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## MEMORANDUM

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TO: Tribal Health Clients

FROM: Hobbs, Straus, Dean & Walker, LLP

Re: Federal Court Allows Breach of Trust Claim Against IHS to Proceed

In a significant decision, the U.S. District Court for South Dakota in *Rosebud Sioux Tribe v. United States, et al.*, 3-16-CV-03038-RAL, recently held that the Tribe's claim that the IHS violated the Federal trust responsibility to provide Indian health care was sufficient to survive a motion to dismiss.

The dispute arose after the Centers for Medicare and Medicaid Services (CMS) sent the IHS Rosebud Hospital a Notice of Intent to Terminate the Hospital's Medicare provider agreement because of CMS findings that emergency services at the Hospital presented an immediate and serious threat to the health and safety. The IHS temporarily closed the emergency department at the Rosebud IHS Hospital and entered into a Systems Improvement Agreement with CMS under which the emergency department was later reopened.

The Tribe sued the United States, the Secretary of Health and Human Services, and various IHS officials alleging: (1) violation of the provision in the Indian Health Care Improvement Act (IHCIA) requiring the IHS to provide one-year notice to Congress before closing any part of a hospital; (2) violation of treaty rights, other statutory obligations, and the Federal trust responsibility; and (3) violations of equal protection and due process under the Fifth Amendment to the U. S. Constitution.

The Government moved to dismiss the Tribe's complaint on the basis of lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The Court granted the Government's motion to dismiss with respect to the closure of the emergency department because the IHCIA provided an exception for temporary closures necessary for medical, environmental, or safety reasons. The Court also granted the Government's motion to dismiss with respect to the equal protection and due process claims. However, the Court denied the Government's motion to dismiss the Tribe's Federal trust claims.

The Tribe's complaint alleged that the federal government has a specific, special trust duty, pursuant to the Snyder Act, the Indian Health Care Improvement Act, the Treaty of Fort Laramie, and the federal common law, to provide health care services to the Tribe and its members and to ensure that health care services provided to the Tribe and its members do not fall below the highest possible standards of professional care. The Tribe alleged that the CMS finding that emergency services at the Hospital presented an immediate and serious threat to the health and safety breached this specific trust duty.

The court noted that where a tribe seeks money damages for breach of a trust duty, a tribe must point to a specific trust creating statute or regulation or other trust creating document establishing federal supervision or control of tribal monies or property that the government has agreed to safeguard. The Rosebud Sioux Tribe is not, however, seeking money damages, but rather a declaration by the court that the IHS violated its trust duties to provide health care to the Tribe and its members; and an injunction requiring the IHS to comply with its trust duties, protect the Tribe's entitlement to health care services, and take sufficient measures to ensure that health care services are provided to members of the Tribe to permit the health status of Indians to be raised to the highest possible level.

The court noted that courts have generally dismissed tribal trust responsibility violation claims based on a general trust responsibility to provide health care to Indians, holding that there must be a statutory or treaty obligation to support such claims. The Court noted, however, that the Eighth Circuit, in *White v. Califano*, 581 F.2d 697, 698 (8th Cir 1978), has recognized a specific trust duty to provide health care to American Indians, based on the Congressional Declaration of National Indian Health Policy in the Indian Health Care Improvement Act that "it is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians." 25 U.S.C. § 1602. The Eighth Circuit in *White* quoted with approval from the district court's opinion in *White v. Califano*, 437 F. Supp. 543, 555 (D.S.D. 1977):

We think that Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians. This stems from the "unique relationship" between Indians and the Federal Government, a relationship that is reflected in hundreds of cases and is further made obvious by the fact that one bulging volume of the U. S. Code pertains only to Indians.

The *White* case involved IHS termination of contracts with the State of South Dakota to provide services to mentally ill Indians in the State mental hospital on the ground that IHS was a residual supplier of services and the State must provide such services to mentally ill Indians as citizens of the State. The State refused to provide such services as a State obligation because the State lacked jurisdiction to commit mentally ill Indians residing on reservations. The Court decided for the State against the IHS, determining that where the State

cannot act, the Federal Government must do so under its trust responsibility to provide health care to Indians.

The court in *Rosebud* determined that the Tribe's complaint includes roughly 5 pages of detailed allegations that the IHS has a trust responsibility to provide an adequate level of care to the Tribe's members, evidenced by specific statutory language and a specific treaty. Further, the court noted that the Supreme Court has established Indian law canons of statutory construction that require the court to construe the statutes cited in the complaint liberally in favor of the Tribe and to resolve any ambiguous provisions to the Tribe's benefit. This includes the statutory Declaration of National Indian Health Policy in the IHCA. Thus, the court held that these allegations are sufficient to survive the government's motion to dismiss.

We will continue to monitor this case closely because it potentially reflects a very positive change in how federal courts may view claims brought on the basis of a breach of the Federal trust responsibility for Indian health care. If you have any questions about the topics discussed herein or would like further information, please contact Elliott Milhollin ([emilhollin@hobbsstrauss.com](mailto:emilhollin@hobbsstrauss.com) or 202-822-8282); or Geoff Strommer ([gstrommer@hobbsstrauss.com](mailto:gstrommer@hobbsstrauss.com) or 503-242-1745).