 25 U.S.C. § 458aaa-14(c).)<sup>2</sup>

5 When rejecting the final offer on the lack of authority  
6 ground, the Secretary stated:

7 [T]he IHS cannot agree to the pharmacy provision  
8 submitted by [Plaintiff] because the IHS cannot  
9 contract or compact with Tribes to carry out  
10 activities that the agency has no authority to  
11 carry out itself. See 25 U.S.C. § 450f(a)(1),  
12 458aaa-4(b)(2). [Plaintiff's] proposed pharmacy  
13 program is not a program provided to eligible  
14 beneficiaries under Federal law, 25 U.S.C. §  
15 458aaa-4(b)(1), nor is it a program that IHS is  
16 authorized to administer. 25 U.S.C. § 458aaa-  
17 4(b)(2). In addition, the IHS is prohibited from  
18 entering into a contract for an activity that  
19 cannot be lawfully carried out. . . . Here, there  
20 is no legal authority for the IHS to enter into an  
21 ISDEAA contract with [Plaintiff] to bill eligible  
22 [American Indians/ Alaska Natives] for services  
23 provided under the contract. Therefore, the IHS  
24 is prohibited from entering into the contract, and  
25 must reject the proposed language.

26 (Grim Letter at 5-6.)

27 Plaintiff argues the Secretary improperly relied on 25

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28 <sup>2</sup> Defendants also argue that 25 U.S.C. § 458aaa-5(e) supports  
their denial of Plaintiff's final offer since Plaintiff's co-pay  
policy denies eligibility to pharmacy services to some Indians. (Feb.  
14, 2007 Hearing.) Section 458aaa-5(e) provides that a tribe's  
redesign or consolidation may not "have the effect of denying  
eligibility for services to population groups otherwise eligible to be  
served under applicable Federal law." However, eligibility is  
different from availability or accessibility, and a co-pay policy is  
not an eligibility criterion. See 42 C.F.R. §§ 136.11, 12; accord  
Lincoln v. Vigil, 508 U.S. 182, 198-99 (1993) (distinguishing between  
denial of access and of eligibility).

Moreover, as Defendants' counsel conceded during the  
February 14 hearing, if Plaintiff did not provide a pharmacy program,  
the beneficiaries that Defendants allege are denied eligibility by  
Plaintiff's pharmacy program would have to purchase drugs elsewhere at  
higher costs. (Feb. 14, 2007 Hearing.)



1 U.S.C. § 458aaa-14(c) as a ground justifying denial of Plaintiff's  
2 final offer since notwithstanding the statutory proscription that  
3 prohibits the IHS from billing and from requiring tribes to bill  
4 beneficiaries, tribes have the discretion to determine whether to bill  
5 beneficiaries. (Pl.'s Mem. at 10.)

6 Section 458aaa-14(c) provides: "The Indian Health Service  
7 under this subchapter shall neither bill nor charge those Indians who  
8 may have the economic means to pay for services, nor require any  
9 Indian tribe to do so." On its face, section 458aaa-14(c) does not  
10 prohibit Tribes from billing. If Congress had intended to prohibit  
11 Tribes from billing, Congress could have replaced the word "require"  
12 with the word "permit," "allow," or "authorize." Congress could also  
13 have stated that "neither the IHS nor any tribe" shall bill or charge  
14 Indians, in lieu of the clause "nor require any Indian tribe to do  
15 so." See e.g., Brown v. Gardner, 513 U.S. 115, 117-18 (1994)  
16 (rejecting Veterans Administration's attempt to add a "fault"  
17 requirement to a liability statute "[d]espite the absence from the  
18 statutory language of so much as a word about fault on the part of the  
19 VA").

20 When Congress enacted 25 U.S.C. § 458aaa-14(c), it expressly  
21 added the clause "nor require any Indian tribe to do so." (Opp'n to  
22 Mot. for TRO at 10-11.) If § 458aaa-14(c) is read as Defendants  
23 suggest, the entire phrase "nor require any Indian tribe to do so" is  
24 rendered redundant since the first clause alone would prohibit IHS  
25 from requiring tribes to charge for services. (Reply at 14.) Courts  
26 "should avoid an interpretation of a statute that renders any part of  
27 it superfluous and does not give effect to all of the words used by  
28 Congress." Beisler v. C.I.R., 814 F.2d 1304, 1307 (9th Cir. 1987);

1 see also Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307-08 (1961)  
2 (rejecting an interpretation of one subpart of statute where that  
3 interpretation would render the immediately following subpart "a mere  
4 redundancy").

5 Defendants support their interpretation of § 458aaa-14(c) by  
6 arguing that when Congress enacted that provision, it was aware of a  
7 1996 opinion from an administrative law judge holding that, as long as  
8 the appropriation act restriction codified at 25 U.S.C. § 1681  
9 remained in effect (the statutory provision that Defendants assert  
10 § 458aaa-14(c) was derived from), the IHS was prohibited not only  
11 from directly billing eligible Indians for services the IHS provided  
12 but also from entering into ISDEAA contracts with a tribe under which  
13 a tribe itself would bill eligible Indians. (Opp'n to Mot. for TRO at  
14 12, 14 (citing Nizhoni Smiles, Inc. v. IHS, DAB Dec. No. CR450  
15 (1996).) Defendants assert that therefore, "despite the lack of an  
16 express statement prohibiting the IHS from entering into ISDEAA  
17 contracts or compacts under which tribes (and not IHS) would bill  
18 eligible Indians, it can be presumed that Congress intended for  
19 section 458aaa-14(c) to have such an effect." (Opp'n to Mot. for TRO  
20 at 13.) Defendants contend that "[a] canon of statutory construction  
21 recognizes that Congress is aware of an administrative or judicial  
22 interpretation of a statute and that it intends to adopt that  
23 interpretation when it adopts a new law that incorporates sections of  
24 a prior law." (Opp'n to Mot. for TRO at 13-14 (citing Lorillard v.  
25 Pons, 434 U.S. 575, 581 (1978)).)

26 However, 25 U.S.C. § 1681 is no longer included in the IHS  
27 appropriations acts (Opp'n to Mot. for TRO at 12), and in Nizhoni  
28 Smiles, § 1681 was interpreted in light of Title I of the ISDEAA, not

1 Title V. (Reply at 15.) Moreover, when Congress adopted § 458aaa-  
2 14(c), it did not re-enact § 1681 without change, or incorporate  
3 § 1681 into § 458aaa-14(c).<sup>3</sup>

4 Congress is presumed to be aware of an  
5 administrative or judicial interpretation of a  
6 statute and to adopt that interpretation when it  
7 re-enacts a statute without change . . . . So  
8 too, where . . . Congress adopts a new law  
incorporating sections of a prior law, Congress  
normally can be presumed to have had knowledge of  
the interpretation given to the incorporated law,  
at least insofar as it affects the new statute.

9 Lorillard, 434 U.S. at 580. Here, Congress adopted the new clause  
10 "nor require any Indian tribe to do so." Since it added that clause,  
11 it is presumed under the rationale of Lorillard, that Congress was  
12 aware of IHS's interpretation of the billing prohibition in Nizhoni  
13 Smiles and deliberately chose the exacting (and different) language in  
14 § 458aaa-14(c) to give tribes the discretion to bill, even though the  
15 IHS is prohibited from billing or forcing tribes to bill.  
16 Defendants acknowledge that § 458aaa-14(c) is silent as to whether a  
17 tribe can charge or bill Indians.<sup>4</sup> (Feb. 14, 2007 Hearing.) However,  
18 Defendants contend that when read in light of the entire ISDEAA,  
19 § 458aaa-14(c) "unambiguously prohibits tribes and tribal  
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24 <sup>3</sup> Defendants even concede that "Congress did not actually  
25 incorporate section 1681 into section 458aaa-14(c)." (Opp'n to Mot.  
for TRO at 14.)

26 <sup>4</sup> Congress's silence with regard to tribal billing should not  
27 be construed to mean that Congress assumed that such a prohibition was  
28 understood. See Zuber v. Allen, 396 U.S. 168, 185 (1969)  
("Legislative silence is a poor beacon to follow in discerning the  
proper statutory route."); Brown, 513 U.S. at 121 ("[C]ongressional  
silence 'lacks persuasive significance'").

1 organizations from billing Indians."<sup>5</sup> (Opp'n to Mot. for TRO at 9.)  
2 In support of their position, Defendants cite to 25 U.S.C. §§ 458aaa-  
3 4(b)(1) and (2).

4 The ISDEEA establishes what may be included in a Title V  
5 Funding Agreement. 25 U.S.C. § 458aaa-4(b). It authorizes a tribe to  
6 administer programs, services, functions, and activities ("PSFAs")  
7 "that are carried out for the benefit of Indians because of their  
8 status as Indians without regard to the agency or office of the Indian  
9 Health Service within which the program, service, function or activity  
10 (or portion thereof) is performed." Id. § 458aaa-4(b)(1). Further,  
11 458aaa-4(b)(2) restates this authority by providing that PSFAs "with  
12 respect to which Indian tribes or Indians are primary or significant  
13 beneficiaries, administered by the Department of Health and Human  
14 Services through the Indian Health Service and all local, field,  
15 service unit, area, regional, and central headquarters or national  
16 office functions so administered under the authority of" the  
17 enumerated statutes may be included in an FA. Id. § 458aaa-4(b)(2).  
18 Thus, according to Defendants, the Tribe may only contract for  
19 programs that the IHS itself is authorized to administer. (Opp'n to  
20 Mot. for TRO at 10.)

21 But, §§ 458aaa-4(b)(1) and (2) do not contain any language  
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23 <sup>5</sup> Defendants also assert, however, that deference should be  
24 given to the IHS's interpretation of § 458aaa-4(b). (Opp'n to Mot.  
25 for TRO at 15 (citing Good Samaritan Hosp. v. Shalala, 508 U.S. 402,  
26 417 (1993)).) But, the deference referenced in Good Samaritan only  
27 applies to ambiguous statutory provisions. 508 U.S. at 414 (stating  
28 that when "[c]onfronted with an ambiguous statutory provision, we  
generally will defer to a permissible interpretation espoused by the  
agency entrusted with its implementation."). Moreover, the referenced  
deference appears preempted by the statutorily-mandated canon of  
construction found in 25 U.S.C. § 458aaa-11(f), prescribing that any  
statutory ambiguity is resolved in favor of a tribe.

1 suggesting that Congress intended to prohibit or restrict the PSFAs  
2 that a tribe may administer. (Feb. 14, 2007 Hearing.) Further  
3 §§ 458aaa-4(b)(1) and (2) do not address the *manner* in which a program  
4 may be operated, which is at issue here. (Reply at 10.)

5           Even if this statutory scheme is ambiguous as to the manner  
6 in which a tribe could operate a program, the ISDEAA prescribes that  
7 “[e]ach provision of [the ISDEAA] and each provision of a compact or  
8 funding agreement shall be liberally construed for the benefit of the  
9 Indian tribe participating in self-governance and any ambiguity shall  
10 be resolved in favor of the Indian tribe.” 25 U.S.C. § 458aaa-11(f).  
11 Further, “the Secretary shall interpret all Federal laws . . . in a  
12 manner that will facilitate- (1) the inclusion of programs, services,  
13 functions, and activities (or portions thereof) and funds associated  
14 therewith, in the agreements entered into under this section; (2) the  
15 implementation of compacts and funding agreements entered into under  
16 this part; and (3) the achievement of tribal health goals and  
17 objectives.” 25 U.S.C. § 458aaa-11(a).

18           Additionally, the Congressional declaration of policy  
19 regarding the ISDEAA specifically indicates that a goal of the ISDEAA  
20 is to “establish . . . a meaningful Indian self-determination policy  
21 which will permit an orderly transition from the Federal domination of  
22 programs for, and services to, Indians to effective and meaningful  
23 participation by the Indian people in the planning, conduct, and  
24 administration of those programs and services.” 25 U.S.C. § 450a(b).  
25 Congress stated that “the United States is committed to supporting and  
26 assisting Indian tribes in the development of strong and stable tribal  
27 governments, capable of administering quality programs and developing  
28 the economies of their respective communities.” Id.

1 Therefore, Plaintiff is likely to succeed on its claim that  
2 Defendants' rejection of Plaintiff's final offer violates the ISDEAA.

3 Status Quo

4 Defendants concede that a preliminary injunction should  
5 issue, arguing "the only issue to be decided in the pending motion is  
6 the nature and extent of the status quo." (Opp'n to Mot. for PI at  
7 3.) Although Plaintiff now argues that it is entitled to a  
8 preliminary injunction under 25 U.S.C. § 450m-1(a), Plaintiff's motion  
9 specifically seeks to preserve the status quo. (Pl.'s Mem. at 2, 3,  
10 15.) "[T]he function of a preliminary injunction is to preserve the  
11 status quo ante litem." Regents of the Univ. of Cal. v. Am. Broad.  
12 Cos., 747 F.2d 511, 514 (9th Cir. 1984); Dep't of Parks and Recreation  
13 for State of Cal. v. Bazaar, 448 F.3d 1118, 1124 (9th Cir. 2006).

14 "Status quo" is defined as "the last, uncontested status  
15 which preceded the pending controversy.'" Regents of the Univ. of  
16 Cal., 747 F.2d at 514 (quoting Tanner Motor Livery, Ltd. v. Avis,  
17 Inc., 316 F.2d 804, 809 (9th Cir. 1963)). "In determining what state  
18 of affairs constitute the status quo, [a court] must look to the last  
19 peaceable state between the parties which preceded the present  
20 controversy." Ashland Oil Co. of Cal. v. Fed. Energy Admin., 389 F.  
21 Supp. 1119, 1126-27 (C.D. Cal. 1975) (quoting Wash. Basketball Club  
22 Inc. v. Berry, 304 F. Supp. 1193 (N.D. Cal. 1969)).

23 Defendants assert the status quo is "an extension of  
24 Plaintiff's current Title I Contract and Annual Funding Agreement  
25 (AFA), and not the Title V compact as requested by Susanville."  
26 (Opp'n to Mot. for PI at 2.) Plaintiff counters the status quo is the  
27 negotiated Title V Compact, including the pharmacy services provision  
28 and no prohibition on billing beneficiaries. (Feb. 26, 2007 Hearing.)

1 Plaintiff's position on the status quo appears to more  
2 accurately reflect the last peaceable "state of affairs" between the  
3 parties. Although the last peaceable state between the parties did  
4 not include an executed Compact or 2007 FA, it did consist of a  
5 contract and funding agreement between the parties that was silent as  
6 to billing (with language identical to the language in the Compact and  
7 2007 FA); Plaintiff engaged in billing and Defendants were aware of  
8 it; and the parties understood that Plaintiff would be entitled to a  
9 Title V Compact and FA for 2007. Defendants acknowledge that  
10 *factually* the status quo was an agreement between the parties for a  
11 pharmacy program (silent as to billing) and Plaintiff was in fact  
12 billing (and Defendants were aware of it). (Feb. 26, 2007 Hearing.)  
13 Yet, Defendants' position on the status quo ignores the fact that the  
14 parties understood that a Title V Compact and 2007 FA would be entered  
15 into and that the terms of the Compact had been negotiated and agreed  
16 upon, except for the no billing language applicable to Plaintiff's  
17 proposed pharmacy program.

18 Conclusion

19 Therefore, because Plaintiff has established a likelihood of  
20 success on the merits and because the status quo is best preserved by  
21 an injunction permitting the parties to continue operating in the  
22 manner they were prior to commencement of this litigation and  
23 recognizing the expectation of the parties that a Compact and 2007 FA  
24 would be entered into, the following preliminary injunction issues:  
25 The parties are directed to execute the Compact and CY 2007 FA (as  
26 proposed by Plaintiff in its final offer) and provide such funding as  
27 is authorized under these agreements without imposing any condition  
28 that would prevent Plaintiff from charging beneficiaries for services.

1 If a judicial determination is made that Defendants' rejection of  
2 Plaintiff's final offer (and imposition of conditions on executing the  
3 Compact and 2007 FA proposed therein) was lawful, either (1) all  
4 references to the Tribe's pharmacy services program in the 2007 FA  
5 shall be deleted, no further funds shall be allocated to the Tribe's  
6 pharmacy services program, and any funds specifically allocated for  
7 the pharmacy services program shall be returned; or (2) a provision  
8 shall be added to the 2007 FA stating that eligible beneficiaries will  
9 not be charged for services pursuant to the pharmacy services  
10 program.<sup>6</sup>

11 IT IS SO ORDERED.

12 Dated: February 28, 2007

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15 GARLAND E. BURRELL, JR.  
16 United States District Judge  
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28 <sup>6</sup> No bond is required since Plaintiff has requested a waiver  
of the security requirement (Pl.'s Mot. for PI at 2) and Defendants do  
not oppose that request (Feb. 14, 2007 Hearing).