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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

SOUTHCENTRAL FOUNDATION, an Alaska corporation, Plaintiff, vs. YVETTE ROUBIDEAUX, DIRECTOR, U.S. INDIAN HEALTH SERVICE, Defendant.	Case No. 3:13-cv-00164-SLG **DEFENDANT'S RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

The Indian Health Service (IHS or Agency), through counsel, opposes Southcentral Foundation's (SCF) Motion for Preliminary Injunction. SCF asks the Court to compel the IHS to award fiscal year (FY) 2012 Methamphetamine and Suicide Prevention Initiative (MSPI) and Domestic Violence Prevention Initiative (DVPI) agreements and to order the IHS to recognize indirect and direct contract support costs (CSC) for those two programs.

The parties have no dispute regarding whether IHS will award the FY 2012 MSPI and DVPI agreements.[1] Indeed, IHS awarded the MSPI agreement, including $599,596 in funding, and the DVPI agreement, including $482,554 in funding, and issued payment authorization for the funding of both agreements on September 10, 2013. Therefore, SCF's first request for relief is now moot. Def.'s Ex. 1; Def.'s Ex. 2.

Regarding SCF's claim that its CSC need should be recognized, SCF has not met its burden for obtaining an injunction. SCF erroneously characterizes the relief sought, as well as the true nature of the MSPI/DVPI awards and the application of the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 450 *et. seq*. These initiatives are awarded as grant-like demonstration projects rather than under the ISDEAA and, therefore, are funded outside of the ISDEAA section 450j-1 methodologies. Moreover, SCF's MSPI/DVPI awards are full-cost recovery awards, for which there can be no need for CSC under the ISDEAA's definition of such costs and the statutory prohibition against duplicative funding, even if section 450j-1 applied. *Id.*, § 450j-1(a)(2),(3). After IHS's award of the MSPI/DVPI agreements on September 10, 2013, the only relief available is limited to the sole issue of reaching agreement on two estimated amounts contemplated by contract language agreed upon by the parties, though neither estimate affects the amount of the award or the amount the parties have agreed that IHS will pay at this time.

[1] Throughout this brief, the agreements may be referenced collectively as the MSPI/DVPI, "initiatives," projects, or demonstration projects. SCF also characterized them as grants. Pl.'s Mem. at 16, 18.

For these reasons, SCF cannot meet the applicable standard, and its motion for preliminary injunction should be denied.

STATEMENT OF FACTS

Overview of IHS

IHS is an agency within the Department of Health and Human Services (HHS). IHS's principal mission is to provide primary health care services to American Indians and Alaska Natives (AI/AN) throughout the United States. *See* S. Rep. No. 102-392, 102d Cong., 2d Sess., at 2-3 (1992), reprinted in 1992 U.S.C.C.A.N. 3943. IHS delivers health care services to AI/AN through three separate mechanisms: (1) by providing health care services directly through its own facilities; (2) by contracting with tribes and tribal organizations pursuant to the ISDEAA to allow tribes to independently operate health care delivery programs previously provided by IHS; and (3) by funding contracts and grants to organizations operating health programs for urban Indians. *Id.* at 4.

IHS's authority to provide health care services to AI/AN is derived primarily from two statutes. The first, the Snyder Act, 25 U.S.C. § 13, is a general and broad statutory mandate authorizing IHS to "expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians," for the "relief of distress and conservation of health." 25 U.S.C. § 13 (providing the authority to the Bureau of Indian Affairs (BIA)); 42 U.S.C. § 2001(a) (transferring the responsibility for Indian health care to IHS). The second, the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. § 1601 *et seq.*, as amended, establishes numerous programs specifically created by Congress to address particular Indian health

initiatives, such as alcohol and substance abuse treatment, diabetes prevention and treatment, urban Indian health, and health professional training.

In 1975, Congress enacted the ISDEAA, which allows tribes and tribal organizations[2] to contract with the HHS Secretary to operate many of the programs that IHS previously operated for the benefit of Indians. The ISDEAA authorizes tribes to contract for "shares" of programs, functions, services, and activities ("PFSA") operated by the IHS at any level of the Agency's operation, which include Headquarters (HQ), Area Office, and service unit levels. *See* 25 U.S.C. §§ 450f(a)(1); 458aaa(a)(8). Tribes may do so either by entering into contracts under Title I of ISDEAA or into self-governance "compacts" under Title V.[3] *Id.*, §§ 450*l*(a), (c), 458aaa-3(a).

Two general categories of funding are available for agreements awarded pursuant to the ISDEAA. *Id.*, § 450j-1(a); 25 C.F.R. § 900.19. First, the "Secretarial amount" or "106(a)(1) amount," "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs . . . without regard to any organizational level within the . . . [HHS]." 25 U.S.C. § 450j-1(a)(1). A contracting tribe's Secretarial amount is determined based on a complicated formula, developed through tribal consultation, whereby IHS determines the tribe's "share" of funds expended by IHS at its HQ, Area, and service unit levels to operate or support the contracted PFSA. Second, after it was determined that tribes may incur unique costs above

[2] For the purposes of this Memorandum we will refer to tribes and tribal organizations collectively.

[3] SCF and IHS compact under Title V of the ISDEAA. The terms "contract" may be used throughout and is intended to be inclusive of contracts and compacts entered under both Title I and Title V, respectively, unless otherwise noted.

what IHS incurred to carry out contracted PFSAs, Congress amended the ISDEAA to authorize tribes to receive a reasonable amount for contract support costs (CSC), which are costs that the tribe incurs for necessary activities to operate the program but that the Secretary did not incur or funded through resources other than those awarded under the contract. *Id.*, § 450j-1(a)(2). For example, CSC may consist of a reasonable amount for the necessary tribal activity of preparing a Single Annual Audit or for worker's compensation, both of which the Secretary either does not incur in her operation of a federal program or funds through resources other than those awarded under the contract. CSC may be indirect or direct in nature; however, IHS is prohibited from paying duplicative CSC funding for costs already funded through the Secretarial amount. *See id.*, § 450j-1(a)(3)(A).

In addition to these statutes, Congress has, from time to time, provided the Agency with additional authorities to combat specific health issues impacting AI/AN. For example, beginning in FY 1998 Congress established the Special Diabetes Program for Indians in order to address the serious impact of diabetes on AI/AN communities. *See* 42 U.S.C. § 254c-3. That program authorizes the Agency to make grants to fund the provision of diabetes prevention and treatment services provided through certain Indian health facilities specified in the statute. *Id.* Another example is the American Recovery and Reinvestment Act of 2009 (ARRA), in which Congress gave the IHS discretion to distribute funds aimed at improving the Indian health system's health information technology infrastructure. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 171. Pursuant to its discretion, IHS funded the special ARRA programs through addendums to existing ISDEAA agreements; however, the ARRA programs

included special terms and conditions separate from the terms of the underlying ISDEAA agreement and the ISDEAA provisions did not apply to the ARRA funds, particularly in the event of a conflict.

MSPI/DVPI

Similarly, beginning in FYs 2008 and 2009, Congress authorized the Agency to develop and fund these two special initiatives aimed at addressing the serious issues of methamphetamine abuse, suicide, and domestic violence; Congress established the authority for these initiatives, as well as the Agency's discretion regarding the award and funding of the projects, in the annual appropriations acts.[4] *See* Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2135; Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, 735. The first of those two initiatives, MSPI, was established in the FY 2008 appropriations act. Pub. L. No. 110-161, 121 Stat. 1844, 2135. Unlike the authorization for the Special Diabetes Program for Indians, which specifically directed the Agency to administer the program through grants, the language authorizing the MSPI provided broad discretion to the IHS Director in distributing the funds:

> $14,000,000 is provided for a methamphetamine and suicide prevention and treatment initiative, of which up to $5,000,000 may be used for mental health, suicide prevention, and behavioral issues associated with methamphetamine use:

[4] Congress has expressly provided that both MSPI and DVPI funds are to "remain available until expended." *See, e.g.*, Pub. L. No. 111-8, 123 Stat. 524, 735. Thus, the MSPI/DVPI funds are available without fiscal year limitation. *See* 5 GAO, Principles of Federal Appropriations Law, p. 7 (3d ed. 2004) ("A no-year appropriation is available for obligation without fiscal year limitation. For an appropriation to be considered a no-year appropriation, the appropriating language must expressly so provide. 31 U.S.C. § 1301(c). The standard language used to make a no-year appropriation is 'to remain available until expended.'" (citations omitted)).

> *Provided further*, That *notwithstanding any other provision of law, these funds shall be allocated outside all other distribution methods and formulas at the discretion of the Director of the Indian Health Service* and shall remain available until expended.

Id. (emphasis added). In fact, IHS interpreted this authorizing language as *mandating* that the funds could not be distributed through existing formulas. *See* Def.'s Ex. 3 at 2 (stating Congress "*mandated* that the funds be provided apart from other distribution methods and formulas at the discretion of the Director") (emphasis added).

On April 28, 2009, the then-Director of IHS issued guidance to each IHS Area Director[5] governing the distribution of the FY 2008 and 2009 MSPI funds. *Id.* at 1. In that letter, Mr. McSwain announced that commensurate with the broad discretion Congress granted to the Agency to allocate and expend the funds, IHS decided to a use a demonstration project model to make the awards: "IHS will use a demonstration project model through which each Area may distribute these non-recurring funds to Tribes and Tribal Organizations." *Id.* The same model was also chosen for the DVPI when it was appropriated the next year. Weakhee Decl., ¶ 7; *see also* Def.'s Ex. 4. After tribal consultation, IHS decided to use the ISDEAA contracts to distribute the demonstration project funding for several reasons, including for expediency. Thus, each IHS Area Office used existing ISDEAA contracts with tribes that received MSPI/DVPI awards as a mechanism to distribute the non-recurring MSPI/DVPI funds.

Moreover, after extensive tribal consultation, IHS chose to award the MSPI based on a unique formula recommended by individual tribes and the National Tribal Advisory Committee

[5] IHS has twelve regional offices throughout the United States, referred to as "Area Offices." Each of those Area Offices is led by an "Area Director."

on Behavioral Health (NTAC), a committee comprised of tribal leaders.[6] *See* Def.'s Ex. 5 at 5; Def.'s Ex. 6 at 1. The formula took "into consideration three quantifiable metrics," which included "Area population; poverty burden; and disease burden." Def.'s Ex. 5 at 5; Weakhee Decl., ¶ 6. The majority of the funding was sent to the IHS Areas for distribution to tribes that received an award, but eight percent of the funding was allocated to urban Indian health programs. Def.'s Ex. 5 at 5; Cotton Decl., ¶ 11. Also as a result of tribal consultation, IHS decided to distribute the funding for MSPI awarded to tribes through separate amendments to existing ISDEAA agreements with those tribes. *See* Def.'s Ex. 5 at 6. This was done only as a response to requests from tribes to fund these awards as expeditiously as possible. *See id.* (stating that the ISDEAA mechanism was used "to award funding for approved projects as quickly as possible"); Def.'s Ex. 7 at 1 (stating that IHS "decided to use a demonstration project model to expedite distribution").

Congress established the second initiative, the DVPI, through the Agency's FY 2009 appropriation. Pub. L. No. 111-8, 123 Stat. 525, 735. In the same act, Congress also provided

[6] As described in a Report to Congress on MSPI, dated May 3, 2010: "Prior to implementation of the MSPI, IHS reached an agreement on program and funding distribution with elected Tribal leaders, using the Tribal consultation process. The Tribal consultation process took approximately eight months (March 2008 – November 2008) and consisted of the nomination of Tribal leaders by each of the twelve IHS Area Directors; formation of the National Tribal Advisory Committee on Behavioral Health (NTAC); and group orientation to the methamphetamine and suicide crisis in Indian Country. Four face-to-face meetings were held resulting in the NTAC's forwarding program and funding recommendations to the IHS Director. IHS accepted virtually all of the NTAC'S recommendations without alteration and funds have been allocated to the 12 IHS Areas, based on the NTAC's MSPI formula." Def.'s Ex. 5 at 5.

another year of funding for the MSPI. *Id.* Once again, Congress provided broad discretion to the IHS Director in distributing the funding associated with these special initiatives:

> $ 16,391,000 is provided for the methamphetamine and suicide prevention and treatment initiative and $ 7,500,000 is provided for the domestic violence prevention initiative and, notwithstanding any other provision of law, the amounts available under this proviso *shall be allocated at the discretion of the Director of the Indian Health Service* and shall remain available until expended.

Id. (emphasis added). Like with MSPI, IHS chose to utilize a unique funding methodology for the DVPI. The DVPI funding was similarly based on a formula that considered user population, poverty burden, and disease burden. Weakhee Decl., ¶ 7.

Not only were the formulas used for funding the MSPI/DVPI unique, but IHS also made certain other terms and conditions applicable to these initiatives (which generally are not applicable to ISDEAA agreements) in order to meet specific goals for the projects. First, for every year of funding, all recipients, including SCF, were required to submit a scope of work and a budget representing the full costs of performance. Weakhee Decl., ¶¶ 6-7; Cotton Decl., ¶¶ 8, 10. Second, SCF's MSPI/DVPI agreements for every year have identified that funding for the projects was nonrecurring.[7] Pl.'s Ex. 2 at 2; Pl.'s Ex. 5 at 2; Pl.'s Ex. 6 at 2; Pl.'s Ex. 16 at 1; Pl.'s Ex. 17 at 1. Third, the agreements also clearly state that project participants could not re-budget or redesign[8] the MSPI/DVPI funds, a term necessary to ensure that the funds were used

[7] SCF's first agreement for the MSPI was executed in FY 2009. The first agreement for the DVPI was executed in FY 2010. However, all provisions relevant to this case in the MSPI/DVPI agreements, as compared to one another, are nearly identical.

[8] Pursuant to the ISDEAA, tribes may generally rebudget funds and "redesign" ISDEAA programs, subject to certain restrictions. 25 U.S.C. §§ 450j(j); 450j-1(o); 458aaa-5(e).

for the Congressionally-mandated purposes. Pl.'s Ex. 2 at 3; Pl.'s Ex. 5 at 2; Pl.'s Ex. 6 at 3; Pl.'s Ex. 16 at 2; Pl.'s Ex. 17 at 2; Def.'s Ex. 3 at 12; Def.'s Ex. 6 at 3-4 ("Both MSPI and DVPI adhere to reporting requirements established by the IHS and report on data and evidence-based outcome measures designed to help determine the most effective means for combating these issues in Tribal and Urban Indian communities. . . . The evaluation also allows IHS to demonstrate to Congress the effective use of these funds for the intended purpose."). Fourth, SCF's initial agreements for MSPI/DVPI stated that "[n]o contract support cost (CSC) funding is associated with the MSPI[/DVPI] funds, and nothing in the [ISDEAA contract or compact] creates a promise on the part of the IHS to pay the [Tribe] CSC funding in connection with the MSPI[/DVPI] funds." Pl.'s Ex. 2 at 2; Pl.'s Ex. 5 at 2; Def.'s Ex. 3 at 11. Finally, the agreements make it clear that the specific terms and conditions of the MSPI/DVPI agreements control in the event of a conflict between those agreements and either the underlying ISDEAA agreement or the ISDEAA itself. *See, e.g.*, Pl.'s Ex. 2 at 3; Pl.'s Ex. 5 at 3; Pl.'s Ex. 6 at 4.

In subsequent years, Congress authorized IHS to continue the MSPI/DVPI projects and appropriated funds for that purpose, and the Alaska Area IHS distributed the funds as follows:

MSPI		
Project Year(s)	**Appropriation**	**Amendment to ISDEAA contract**
1 and 2	FY 2008 and FY 2009 funds	FY 2009
3	FY 2010 funds	FY 2010
4	FY 2011 and FY 2012 funds	FY 2012

DVPI		
Project Year	**Appropriation**	**Amendment to ISDEAA contract**
1	FY 2009 funds	FY 2010
2	FY 2010 funds	FY 2011
3	FY 2011 and FY 2012 funds	FY 2012

For each of the years, the Alaska Area distributed funding for both initiatives through the same mechanism, attaching an amendment to SCF's funding agreement with the special MSPI/DVPI

terms and conditions that it used to distribute the funds the year before. The terms and conditions of the agreements changed only slightly over time. *See, e.g.*, Pl.'s Ex. 6 at 2.

One such altered term was the language regarding CSC. Although the initial language made it clear that no CSC was applicable to these agreements (Pl.'s Ex. 2 at 2; Pl.'s Ex. 5 at 2), in FY 2011, the language addressing CSC was changed in the agreements nationwide in response to requests from tribes, many of whom believed CSC was applicable. *See* Olson Decl., ¶15; *see, e.g.*, Pl.'s Ex. 6 at 2-3. Although IHS disagreed that CSC was applicable to these demonstration project awards, IHS agreed to change the language to be consistent with "model" CSC language used at the time in many ISDEAA contracts. McSwain Decl., ¶ 9. This was done only in an attempt to avoid disputes with tribes and to ensure that the funding of the projects was not delayed. McSwain Decl., ¶ 9. The Agency and tribes have been engaged in litigation regarding CSC for many years. *See, e.g.*, *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005). At the time IHS changed the CSC language in the MSPI/DVPI agreements, this litigation was still ongoing, *see, e.g.*, *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012) (petition for certiorari filed October 31, 2011); *Arctic Slope Native Assoc. v. Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010); *Southern Ute Indian Tribe v. Sebelius*, 657 F.3d 1051 (10th Cir. 2011); *Salazar v. Ramah Navajo Chapter*, 644 F.3d 1054 (10th Cir. 2011), and language regarding CSC often led to disputes and the failure to execute updated ISDEAA agreements. McSwain Decl., ¶ 9. Although the CSC litigation did not address the underlying dispute in this case (*i.e.*, how to determine the full amount of CSC under section 450j-1(a) and the circumstances in which section 450j-1(a) does not apply), IHS agreed to revise language regarding CSC to avoid such

disputes. In FY 2012, IHS again agreed to change the language in SCF's agreements for similar reasons, discussed in more detail below.

For similar reasons, IHS also agreed to include tribally-requested CSC amounts for the MSPI/DVPI on the annual report to Congress required by 25 U.S.C. § 450j-1(c). McSwain Decl., ¶ 10. However, the reported amounts reflected tribal requests that were not negotiated amounts and were reported only to accommodate tribal requests. McSwain Decl., ¶ 10; *see, e.g.*, 2010 Report to Congress on Funding Needs for Contract Support Costs of Self-Determination Awards at 7, *available at* http://www.ihs.gov//newsroom/includes/themes/newihstheme/display_objects/documents/RepCong_2012/2010CSCShortfallReporttoCongressfwdata.pdf. The annual report does not create any obligation on the part of IHS, and at all times the language in the agreements made it clear that IHS was not agreeing to pay an amount for CSC for these projects by including $0 for both indirect CSC and direct CSC. *See, e.g.*, Pl.'s Ex. 6 at 2.

The controversy in this case involves Year 4 of the MSPI and Year 3 of the DVPI (also referred to as SCF's "FY 2012 MSPI/DVPI agreements").

SCF's MSPI and DVPI Awards

In each year, the IHS Alaska Area Office required all eligible tribes and tribal organizations, including SCF, to apply for MSPI/DVPI by submitting a scope of work and an all-inclusive budget ("proposal") that identified all costs necessary to carry out the deliverables set out in the scope of work. Weakhee Decl., ¶¶ 6-7; Cotton Decl., ¶ 8. SCF submitted such proposals each year IHS awarded funding for these initiatives, including for the project years at issue in this case (Year 4 of the MSPI and Year 3 of the DVPI) to be funded through

amendments to SCF's FY 2012 ISDEAA compact. Cotton Decl., ¶ 8; *see, e.g.*, Def.'s Ex. 8; Def.'s Ex. 9.

The IHS Division of Behavioral Health (DBH) approved SCF's proposals for Year 4 of the MSPI and Year 3 of the DVPI, and SCF began engaging with the Area Office in discussions regarding the award language. In a letter dated September 7, 2012, the Alaska Native Tribal Health Consortium (ANTHC), on behalf of several Alaska ISDEAA contractors, including SCF, requested the addition of the following language in the FY 2012 MSPI/DVPI agreements: "The parties agree that the [CSC] funding related to the [MSPI/DVPI] funds shall be calculated and paid in accordance with this Funding Agreement and applicable law."[9] Def.'s Ex. 10 at 1-2; Tahsuda Decl., ¶ 5. Whereas IHS previously made concessions regarding CSC language in the MSPI/DVPI awards in order to limit the impact of the CSC litigation on the performance of the projects, *supra* p. 12, IHS rejected ANTHC's proposed language due to the Agency's position that the MSPI/DVPI agreements created separate and independent legal obligations from the ISDEAA contracts; therefore, referencing the ISDEAA contract in the MSPI/DVPI agreement

[9] In the same letter, ANTHC requested that CSC language negotiated in August 2012 between several tribal attorneys and IHS be added to its ISDEAA contract. Def.'s Ex. 10 at 2-3. After the Supreme Court's decision in *Ramah Navajo Chapter*, 132 S. Ct. 2181, IHS negotiated language with a group of tribal attorneys that tribes could opt to include in their ISDEAA agreements with IHS. *See* Pl.'s Ex. 9. Consistent with the Supreme Court's decision recognizing a tribe's rights under § 450j-1(a)(2) to funding for the CSC incurred in carrying out the ISDEAA contract, while also recognizing that the amount the Agency can pay is limited by its available appropriations, the negotiated language includes three paragraphs: the first recognizes the ISDEAA definition of CSC and estimates the tribe's CSC need pursuant to that definition, the second states the amount of CSC IHS agrees to pay the tribe from its annual CSC appropriation, and the final paragraph states that the tribe does not waive any right to recover any allegedly unpaid CSC.

would be inappropriate. Tahsuda Decl., ¶ 6. In the alternative and in an effort to expediently award the funding, IHS offered to include the recently negotiated CSC language, *supra* p. 12, in the MSPI/DVPI agreements. Tahsuda Decl., ¶ 7. This is the same language that SCF had requested be included in its ISDEAA agreement in its September 7, 2012 letter. Def.'s Ex. 10 at 2-3. However, IHS's offer was conditioned upon SCF's acknowledgement that MSPI/DVPI awards were non-recurring and discretionary in nature. Tahsuda Decl., ¶ 8. IHS was willing to agree to this CSC language only in an attempt to reach agreement and because the language continued to make it clear that no amount would be paid for CSC. *Id.*, ¶ 7; Olson Decl., ¶¶ 18-19. After several exchanges, IHS and SCF reached agreement about the CSC language to be included in the MSPI/DVPI agreements. *See* Pl.'s Ex. 14. The parties also agreed in paragraph two of the language (section III(B) of the FY 2012 agreements) to the amount ($0) of CSC IHS would pay to SCF from its annual appropriation. *See* Olson Decl., ¶¶ 18-19.

After the parties reached agreement on these issues, the sole dispute that remained was the estimated amount, if any, of SCF's anticipated costs that can be identified in paragraph one (section III(A) of the FY 2012 agreements, *see* Pl.'s Ex. 12 at 3; Olson Decl., ¶ 20) of the agreed-upon language as reasonable, necessary, non-duplicative costs that qualify for CSC funding under the ISDEAA. The purpose of this paragraph is to incorporate an amount that the parties agree is an accurate estimate under section 450j-1(a) of the tribe's CSC associated with the project funding, if these costs were not captured in the award and if section 450j-1 applied. In fact, IHS and SCF did not fully discuss the appropriate amounts; although several e-mails were exchanged regarding the estimates, a final negotiated amount was not arrived upon. Olson Decl.,

¶ 22; Pl.'s Ex. 15; Tahsuda Decl., ¶ 13. However, on June 25, 2013, SCF unilaterally presented numbers to IHS in a letter styled as a final offer (June 25, 2013 Letter). Pl.'s Ex. 19; *see* 25 U.S.C. § 458aaa-6(b) ("In the event the Secretary and [an] . . . Indian tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement . . . the Indian tribe may submit a final offer to the Secretary.").

IHS responded to SCF's letter on August 7, 2013 (August 7, 2013 Letter). Pl.'s Ex. 21. In that response, IHS first stated that it did not construe SCF's June 25, 2013 Letter to be a final offer under the ISDEAA because the MSPI/DVPI agreements are not awarded under the ISDEAA and instead "are limited duration, non-recurring pilot demonstration projects and not ISDEAA PSFAs [funded through section 450j-1(a)]."[10] *Id.* at 8. Therefore, IHS concluded that no CSC was applicable to the projects, not only because IHS "allocate[d] the funds outside of existing distribution methods," *id.* at 9, but also because IHS fully funded SCF's budget request, which was to include all costs of carrying out the deliverables set out in its scope of work. *Id.* IHS also noted the likelihood that, even if CSC did apply, certain costs that would typically be paid as CSC were already funded by IHS as part of SCF's budgets. *Id.* at 12-13. The Agency concluded by inviting SCF to engage in discussions on the proper estimates for paragraph one.

[10] To the extent the August 7, 2013 Letter states that the MSPI/DVPI are not ISDEAA "PSFAs," this phrasing is shorthand for IHS's position that the MSPI/DVPI were not awarded pursuant to the authority of the ISDEAA; rather, IHS awarded MSPI/DVPI as demonstration projects and only used the existing ISDEAA agreements of MSPI/DVPI award recipients as an expedient option for transferring funding. Therefore, requirements unique to the ISDEAA, *e.g.*, the funding methodology of section 450j-1(a), do not apply to the MSPI/DVPI awards, as explained in further detail below.

Only after receiving SCF's complaint did the Agency understand that SCF did not intend to engage in such negotiations and, therefore, the Agency proceeded to award SCF the FY 2012 MSPI/DVPI on September 10, 2013.[11]

JURISDICTION

IHS agrees that this court has jurisdiction to hear this case pursuant to 25 U.S.C. § 450m-1 and 28 U.S.C. § 1331.

STANDARDS FOR REVIEW

SCF's motion is styled as a motion for preliminary injunction.[12] Issuing a preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the

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[11] In the award, IHS and SCF have agreed to reserve the issue of CSC language so as not to prejudice either party in these proceedings. Def.'s Ex. 1; Def.'s Ex. 2.

[12] Although SCF states that its motion is one for preliminary injunction, *see, e.g.*, Pl.'s Mem. at 1 (case caption), 28; Complaint at 13, certain aspects of SCF's Memorandum suggest that SCF may also be seeking a permanent injunction or mandamus relief, s*ee, e.g.*, Pl.'s Mem. at 13 (emphasizing the ISDEAA language authorizing district courts to grant mandamus relief). Mandamus relief is subject to a high standard. *See, e.g.*, *In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1120 (9th Cir. 2001) ("The writ of mandamus is, however, an extraordinary remedy justified only in 'exceptional circumstances.'") (citing *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988)). Generally, mandamus relief is available "only if (1) the individual's claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available." *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1997). Because SCF explicitly states that it is seeking a preliminary injunction, however, the Government has focused on the corresponding standard. To the extent SCF is seeking mandamus relief, the Government requests the opportunity for further briefing on why SCF also cannot meet that standard.

SCF also relies, in part, upon the Declaratory Judgment Act, 28 U.S.C. § 2201, for jurisdiction. Complaint, ¶ 3. Not only does SCF fail to explain what, if any, declaratory judgment it seeks, it seems clear that a declaratory judgment would not immediately result in the relief that SCF requests (*i.e.*, "immediate injunctions" compelling the Agency to act. *See* Complaint at 13). *See Perez v. Ledesma*, 401 U.S. 82, 112 ("The declaratory judgment differs in no essential respect

movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (emphasis in original) (citation omitted). A party seeking a preliminary injunction must establish the existence of four elements: "(1) likelihood of success on the merits; (2) likelihood of suffering irreparable harm absent a preliminary injunction; (3) the balance of equities tips in the plaintiff's favor; and (4) injunctive relief is in the public interest." *Leigh v. Salazar*, 677 F.3d 892, 896 (9th Cir. 2012) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)).[13]

While the movant party must meet all four elements referenced above, the Ninth Circuit has also recognized a "serious questions" test that grants preliminary injunctions "if there are serious questions going to the merits; there is a likelihood of irreparable injury to the plaintiff; the balance of hardships tips sharply in favor on the plaintiff; and the injunction is in the public interest." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011)). This balancing of the preliminary

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from any other judgment *except that it is not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree*.") (quoting S. Rep. No. 1005, 73d Cong., 2d Sess., 2-3 (1934)) (emphasis added); *Ulstein Maritime Ltd. v. United States*, 833 F.2d 1052, 1055 (1st Cir. 1987) ("Injunctions and declaratory judgments are different remedies. An injunction is a coercive order by a court directing a party to do or refrain from doing something, and applies to future actions. A declaratory judgment states the existing legal rights in a controversy but does not, in itself, coerce any party to enjoin any future action."). To the extent that SCF seeks declaratory judgment, the Government requests the opportunity for further briefing on why SCF also cannot meet that standard.

[13] The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success. *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 546 n. 12 (9th Cir. 1987).

injunction elements allows "a stronger showing of one element . . . [to] offset a weaker showing of another" as long as a plaintiff meets all four elements. *Lopez*, 680 F.3d at 1072; *see also Alliance for the Wild Rockies*, 632 F.3d at 1131.

In addition, as in this case, when a plaintiff seeks a "mandatory injunction" that goes beyond preserving the status quo and instead compels action, the plaintiff must meet a heightened standard that disfavors such relief "unless the facts and the law clearly favor the moving party." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (quoting *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979)).[14] Courts should be "extremely cautious" about issuing a mandatory injunction that goes beyond the status quo. *Stanley*, 13 F.3d at 1319. Thus, a mandatory injunction requires not only proof of the four elements generally required for issuance of a preliminary injunction, but also the heightened standard of clearly showing that "extreme or very serious damage will result." *Anderson*, 612 F.2d at 1115 (quoting *Clune v. Publisher's Ass'n of New York City*, 214 F. Supp. 520, 531 (S.D.N.Y. 1963)). Furthermore, a mandatory injunction is not appropriate in "doubtful" cases. *Id.*

Rather than attempt to show that it satisfies any of these tests, SCF suggests that it need not make a showing of any of the above elements under the ISDEAA. Even if these

[14] Similarly, the standard is higher where the party seeks to accomplish the whole object of the suit through preliminary injunction. *See, e.g.*, *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001). SCF's requested relief seeks to achieve the ultimate goal of this case – a contract award identifying CSC estimated amounts in dispute. A preliminary injunction is not the proper route for obtaining relief on the merits and instead should be limited to preserving the status quo in order to prevent irreparable loss before the merits can be properly resolved. *See, e.g.*, *Sierra On–Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984).

demonstration funds were found to be subject to the ISDEAA, nothing in 25 U.S.C. § 450m-1 supports the conclusion that Congress intended injunctive relief under the ISDEAA to follow a standard that differs from the well-established law in such cases. Section 450m-1(a) provides that the Court "*may* order appropriate relief including money damages, injunctive relief against any action by an officer of the United States . . . or mandamus." 25 U.S.C. § 450m-1(a) (emphasis added). The use of the term "may" indicates that section 450m-1 is permissive and discretionary on its face with respect to a court's exercise of authority. In addition the statutory language makes clear that injunctive relief is "not the only means of ensuring compliance." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982). Section 450m-1 expressly provides that "appropriate relief" may include money damages and mandamus and therefore cannot be read as compelling a court to order injunctive relief as a means of enforcing the ISDEAA.

Given the plain language of section 450m-1, this Court need not resort to legislative history to determine whether Congress has intended to circumscribe the Court's equitable powers. Congress clearly has not expressed any such limitation. Nevertheless, SCF's characterization of the legislative history is incomplete. The legislative history cited by SCF clearly establishes that Congress explicitly amended the ISDEAA in 1988 to authorize injunctive relief, not to limit a court's exercise of its equitable power in the ISDEAA context, but to guarantee the availability of such relief; thus, Congress acted to remedy a legal landscape in which "[t]ribal contractors [were] denied access to injunctive relief." S. Rep. No. 100-274, at 37 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2656 (citing *Alamo Navajo Sch. Bd., Inc. v. Andrus*, 664 F.2d 229 (10th Cir. 1981) as an example where injunctive relief was denied).

Accordingly, SCF continues to have the burden under section 450m-1 of proving the need for a preliminary injunction in accordance with standard set out above for such actions.

Rather than demonstrate how the standard is met in this case, SCF appears to be asking this court to issue "immediate" injunctive relief on the merits, while relying on its position that SCF automatically prevails unless the Government meets "the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the [final] offer." Pl.'s Mem. at 17; 25 U.S.C. § 458aaa-7(d).[15] The United States objects to SCF's attempt to apply this standard in the context of its motion for a preliminary injunction. The Government disagrees that this standard, which is unique to the contracting process of the ISDEAA, applies to the MSPI/DVPI because the initiatives are not awarded under the ISDEAA, as SCF itself concedes when it characterizes MSPI/DVPI as "grants." Pl.'s Mem. at 16, 18. The appropriate standard for obtaining a preliminary injunction is the standard discussed in detail above, not the standard of review that would apply to a decision on the merits.

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[15] The case cited by SCF, *Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs*, No. Civ.A. No.12-1494-RMC, 2013 WL 2255208 (D.D.C. May 23, 2013),is inapplicable here. *See* Pl.'s Mem. at 19, 21. In *Seneca*, IHS did not respond within the statutory deadline imposed for responding to Title I contract proposals. For that reason, the court held that the contract provisions at issue were "deemed approved" automatically as proposed by operation of the applicable regulations. *Seneca*, 2013 WL 2255208, at *9, *16. The Seneca Court's holding that IHS did not meet its burden under the ISDEAA was based entirely on IHS's failure to respond. *Id.* at *16. However, in this case IHS did not consider SCF's June 25 letter to be a final offer under the ISDEAA for the reasons discussed above. Moreover, even if the letter were a final offer, IHS fully and adequately responded to the letter within 45 days, which is the timeline imposed by the ISDEAA for Title V final offers. 25 U.S.C. § 458aaa-6(b).. The *Seneca* court recognized that this is precisely the action that IHS should take to prevent a similar ruling in other cases. *Seneca*, 2013 WL 2255208, at *16.

ARGUMENT

SCF asks the Court to order preliminary injunctive relief in the form of: (a) the award and payment of the MSPI/DVPI agreements; (b) the inclusion of SCF's proposed indirect CSC estimates in the MSPI/DVPI awards; and (c) the inclusion of SCF's proposed direct CSC estimates in the MSPI/DVPI awards.

As discussed above, the first remedy sought is now moot because IHS issued the awards and authorization for payments in the amounts of $599,596 and $482,554, respectively, on September 10, 2013. Def.'s Ex. 1; Def.'s Ex. 2. IHS always expected to issue the MSPI/DVPI awards and, contrary to SCF's assertions, did not decline to issue the awards or to transfer the funds in its August 7, 2013 Letter. Nor, contrary to SCF's assertions, did IHS attempt to force CSC language on SCF; rather, the Agency had agreed to compromise on the language to avoid the very result we now face – litigation over CSC as it relates to the MSPI/DVPI. Instead, in its August 7, 2013 Letter, IHS explained its lack of authority under the ISDEAA to agree to SCF's proposed estimates of direct and indirect CSC to be identified in its MSPI/DVPI awards. IHS anticipated that the limited issue regarding these estimated amounts would be resolved and that there would not be an extended delay in funding the awards. Once IHS learned of this action and realized that timely resolution of the dispute was unlikely, the Agency proceeded to issue the awards (with place holder language in the section addressing CSC) and authorize the funding.

"[A] suit becomes moot, 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *Chafin v. Chafin*, --- U.S. ---, 133 S.Ct. 1017, 1023 (2013) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. ---, 133 S.Ct. 721, 726 (2013). When

IHS awarded these amounts, an "event occur[ed] while [the] case [was] pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever'" to SCF on this cause of action; therefore, the appeal as to this request "must be dismissed." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992); *see Elizabeth v. F.D.I.C.*, 465 Fed. Appx. 696, 697 (9th Cir. 2012) (unpublished) (finding that, when the plaintiff had "been refunded the entire [amount] her action sought to recover," "there is no longer a live issue or controversy and no effective relief can be granted"). Moreover, it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," because the agreements have been fully executed and the amounts requested already awarded. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Therefore, this issue is now moot and, accordingly, the Court does not have the authority to decide the issue and should deny SCF's motion. *See, e.g.*, *Foster v. Carson*, 347 F.3d 742, 747 (9th Cir. 2003).[16]

1. <u>SCF will not succeed on the merits of its claims.</u>

SCF fails to meet its burden of persuasion with respect to its request that the MSPI/DVPI awards recognize an estimated right to $223,493 and $134,999, respectively, in indirect CSC and an estimated right to $48,209 and $42,734, respectively, in direct CSC. SCF's argument fails for two primary reasons. First, on its face, SCF's argument is contradicted by the authority under

[16] Even to the extent that the request has not been mooted, SCF fails to meet its burden of persuasion. First, SCF has not alleged any extreme, serious, or irreparable harm to itself or its beneficiary population that meets the first requirement for obtaining injunctive relief in any of the forms requested. Similarly, SCF has failed to identify any public interest or to explain the balance of any equities that would compel the relief sought. Finally, contrary to SCF's assertions, SCF will not succeed on the underlying merits.

which the MSPI/DVPI were awarded. Second, even if the ISDEAA CSC funding provision applied, SCF has not identified any costs that qualify under the ISDEAA for CSC funding.

a. The MSPI/DVPI were not awarded under the ISDEAA and, therefore, ISDEAA provisions such as section 450j-1(a) are not applicable to the awards.

As noted above, when authorizing the MSPI/DVPI, Congress granted IHS broad discretion, notwithstanding any other law, to award the funds. *See* Pub. L. No. 110-161, 121 Stat. 1844, 2135; Pub. L. No. 111-8, 123 Stat. 524, 735. In accordance with this discretion, and after engaging in tribal consultation and considering the specific goals of these initiatives, IHS chose to establish and award each initiative as a demonstration project rather than making the funds available as tribal shares to be awarded under 25 U.S.C. § 450j-1, which, as explained above, typically includes two components—the "Secretarial amount" and CSC.

In exercising its discretion, IHS chose not to award MSPI/DVPI under the § 450j-1 methodologies for several reasons. One important consideration was that Congress made clear when it authorized MSPI/DVPI that these were unique initiatives and that the funding appropriated for these initiatives was discretionary in nature. *See id.* As discussed above, the MSPI funds were originally appropriated in FY 2008. *See* Pub. L. No. 110-161. The appropriations language specifically stated that the funds were appropriated only for the specific purpose of "a methamphetamine and suicide prevention and treatment initiative" and that, "notwithstanding any other provision of law, these funds shall be allocated outside all other distribution methods and formulas at the discretion of the Director of the Indian Health Service." Pub. L. No. 110-161, 121 Stat. 1844, 2135. In FY 2009, FY 2010, FY 2011, and FY 2012,

Congress again appropriated funds for the MSPI, and also appropriated funds for the DVPI. As to both initiatives, Congress again directed that "notwithstanding any other provision of law, the amounts . . . shall be allocated at the discretion of the Director." Pub. L. No. 111-8, 123 Stat. 524, 735 (FY 2009); Pub. L. No. 111-88, 123 Stat. 2904, 2946 (FY 2010); P.L. 111-242, 124 Stat. 2607 (FY 2011); Pub. L. No. 112-74, 125 Stat. 786, 1027 (FY 2012).

Thus, the appropriations language makes it clear that Congress's intent was for IHS to allocate these funds outside of existing formulas (*i.e.*, as funds available as tribal shares for all tribes contracting/compacting under the ISDEAA under section 450j-1, rather than only for some tribes competitively) "notwithstanding any other provision of law," and that the funding distribution mechanism was left entirely to the Director's discretion. Courts generally recognize that the "notwithstanding" language provides broad discretion to allocate funds, despite any other otherwise-mandatory laws or regulations.[17] This discretion is not reviewable by the courts and cannot be challenged by tribes. *Lincoln v. Vigil*, 508 U.S. 182, 192 ("The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion. After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way."); *see also Ramah Navajo Chapter*, 132 S.

[17] "When Congress wishes to confer discretion unrestrained by other law, its practice has been to include the words 'notwithstanding the provisions of any other law' or similar language." 1 GAO, Principles of Federal Appropriations Law, p. 44; *see, e.g., Liberty Maritime Corp. v. U.S.*, 928 F.2d 413, 416 (D.C. Cir. 1991) ("This court has interpreted similar 'notwithstanding' language in other cases to supersede all other laws, stating that '[a] clearer statement is difficult to imagine.'").

Ct. at 2190 (quoting *Vigil* with approval and confirming that the ability to direct funds within an appropriation is "committed to agency discretion by law"); *Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, No. 11-57222, slip op. at 24-25 (9th Cir. Sept. 4, 2013).

The associated legislative history also supports this interpretation. In the House Report accompanying the Department of the Interior, Environment, and Related Agencies Appropriations Bill, 2008 (the source of the MSPI eventually included in the enacted Consolidated Appropriations Act), the House Committee on Appropriations stated:

> The Committee . . . has included $15,000,000 within this amount for the Indian Health Service for substance abuse treatment and mental health issues, including youth suicide, associated with methamphetamine use. The Committee expects the Directors of the Indian Health Service and the Bureau of Indian Affairs to distribute this funding outside of the normal formulas and methodologies to target the areas with the highest needs in Indian Country.

H.R. Rep. No. 110-187, at 5 (2008).

Pursuant to the broad discretion Congress imparted on the Director to distribute these funds, and after extensive tribal consultation, IHS determined specific, unique funding metrics to use to award the MSPI/DVPI to best meet the Congressional directives and the Agency's goals. These funding metrics allowed IHS to target the initiatives based on need through a competitive process and full-cost recovery awards. *See* Cotton Decl., ¶ 12; Weakhee Decl., ¶¶ 6-7; Def.'s Ex. 7 at 1 (in a letter from the Alaska Area Office to Alaska tribes (2009 Letter), IHS references the competitive process to receive MSPI funding, indicating that only "selected projects" will receive FY 2008 and FY 2009 funding); Def.'s Ex. 4 (in a similar letter from the Alaska Area to tribes regarding DVPI (2010 Letter), the Area refers to the "solicitation of proposals,"

"application guidelines," and "scoring" of proposals for DVPI funding, again making clear that the funds were being competed among eligible entities). IHS required MSPI/DVPI participants to submit a scope of work and a budget that was inclusive of all costs necessary to carry out those deliverables. Weakhee Decl., ¶¶ 6-7; Cotton Decl., ¶¶ 8, 10 . When an MSPI/DVPI proposal is approved, IHS awards the project as a full-cost recovery award that funds the amount requested in the budget. Weakhee Decl., ¶¶ 6-7; Cotton Decl., ¶ 10; *see also* Pl.'s Ex. 1 at 2 ("The tribal members present at the tribal caucus have agreed to conform their proposals for [MSPI] funding to the funding levels provided in this memo."); Pl.'s Ex. 2 at 2 ("Nothing in this Amendment construes a right on behalf of the SCF to any funding for its Proposal beyond the funds awarded in this Amendment.").

In contrast, determination of the Secretarial amount under section 450j-1 for an ISDEAA contract is not dependent on a tribal budget request, but instead is determined in IHS's sole discretion based on the amount it had previously spent to operate the program, which the Agency calculates through a methodology used to determine the applicable "tribal share" associated with the program. *See* 25 U.S.C. §§ 450j-1; 458aaa-7(c).

Not only were MSPI/DVPI awarded outside of the section 450j-1 methodology, but even when the funds were distributed through the ISDEAA agreements, the distribution was made pursuant to separate agreements with unique terms and conditions. Moreover, the MSPI/DVPI were only awarded to some of the tribes contracting under the ISDEAA. While IHS agreed to pass these funds through the ISDEAA payment mechanism to efficiently take advantage of an existing process, the unique terms and conditions of the agreements make clear that the use of

the mechanism did not alter the unique nature of the awards. At the very outset of the MSPI, IHS explained its reasoning for utilizing this mechanism to tribes and tribal organizations, including SCF, in the Alaska Area. In the 2009 Letter, the Alaska Area Director clearly states that IHS "decided to use a demonstration project model to expedite distribution" of the MSPI funding. Def.'s Ex. 7 at 1. Unlike the funding that makes up the Secretarial amount, which is typically recurring, SCF's MSPI/DVPI agreements themselves explain that MSPI/DVPI are "non-recurring demonstration projects."[18] *See, e.g.*, Pl.'s Ex. 2 at 2; Pl.'s Ex. 5 at 2; Pl.'s Ex. 6 at 2. For FY 2012, IHS and SCF specifically agreed that "any future allocation of this non-recurring funding is subject to re-allocation at the discretion of the IHS Director and available appropriations." Tahsuda Decl., ¶¶ 8, 12. This was also made clear to the IHS Tribal Self-Governance Advisory Committee in a January 13, 2010 letter, which stated that the "MSPI model is a new and innovative method for expediting funding distribution, consistent with Congressional intent." Pl.'s Ex. 3 at 1.

Moreover, SCF's MSPI/DVPI agreements include terms and conditions that clearly exempt the awards from being subject to the ISDEAA.[19] Again, these terms and conditions were necessary to effectuate the Congressional and Agency goals for these targeted initiatives. By

[18] In an email dated August 21, 2012, from IHS to SCF regarding MSPI, IHS reiterated the limited duration of the initiative, making it clear that "MSPI funding beyond Project Year 4 will be determined at a future date. . . . Programs should plan for a program end date of August 31, 2013 and expect that Year 4 will be your last year of funding." Def.'s Ex. 11 at 1.

[19] As other evidence that MSPI/DVPI was not awarded under the ISDEAA, IHS also issued awards to urban Indian health programs, which do not have a right to contract for programs funded under section 450j-1. Cotton Decl., ¶ 11.

agreeing to these provisions, which along with SCF's proposal "constitute the complete agreement between the parties with respect to the use of the [MSPI/DVPI] funds," *see* Pl.'s Ex. 2 at 2; Pl.'s Ex. 5 at 2; Pl.'s Ex. 6 at 3; Pl.'s Ex. 8 at 2, SCF has clearly accepted that the MSPI/DVPI awards are distinguishable from its ISDEAA agreements. First, the MSPI/DVPI agreements make it clear that the funds "must be expended for the specific purpose outlined" in the agreement and SCF's proposal.[20] Pl.'s Ex. 2 at 2; Pl.'s Ex. 5 at 2; Pl.'s Ex. 6 at 3; Pl.'s Ex 8 at 2. This limitation on MSPI/DVPI awards is a clear distinction from ISDEAA agreements, under which Title V compactors have the authority to rebudget and redesign programs under certain circumstances. *See* 25 U.S.C. § 458aaa-5(e). Second, the MSPI/DVPI participants, including SCF, must abide by heightened reporting requirements, including the submission of progress and financial reports on specific outcome measures, which generally are not applicable to ISDEAA agreements. *See* Cotton Decl., ¶ 13. Finally, the conflict of law provisions in the MSPI/DVPI awards make it clear that the agreements control over any other law, including the ISDEAA and SCF's ISDEAA agreement. *See* Pl.'s Ex. 2 at 3; Pl.'s Ex. 5 at 3; Pl.'s Ex. 6 at 4.

SCF clearly understood the ISDEAA would not control these awards. In fact, SCF concedes as much in its Memorandum, in which it refers to the MSPI/DVPI awards as "grants" on three occasions. Pl.'s Mem. at 16, 18. SCF's proposals for the awards in question similarly refer to the awards as "grants." Def.'s Ex. 8 at 1; Def.'s Ex. 9 at 5; Def.'s Ex. 12 at 1. If these awards were in fact grants that had been added to SCF's Title V funding agreement pursuant to

[20] The language in the appropriations act shows that this was also Congress's intent, as the funds were specifically appropriated for this purpose.

25 U.S.C. § 458aaa-4(b)(2), the terms and conditions of the grant award would govern. *See, e.g.* 42 C.F.R. § 137.68 (providing that even though Title V Tribes may reallocate 106(a)(1) funds, they may not reallocate grant funds added to their funding agreement, unless reallocation is permitted by the authorizing statute or the terms and conditions of the grant award); 42 C.F.R. § 137.69 (providing that even though Title V Tribes may redesign 106(a)(1) funds, they may not redesign grant funds added to their funding agreement, unless redesign is permitted by the authorizing statute of the terms and conditions of the grant award); 42 C.F.R. § 137.70 (providing that the reporting requirements outlined in the terms and conditions of the grant award continue to apply even when the award is added to the funding agreement). In fact, the regulations clearly state that "*[n]one* of the provisions of Title V apply" to a grant when it is added to a Title V funding agreement. 42 C.F.R. § 137.73 (emphasis added). Thus, by their own characterization of the awards as "grants," SCF clearly understood that the MSPI/DVPI are unique awards, funded based on a methodology outside of the section 450j-1 formulas, and that the terms of the MSPI/DVPI agreements control over SCF's ISDEAA agreements. Accordingly, the CSC provisions of the ISDEAA do not apply.

b. Even if ISDEAA provisions such as section 450j-1(a) were applicable to the MSPI/DVPI awards, IHS awarded and funded the full costs of the initiatives.

The purpose of the CSC funding authority is to ensure that there is no diminution in services when programs previously operated by the Secretary are transferred to tribal control. 140 Cong. Rec. H11140-01 (1994) (stating that the purpose of CSC is to prevent the "diminution in program sources when programs, services, functions or activities are transferred to tribal

operation," because without this funding, "a tribe would be compelled to divert program funds to prudently manage the contract"). Congress intended CSC to prevent tribes from having to use the Secretarial amount to cover their unique, additional costs and thereby reduce the program that was being provided prior to the transfer of the program to tribal administration. Therefore, CSC exists only as a function of ensuring the success of self-determination and is necessary only to ensure funding of tribe's contract costs that are not funded by the Secretarial amount. Because IHS awarded the MSPI/DVPI outside of the ISDEAA, however, the awards were issued as full-cost recovery awards. Weakhee Decl. ¶¶ 6-7; Cotton Decl. ¶ 10. Therefore, SCF cannot identify additional, unfunded costs related to the initiatives, CSC or otherwise.

SCF has not explained the basis for its estimated CSC amounts, nor has it explained what costs it will have in carrying out the initiatives that it did not include in its budgets. For example, costs that are most often eligible to be paid as direct CSC are certain portions of fringe benefits that are higher than the amount transferred by IHS in the Secretarial amount, as well as some forms of insurance not transferred by the government through the Secretarial amount, *i.e.*, workers' compensation. *See* IHS CSC Manual, Part 6, Chapter 3, Manual Exhibit 6-3-H at 22; Olson Decl. ¶ 29. However, SCF's budgets for MSPI/DVPI, which equal the award amount, already include these costs. *See* Def.'s Ex. 8 at 20 (the MSPI award included fringe benefits of between 34% and 39% on all requested salaries, totaling $133,826); Def.'s Ex. 12 at 2[21] (the

[21] Although the proposal is labeled as one for FY 2013, it was in actuality SCF's proposal for the Year 3 DVPI award, *i.e.*, the FY 2012 DVPI agreement.

DVPI award included fringe benefits for the nine program employees, totaling $62,846).[22] Likewise, it also seems that all potential indirect costs were included in SCF's DVPI budget and funded by IHS. SCF's initial FY 2012 DVPI budget proposal included an amount for "indirect costs." Def.'s Ex. 9 at 21. Although the revised budget retitles the line items, the total dollar amount budgeted and awarded is the same. *See* Def.'s Ex. 12 at 2. Thus, even if section 450j-1 were to apply to the MSPI/DVPI awards, it does not appear that SCF has any additional reasonable costs necessary to ensure compliance with the awards, which already include funding for all of SCF's costs of carrying out the projects.

Together, the appropriations language, the unique process for applying for and awarding MSPI/DVPI, the terms in the MSPI/DVPI awards, and the full-cost recovery nature of the awards make it clear that these initiatives are special demonstration projects awarded outside of the scope of section 450j-1. Even if the project funding was subject to section 450j-1, however, SCF has no additional costs that qualify as CSC, which is available only to cover additional necessary contract costs that were not funded in the Secretarial amount. For these reasons, SCF is not likely to prevail on the merits of its allegations, and this Court should deny its request for a preliminary injunction.

[22] In fact, the fringe benefits amounts already funded as part of the MSPI/DVPI award amounts are higher than the amounts Mr. Olson now attests are required to operate the MSPI/DVPI projects, making it even more apparent that all potential fringe costs were already awarded to SCF. Olson Decl., ¶¶ 30-31.

2. <u>The parties' dispute regarding estimated CSC amounts will not cause extreme, serious, or irreparable harm to SCF or its beneficiary population.</u>

The sole dispute remaining between the parties is over the appropriate amount of estimated CSC associated with SCF's MSPI/DVPI projects that should be identified in paragraph one of the agreed-upon language (at paragraph III(A) of the MSPI/DVPI agreements); no dispute exists regarding the amount SCF expects to be funded or that IHS promises to pay. *See* Olson Decl., ¶ 18. The dispute regarding the estimates remains despite IHS agreeing to compromise with SCF on the language of the MSPI/DVPI awards by including language that SCF itself requested be included in its separate ISDEAA agreement.[23]

SCF has made no showing of any extreme, serious, or irreparable harm that will be caused by a delay in resolving a dispute over estimated amounts that do not otherwise affect the agreement, including the amount of funds that IHS will pay SCF from its appropriation for these initiatives.[24] Irreparable harm cannot be presumed. *See Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 998 (9th Cir. 2011) (overruling precedent applying a presumption of

[23] As explained above, the agreed-upon language includes three paragraphs: paragraph III(A) recognizes the ISDEAA definition of CSC and an estimate of SCF's CSC pursuant to that definition; paragraph III(B) identifies the amounts ($0 in this case) IHS will pay from its appropriation; and paragraph III(C) preserves SCF's right to bring a Contract Disputes Act claim for alleged underpayments. *See, e.g.*, Pl.'s Ex. 16 at 2; Pl.'s Ex. 17 at 2 (MSPI/DVPI agreements successfully negotiated with a different Alaska tribal organization based on the result of the negotiations with ANTHC).

[24] Even if SCF's first request for relief had not been mooted, SCF also fails to meet its burden to show that failure to award the MSPI/DVPI would result in any extreme, serious, or irreparable harm. As noted in the Plaintiff's Memorandum, SCF elected to continue the initiatives with other funds and, therefore, the beneficiary population has continued to benefit. *See* Pl.'s Mem. at 3; Olson Decl., ¶ 24. Moreover, SCF is under no legal obligation to continue to carry out the projects absent IHS funding.

irreparable harm in copyright infringement cases and finding that "even in a copyright infringement case, the plaintiff must demonstrate a likelihood of irreparable harm as a prerequisite for injunctive relief, whether preliminary or permanent"). It is obvious that no such irreparable harm exists. As made clear in paragraph III(C) of the agreements, nothing in the language limits SCF's right to make a claim under the Contract Disputes Act (CDA) for any alleged CSC that may be owed. *See, e.g.*, Pl.'s Ex. 16 at 2; Pl.'s Ex. 17 at 2. Identifying an estimated amount of CSC neither limits SCF's future rights, affects the amounts to be paid, nor affects SCF's immediate obligations, and therefore, is not a matter that meets the high bar required for immediate injunctive relief. *Compare Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1159 (9th Cir. 2011) (finding that immediate eviction constitutes irreparable harm) *with Earth Island Inst. v. Carlton*, 626 F.3d 462 (9th Cir. 2010) (finding that the district court did not abuse its discretion in finding that logging of a particular species' habitat did not create the likelihood of irreparable harm) *and Winter*, 555 U.S. at 22 ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."). Failing to meet this first prong of the standard, SCF's motion should be denied.[25] *Alliance for the Wild Rockies*, 632

[25] To the extent this Court construes SCF's motion as one for mandatory injunction, SCF clearly also does not satisfy the additional requirement that "extreme or very serious damage will result." *Anderson*, 612 F.2d at 1115.

F.3d at 1135 ("*Winter* . . . requires the plaintiff to make a showing on all four prongs [of the preliminary junction test].") (citing *Winter*, 555 U.S. at 21).

3. **SCF has not identified any public interest that requires a preliminary injunction**.

Similarly, SCF has not even suggested that the relief sought is required for the public interest, contrary to the requirement that a plaintiff satisfy all four prongs of the test for preliminary injunction. *Id.* Even if SCF had suggested that such relief is required, it is clear that it is not. The dispute at bar affects only the estimated CSC need associated with projects operated by SCF; it does not affect the amount paid, SCF's ability to carry out the initiatives, nor any other recipient of the MSPI/DVPI. This is in sharp contrast to cases in which the Ninth Circuit has found that relief is required for the public interest, for example, in the case of irreparable environmental injury, *Alliance for the Wild Rockies*, 632 F.3d at 1138, or when a lack of injunction would infringe upon "the First Amendment rights of many persons who are not parties to this lawsuit." *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 829 (9th Cir. 2013).

4. **The balance of equities favors IHS**.

SCF requests that this Court require IHS to recognize in contract SCF's proposed amounts for CSC associated with its MSPI/DVPI projects. The balance of equities favors IHS, whose interests include preserving the Agency's discretion on the award and funding of these demonstration projects and complying with the ISDEAA when determining CSC amounts for any agreements entered into by the Agency.

SCF's request for relief threatens the Agency's discretion over these funds. The MSPI/DVPI are unique initiatives, and Congress gave IHS broad discretion for determining how to award and fund the initiatives. After consultation with tribes, IHS adopted the methodology that it concluded would best serve the purposes of the initiatives. The relief SCF seeks threatens the discretion that Congress clearly granted to the Agency.

SCF further seeks to create a contractual entitlement unsupported by the law, thereby potentially creating a contract claim under the CDA. IHS has not agreed to the amounts proposed for two primary reasons: (a) as discussed above in section 1, IHS does not agree that CSC under section 450j-1(a) applies to SCF's MSPI/DVPI awards; and (b) even if section 450j-1(a) were to apply, an estimate of CSC – and any contractual recognition of such an estimate – is the subject of negotiation between the parties. The parties must jointly determine which proposed costs qualify as CSC under the ISDEAA. Despite this, SCF has not supported the amounts it proposes with any documentation, nor has it engaged in any meaningful negotiations with IHS regarding these amounts. *See* 25 U.S.C. § 450j-1(a)(3)(B); 25 U.S.C. § 450j(c)(2); IHS CSC Manual, Part 6, Chapter 3.1E(12).

IHS would be seriously harmed if this Court were to relieve a tribe from any duty to justify its proposal under the statute and instead to require the Agency to agree in contract to proposed amounts without regard to whether the amounts are outside of the Agency's statutory authority. Contrary to SCF's assertions, the burden is on SCF to demonstrate in its proposal that it anticipates incurring additional, reasonable costs necessary to carry out these projects that were not already funded in the awards, which were full-cost recovery awards. *See* 25 U.S.C. §§ 450j-

1(2)-(3). The parties must then negotiate the amounts. *See id.*, § 450j-1(a)(3)(B). Such steps are necessary to ensure that amounts identified for CSC comply with the statutory definition of such costs and do not duplicate funding already provided under the agreement. *Id.*, § 450j-1(a)(2), (3)(A). In this case, neither of these requirements has been met, although IHS requested to do so. Pl.'s Ex. 21 at 8.

For these reasons, even if CSC were theoretically applicable to the projects, this Court should not grant SCF's request to immediately compel IHS to recognize its unilaterally proposed estimates in the MSPI/DVPI awards. There is no equity in requiring an agency to identify an estimate that has not been scrutinized under the applicable statutory standard.

CONCLUSION

Because IHS has awarded SCF's MSPI/DVPI agreements and associated funding, SCF's first cause of action is now moot. Moreover, SCF has not shown that the remaining dispute regarding estimated amounts to be included in agreed-upon contract language, which in no way influences the amount paid to SCF or any specific obligation under the agreement, causes any harm, either immediate or irreparable, to SCF. Further, SCF has not demonstrated that any other factor required for an injunction, preliminary or permanent, exists here. Finally, SCF is unlikely to prevail on the merits because IHS has funded SCF's MSPI/DVPI awards through a unique funding methodology that provides full-cost recovery and to which CSC is inapplicable. It is entirely within IHS's discretion to determine the methodology for issuing these awards in a manner that is most likely to enable tribes and IHS to meet the specific goals of these initiatives.

For these reasons, the Government respectfully requests that this Court deny SCF's motion for preliminary injunction.

RESPECTFULLY SUBMITTED on September 16, 2013, at Anchorage, Alaska.

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s/ Richard L. Pomeroy
Richard L. Pomeroy
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2013 a true and correct copy of the foregoing was served electronically on the following:

Lloyd B. Miller

s/Richard L. Pomeroy
Assistant U.S. Attorney