UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MANIILAQ ASSOCIATION	)	
	)	
PLAINTIFF,	)	
	)	
v.	)	Civil Action No. 1:13-cv-380 (JDB)
	)	
KATHLEEN SEBELIUS, et al.	)	
	)	
DEFENDANTS.	)	ORAL HEARING REQUESTED
	)	
	)	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Maniilaq Association ("Maniilaq"), by and through the undersigned counsel, respectfully moves pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in Maniilaq's favor. The essential facts of this case, as set forth in the accompanying Plaintiff's Statement of Material Facts Not in Genuine Dispute, have not been contested by the Defendants. Therefore, as demonstrated in the accompanying Memorandum of Points and Authorities, the Tribe is entitled to judgment as a matter of law.

Specifically, Maniilaq asks that this Court enter judgment as follows:

1. Declaring that Maniilaq's final offer as proposed, including the proposed lease of the Ambler clinic facility, has been approved by operation of law;

2. Ordering the Defendants, pursuant to this Court's authority under 25 U.S.C. § 450m-1(a), to enter into the proposed lease of the Ambler clinic included in the final offer and

incorporate the lease into Maniilaq's 2013 funding agreement along with the necessary language to implement the terms of the final offer;

3. Ordering the Defendants, pursuant to this Court's authority under 25 U.S.C. § 450m-1(a), to pay Maniilaq $172,536 in compensation under the lease for using the Ambler clinic to provide health services under the CHAP program carried out pursuant to the funding agreement;

4. Awarding interest on the amount in subparagraph 3 from the date of the deemed approval of the final offer under the Prompt Payment Act or other applicable law;

5. Awarding reasonable attorney fees and expenses in favor of Maniilaq under the Equal Access to Justice Act, 28 U.S.C. § 2412, and any other applicable law; and

6. Granting such other relief as the Court deems just.

Alternatively, if this Court determines that Maniilaq's final offer is not subject to the final offer provisions of §§ 458aaa-6(b) and (c) of the ISDEAA, Maniilaq respectfully asks that this Court enter judgment:

1. Declaring that Mr. Mandregans's determination that Maniilaq must submit its proposed lease to the AANHS under the IHS Lease Priority System contained in the IHS Technical Handbook for Environmental Health and Engineering is contrary to the ISDEAA;

2. Declaring that Mr. Mandregan's determination that AANHS need not provide monetary compensation to Maniilaq for Maniilaq's use of the Ambler clinic facility under the § 105(*l*) lease (25 U.S.C. § 450j(*l*)) is contrary to the ISDEAA;

3. Ordering the Defendants, pursuant to this Court's authority under 25 U.S.C. § 450m-1(a), to approve the § 105(*l*) lease of the Ambler clinic facility as proposed by Maniilaq;

4. Ordering the Defendants, pursuant to this Court's authority under 25 U.S.C. § 450m-1(a), to provide $172,536 to Maniilaq for Maniilaq's use of the Ambler clinic facility under the § 105(*l*) lease as proposed by Maniilaq;

5. Awarding reasonable attorney fees and expenses in favor of Maniilaq under the Equal Access to Justice Act, 28 U.S.C. § 2412, and any other applicable law; and

6. Granting such other relief as the Court deems just.

In support of its Motion for Summary Judgment, Maniilaq submits a Statement of Material Facts Not in Genuine Dispute and a Memorandum of Points and Authorities with exhibits attached and factual citations from the Record. In addition, the Tribe requests an oral hearing on this motion pursuant to LCvR 7(f).

Respectfully submitted,

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Attorneys for the Maniilaq Association

DATED: May 14, 2013.

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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY

Plaintiff, the Maniilaq Association ("Maniilaq"), compacts with the Secretary of Health and Human Services ("Secretary") through Indian Health Service ("IHS") under Title V of the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 458aaa, *et seq.* Pursuant to its compact and annual funding agreements, Maniilaq administers certain healh care-related programs, functions, services and activities ("PFSAs") that the IHS would otherwise be obligated under federal law to provide to Indians and Alaska Natives in Maniilaq's service area. 25 U.S.C. § 450f(a)(1). A critical component of those services is the Community Health Aide Program ("CHAP"), whereby basic health care services are provided through community health aides to Alaska Natives in remote areas where access to health care providers would otherwise be severely restricted. 25 U.S.C. § 1616*l*. In order to implement the CHAP in Alaska, IHS leases Village Built Clinic ("VBC") facilities from remote Alaska villages for community health aides to utilize as clinic space.

In order to further the ISDEAA's purpose of reducing federal domination of Indian programs and promoting tribal self-determination and self-governance, 25 U.S.C. § 450a(b), C*herokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 639 (2005), Congress in the ISDEAA provided tribes with wide latitude to determine what PSFAs ought to be included in their compacts and annual funding agreements and how their programs ought to be designed. 25 U.S.C. § 458aaa-4; Pub. L. No. 106-260, § 3(2)(F), 114 Stat. 711, 712 (2000) (describing the policy of Congress to, among other things, "provide tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer [PFSAs] (or portions thereof) that meet the needs of the individual tribal communities"). Congress also significantly limited the Secretary's discretion to bind tribes through administrative guidance or policymaking (other

than through negotiated rulemaking) without the tribes' permission, 25 U.S.C. § 458aaa-16(e), or to reject a tribe's compact or funding agreement proposal unless the Secretary timely advises the tribe that at least one of four specifically listed criteria applies to the tribe's "final offer." 25 U.S.C. § 458aaa-6(c).

At negotiations for the fiscal year 2013 funding agreement, Maniilaq and the IHS were unable to reach agreement on the IHS lease of the Village of Ambler VBC, which Maniilaq owns. Maniilaq proposed that the lease be attached and incorporated into the funding agreement along with language necessary to adjust provisions in the agreement dealing with the CHAP and VBC programs. IHS took the position that the lease cannot be negotiated as part of Maniilaq's funding agreement, but rather must be submitted for IHS review and determination pursuant to a separate administrative process adopted by the IHS in an agency Handbook (a process to which Maniilaq has not consented to be bound). Maniilaq disagreed and submitted its final offer, and IHS did not timely respond with an identification of any of the four statutory criteria as required for the IHS to reject a final offer under the ISDEAA. Maniilaq then initiated this action for declaratory, mandamus, and injunctive relief requesting that this Court declare that Maniilaq's final offer, including the proposed lease of the Ambler VBC facility, has been approved by operation of law.

LEGAL AND FACTUAL BACKGROUND

The CHAP was formally established by Congress in the Indian Health Care Improvement Act, 25 U.S.C. § 1616*l*, in 1968. Prior to the CHAP, in particular during the tuberculosis epidemic of the 1940s and 1950s, health care in the remote villages of Alaska was primarily provided by resident volunteers. These volunteers, who were generally not formally trained, were unpaid and provided services out of their homes. Hearing on the Indian Health Care

Improvement Act Before the S. Comm. on Indian Affairs, 110th Cong. 57 (2007) (hereinafter "2007 ICHIA Hearing") (Community Health Aide Program Overview 2007); Exhibit A (IHS Technical Handbook for Environmental Health and Engineering (hereinafter "Technical Handbook"), § 33-3.3-3). The CHAP evolved as the village volunteers gained more experience and expertise and the benefits of the direct services they were able to provide became clear. 2007 ICHIA Hearing at 57.

After the CHAP was enacted into law in 1968, community health aides for the first time were paid a salary and provided with formal training. *Id.* The program also established clinics so that community health aides would no longer need to attend to patients in their own homes, and provided for the use of technology with the capacity to improve health care in isolated areas. As part of the CHAP, the Secretary, acting through the IHS, is thus tasked with operating a program that:

> (1) provides for the training of Alaska Natives as health aides or community health practitioners; (2) uses those aides or practitioners in the provision of health care, health promotion, and disease prevention services to Alaska Natives living in villages in rural Alaska; and (3) provides for the establishment of teleconferencing capacity in health clinics located in or near those villages for use by community health aides or community health practitioners.

25 U.S.C. § 1616*l*(a).

The CHAP is vital to the provision of health care for Alaska Natives throughout the State – a fact acknowledged by the IHS. Exhibit A (Technical Handbook at § 33-3.3-2). It operates in remote areas where access to other health care services is often severely limited. As described by one witness during a 2007 hearing of the Senate Committee on Indian Affairs, without the CHAP:

> We just wouldn't have health care in a lot of communities. There might be somebody with some EMT training, or able to provide some basic first aid, but it would require everyone traveling, if they could afford it and if the weather permitted, or simply

> enduring consequences of disease. … Our health care would go way down. I couldn't image it without the community health aides.

2007 IHCIA Hearing at 34 (statement of Steve Gage, Director, Community Health Aide Program, Southeast Alaska Regional Health Consortium). Senator Murkowski of Alaska agreed with the witness, adding that Alaska has critically few health care providers compared with every other state in the Nation: "We don't have providers, period. So if we didn't have this Community Health Aide Program in our villages, … we just wouldn't have the ability to provide for health care." *Id.*

In order to implement the CHAP program, which requires clinic space, the IHS leases clinic facilities known as "Village Built Clinic" ("VBC") facilities from villages in Alaska where the Community Health Aide is the primary health care provider (in lieu of constructing federal clinic facilities). Exhibit A (Technical Handbook at 33-3.3). In 1989, Congress specifically authorized the operation of 170 VBCs in Alaska and provided approximately $3 million in funding for the program. Department of the Interior and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-446, 102 Stat. 1774, 1817. That funding provides lease monies to "support operation and maintenance expenses of the facility such as janitorial, electricity, water, sewage disposal, fuel, loan amortization, insurance and repairs." 2007 IHCIA Hearing at 60.

IHS funding, however, has not kept pace with medical inflation or the extraordinary cost of providing care in remote, isolated areas. Alaska Tribal Health Programs that compact with the IHS to carry out the CHAP under the ISDEAA have therefore been forced to supplement federal CHAP funding with millions of dollars annually. "These funds typically come from reprogrammed health resources, effectively taking other dedicated health resources to ensure basic coverage for patients in rural Alaska." 2007 IHCIA Hearing at 61. To make matters worse, the IHS has insisted that VBC leased facilities are not eligible for maintenance and

improvement funding. Exhibit A (Technical Handbook at 33-3.3-5). Testimony submitted to Congress in 2007 explained, "Unfortunately, as these health care resources get more limited, it is unclear how much more the Alaska Tribal Health System can continue to absorb, while maintaining our commitment to provide quality, safe care for our patients. Additional resources are necessary to address inflation, pay cost increases and provide for increased patient needs." 2007 IHCIA Hearing at 61.

Maniilaq is one of the Alaska Tribal Health Programs that has compacted with the IHS to carry out the CHAP under Title V of the ISDEAA. Title V, codified at 25 U.S.C. § 458aaa, *et seq*., requires the Secretary of Health and Human Services to negotiate and enter into self-governance compacts and funding agreements with tribes and tribal organizations participating in the self-governance program, 25 U.S.C. §§ 458aaa-3 and 458aaa-4. In the negotiation of compacts and funding agreements, the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy. 25 U.S.C. § 458aaa-6(e). Section 458aaa-4(b) requires that each funding agreement shall, "as determined by the Indian tribe," include all PFSAs administered by the IHS under certain listed laws, including the Indian Health Care Improvement Act, 25 U.S.C. § 1601, *et seq.* Thus, Congress granted tribes significant power to determine the scope of programs included in their agreements, and left the Secretary no discretion in that determination. Under § 458aaa-4(b), tribes are entitled to "plan, conduct, consolidate, administer, and receive full tribal share funding" for the PSFAs they elect to include in the agreement. Section 458aaa-4(d) further sets forth minimum requirements for the contents of funding agreements, including the identity of PSFAs to be administered as well as budget categories, funds, the time and method of transfer of the funds, and the responsibilities of the Secretary. That section further specifically allows tribes broadly to include "any other provision

with respect to which the Indian tribe and the Secretary agree." 25 U.S.C. 458aaa-4(d)(2)(E). An Indian tribe may also retrocede to the Secretary, fully or partially, PSFAs (or portions thereof) included in the self-governance compact or funding agreement. 25 U.S.C. § 458aaa-5(f).

As with other tribes and tribal organizations, the IHS's chronic underfunding of the CHAP and the VBC leasing programs has forced Maniilaq, as a result of operating the CHAP and the VBC leasing programs under its ISDEAA agreement, to subsidize these programs with its own funds. This in turn has taken a significant toll on Maniilaq's other important health programs. As part of the ISDEAA, however, Congress has provided that the IHS is *required* to agree to lease VBC and other facilities used by tribes and tribal organizations to administer and deliver health services and to provide full compensation for such use at the option of the tribe or tribal organization. Section 105(*l*) of the ISDEAA, 25 U.S.C. § 450j(*l*), provides:

> (1) Upon the request of an Indian tribe or tribal organization, the Secretary shall enter into a lease with the Indian tribe or tribal organization that holds title to, a leasehold interest in, or a trust interest in, a facility used by the Indian tribe or tribal organization for the administration and delivery of services under this subchapter.
> (2) The Secretary shall compensate each Indian tribe or tribal organization that enters into a lease under this paragraph (1) for the use of the facility leased for the purposes specified in such paragraph. Such compensation may include rent, depreciation based on the useful life of the facility, principal and interest paid or accrued, operation and maintenance expenses, and such other reasonable expenses that the Secretary determines, by regulation, to be allowable.

The Alaska Tribal Health Compact, of which Maniilaq is a Co-Signer, incorporates this provision: "Upon the request of a Co-Signer, the Secretary shall enter into a lease with the Co-Signer in accordance with section 105(*l*) of the [ISDEAA], as amended." Exhibit B (Alaska Tribal Health Compact (amended and restated Oct. 1, 2010) (hereinafter "ATHC"), Art. II § 8(d).

In order to access the full amount of VBC funding as Congress intended and mandated in § 450j(*l*), Maniilaq elected to partially retrocede operation of the VBC leasing program with respect to the Ambler clinic facility back to the IHS and to request that IHS lease the Ambler clinic facility under § 450j(*l*). Exhibit C (Memorandum to Indian Health Service from Maniilaq Association, dated Feb. 29, 2012) at 1; Exhibit E (Letter to Christopher Mandregan, Jr., Area Director, Alaska Area Native Health Service ("AANHS"), from Ian Erlich, President/CEO of Maniilaq Association, dated Nov. 28, 2012) at 1. Maniilaq further elected to incorporate the mandatory lease into its funding agreement as permitted by § 458aaa-4(b). Exhibit C at 3. This arrangement not only increases Maniilaq's ability to effectively provide health care services as required under its compact, but it gives greater effect to the express Congressional directive that IHS reasonably compensate tribes for the lease of health care facilities on a mandatory, not discretionary, basis.

The regulations implementing § 105(*l*) leases, at 25 C.F.R. § 900.74, reflect the statute and present tribes with three options for compensation. Section 900.74 provides:

> **§ 900.74 How may an Indian tribe or tribal organization propose a lease to be compensated for the use of facilities?**
> There are three options available:
> (a) The lease may be based on fair market value;
> (b) The lease may be based on a combination of fair market rental and paragraphs (a) through (h) of § 900.70, provided that no element of expense is duplicated in fair market rental;
> (c) The lease may be based on paragraphs (a) through (h) of § 900.70 only.

Pursuant to these statutory and regulatory provisions, Maniilaq elected in its proposal to receive compensation pursuant to § 990.74(c). Exhibit C at 2. AANHS responded to Maniilaq's proposal by stating that it would not negotiate a § 450j(*l*) lease with Maniilaq as part of the funding agreement, and that Maniilaq would be required to submit a separate lease proposal through an IHS administrative process known as the Lease Priority System. Exhibit D (Letter to

Ian Erlich, President/CEO of Maniilaq, from Evangelyn "Angel" Dotomain, Director of Tribal Programs, AANHS, dated May 15, 2012).

Maniilaq disagreed that the proposed lease was subject to the IHS's Lease Priority System. Exhibit E at 2. Under 25 U.S.C. § 458aaa-16, the Secretary is authorized to promulgate regulations governing the self-governance program, but only through negotiated rulemaking procedures. Section 458aaa-16(e) limits the authority of the IHS to impose on participating self-governance tribes its policies and procedures not contained in those regulations:

> **(e) Effect of circulars, policies, manuals, guidances, and rules**
> Unless expressly agreed to by the participating Indian tribe in the compact or funding agreement, the participating Indian tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the Indian Health Service, except for the eligibility provisions of section 450j(g) of this title and regulations promulgated under this section.

There are two sets of regulations which implement the ISDEAA with respect to health programs: (1) joint regulations of the Secretaries of the Interior and Health and Human Services governing self-determination contracting under Title I of the ISDEAA, 25 C.F.R. Part 900; and (2) regulations of the Secretary of Health and Human Services governing the self-governance program under Title V of the ISDEAA, 42 C.F.R. Part 137. These regulations do not mandate the use of the Lease Priority System, which is governed by the agency Technical Handbook, and Maniilaq has not agreed to be bound by the Handbook or the Lease Priority System.

Given the disagreement between Maniilaq and the AANHS, Maniilaq invoked the ISDEAA's final offer process. Exhibit E. In the event a tribe or tribal organization and the IHS are unable to agree, in whole or in part, on the terms of a funding agreement (including funding levels), the tribe or tribal organization may submit a "final offer" to the IHS. The IHS is required to review and make a determination with respect to the final offer not more than 45 days after its submission. In the absence of a timely rejection of the offer, in whole or in part, the ISDEAA

provides that the final offer "shall be deemed agreed to by the Secretary," 25 U.S.C. § 458aaa-6(b).

The regulations at 42 C.F.R. §§ 137.136 through 137.138 are likewise clear that if the IHS does not respond to a final offer within the 45 day review period, the final offer is deemed accepted by operation of law and there are no exceptions to this rule:

> **§ 137.136 What happens if the agency takes no action within the 45 day review period (or any extensions thereof)?**
> The final offer is accepted automatically by operation of law.
> **§ 137.137 If the 45 day review period or extension thereto, has expired, and the Tribes offer is deemed accepted by operation of law, are there any exceptions to this rule?**
> No, there are no exceptions to this rule if the 45 day review period or extension thereto, has expired, and the Tribe's offer is deemed accepted by operation of law.
> **§ 137.138 Once the Indian Tribe's final offer has been accepted or deemed accepted by operation of law, what is the next step?**
> After the Indian Tribe's final offer is accepted or deemed accepted, the terms of the Indian Tribe's final offer and any funds included therein, shall be added to the funding agreement or compact within 10 days of the acceptance or the deemed acceptance.

Moreover, subsection 507(c) of the ISDEAA, 25 U.S.C. § 458aaa-6(c), provides that if the Secretary does reject a final offer, the Secretary shall provide timely written notification to the Indian tribe that contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority, that one or more of the following four reasons for rejection applies:

> (1) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this part;
>
> (2) the program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent federal function that cannot legally be delegated to an Indian tribe;
>
> (3) the Indian tribe cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in significant danger or risk to the public health; or
>
> (4) the Indian tribe is not eligible to participate in self-governance under section 458aaa-2 of this title[.]

The statute does not allow the Secretary to reject a final offer for any other reason. *Id.* If the Secretary does reject a final offer for one of the foregoing reasons, the Secretary must support her conclusion with "a specific finding that clearly demonstrates, or that is supported by a controlling legal authority," that the reason applies. *Id.* Moreover, the Secretary "shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer (or a provision thereof)[.]" 25 U.S.C. § 458aaa-6(d). *Susanville Indian Rancheria v. Leavitt*, No. 2:07-cv-259 (E.D. Cal. Jan. 3, 2008), 2008 WL 58951, at 3-6.

IHS did not respond to Maniilaq's final offer until January 25, 2013 – 58 days after receipt of the final offer via email – and failed at that time to identify or demonstrate the applicability of any of the four statutory rejection criteria. Exhibit F (Letter to Ian Erlich, President/CEO of Maniilaq, from Christopher Mandregan, Jr., Director, AANHS, dated Jan. 25, 2013); Exhibit H (Email of Final Offer to Christopher Mandregan, Jr., Area Director, AANHS and USPS Track & Confirm records showing receipt via Certified Mail). Since that time, IHS has made no further effort to meet the statutory criteria for rejection of a final offer. Thus, it is Maniilaq's position that Maniilaq's proposal has been deemed accepted by operation of law under the ISDEAA.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Maniilaq is an Alaska Native Regional Non-Profit Corporation which operates a comprehensive health services delivery program for its twelve member Alaska Native village tribes, and other eligible American Indians and Alaska Natives, in the Northwest Arctic Borough and Point Hope region of Northwest Alaska. *See* Exhibit B; Exhibit G (Funding Agreement Between Certain Alaska Native Tribes Served by the Maniilaq Association and the Secretary of

the Department of Health & Human Services of the United States of America, Fiscal Year 2009[1]) at § 3(a). Maniilaq, on behalf of its member village tribes, operates its health services delivery program as a co-signer to the self-governance ATHC, and under funding agreements with the IHS, authorized by Title V of the ISDEAA, 25 U.S.C. § 458aaa, *et seq.* *See* Exhibit G.

Under its funding agreement and as part of its compacted health services program, Maniilaq delivers health services through paraprofessionals (community health aides and practitioners) under the CHAP. Exhibit G at § 3(a)(2)(ix). In conducting the CHAP, Maniilaq delivers health services in remote village locations using VBC facilities located in the villages, and Maniilaq assumed the IHS Village Built Clinic Lease/Construction Program as part of its compacted health services program. Exhibit G at § 3(a)(2)(xiv). This program is described in Maniilaq's funding agreement as providing funds to eligible entities to support the rental of Community Health Practitioner/Aide clinic space and providing construction, maintenance and upkeep of Village Clinic Facilities. *Id*. Maniilaq now owns the Ambler VBC clinic. Exhibit F at 1.

By Memorandum dated February 29, 2012 to the IHS, Maniilaq notified the IHS of its intent to retrocede the Village Built Clinic Lease/Construction program back to the IHS under section 506(f) of the ISDEAA, 25 U.S.C. § 458aaa-5(f). Exhibit C at 1. The February Memorandum also notified IHS of Maniilaq's intention to negotiate new VBC leases with the IHS under § 105(*l*) of the ISDEAA, 25 U.S.C. § 450j(*l*). Exhibit C at 1-2. The February Memorandum further proposed specific changes to the 2013 funding agreement and its appendices to implement the new VBC arrangements. *Id*. at 2-3.

[1] Maniilaq and the IHS last executed a funding agreement in FY 2009. Pursuant to Title V and the 2009 Funding Agreement, that Funding Agreement remains in full force and effect until a subsequent funding agreement is executed. 25 U.S.C. § 458aaa-4(e); Exhibit G at § 24.

The IHS responded to the February Memorandum by letter to Ian Erlich, President/CEO of Maniilaq, from Evangelyn "Angel" Dotomain, Director of Tribal Programs, AANHS on May 15, 2012. Exhibit D. In the May Letter, which was characterized by the AANHS as technical assistance, *Id*. at 1, Ms. Dotomain agreed that leasing of tribal facilities under § 105(*l*) is mandatory. *Id*. at 2. However, she asserted that paying monetary compensation for a § 105(*l*) lease is not mandatory, but entirely within the discretion of the IHS. *Id*.

The AANHS May Letter also states that "requests by tribes for facility leases under Section 105(*l*) of the ISDEAA are not negotiated." *Id*. Rather, the letter provides that requests for § 105(*l*) leases must be submitted to the AANHS in accordance with the Lease Priority System, which is described in the letter as follows:

> Since June 24, 2007, the IHS has established an administrative process for all Tribes and tribal organizations with ISDEAA contracts/compacts who request leases under this section of the ISDEAA—the Lease Priority System. Section 33 of the *IHS Technical Handbook for Environmental Health and Engineering*, lays out the entire process and has been enclosed with this letter for your convenience. Should Maniilaq decide to continue to request a lease of its VBCs under Section 105(*l*), Maniilaq must first submit a written proposal in accordance with Section 33-3.1.5 of the IHS Technical Handbook. Please see Exhibit B, Worksheet A for the proposal form, and Exhibit C, Worksheet B.

Id.

Maniilaq submitted its final offer by letter to Christopher Mandregan, Jr., Area Director, AANHS, from Ian Erlich, President/CEO of Maniilaq Association, on November 28, 2012. Exhibit E. The final offer was submitted via email as well as certified mail. Exhibit H. The final offer revoked Maniilaq's earlier retrocession of the VBC program in the February Memorandum, except for that portion of the program associated with the Village of Ambler clinic facility. Exhibit E at 1. The final offer provided that this partial retrocession of the VBC

program for the Ambler clinic would take effect on September 30, 2012, as agreed by IHS in the May Letter. *Id*.

In the final offer, Maniilaq stated, "we do not agree that IHS has the 'discretion' to fund leases under Section 105(*l*) at any amount the agency wishes, including $0." Exhibit E at 2. The final offer further noted that:

> IHS has no basis for asserting that facility leases under Section 105(*l*) 'are not negotiated,' but rather subject to an 'administrative process' set forth in the *IHS Technical Handbook for Environmental Health and Engineering* (Handbook). The IHS Handbook is an internal agency manual that is not binding on Maniilaq under the express terms of the ISDEAA, the ATHC and Maniilaq's FA.

Id. The final offer also stated: "Finally, Maniilaq does not agree with IHS's objections to the specific changes in the FA proposed by Maniilaq. In particular, we believe the new lease should be attached to, and deemed part of, the FA." Exhibit E at 3.

In the final offer, Maniilaq concluded: "Enclosed please find a proposed lease for the Ambler Clinic, submitted in accordance with the final offer provisions of Section 507 of the ISDEAA, 25 U.S.C. § 458aaa-6. Of the three options available for lease compensation under 25 C.F.R. § 900.74, Maniilaq elects the option in subsection (c): compensation 'based on paragraphs (a) through (h) of § 900.70 only.'" Exhibit E at 3. The final offer also contained a breakdown of the compensation pursuant to § 900.70 (a) through (h) totaling $172,536. Exhibit E at 4. The final offer concluded: "We would be happy to discuss these costs and the other terms of the lease with IHS over the next 45 days." *Id*.

The IHS responded to the final offer 58 days later, by letter to Ian Erlich, President/CEO of Maniilaq, from Christopher Mandregan, Jr., Director, AANHS, on January 25, 2013. Exhibit F. In the January Letter, Mr. Mandregan took the position that Maniilaq's November Letter and proposed lease was not a final offer subject to the final offer provisions of § 507 of the ISDEAA.

Exhibit F at 1. Thus, IHS did not purport to properly reject the final offer under the statutory requirements and did not identify or demonstrate the applicability of any of the four statutory rejection criteria, nor has IHS done so at any time since Maniilaq submitted the final offer. *Id.*

In the January 25 response, Mr. Mandregan asserted that the ISDEAA grants the Agency "full discretion" in determining what compensation a requesting tribe will receive for a § 105(*l*) lease as stated in AANHS's earlier May 2012 Letter. Exhibit F at 2. Mr. Mandregan agreed to issue a lease, but asserted, in accordance with the May 15, 2012 letter, that Maniilaq's proposed lease for the Ambler clinic under § 105(*l*) must be processed through the IHS Lease Priority System. *Id.* Mr. Mandregan concluded that; "If you need further technical assistance with the Maniilaq proposal for the IHS Lease Priority System, please contact Paula Poncho, Lease Contracting and Realty Management Officer. . . ." *Id.*

Maniilaq filed this action to challenge IHS's belated and deficient rejection of the final offer, as authorized by 25 U.S.C. § 458aaa-6(c)(1)(C).

STANDARD OF REVIEW

Summary judgment is considered "an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotations omitted). Thus, summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed .R. Civ. P. 56(a); *See also Celotex Corp.*, 477 U.S. 330. The movant bears the initial burden of "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)). However, "this standard

provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48 (1986) (emphasis in original). A material fact is one that "might affect the outcome of the suit under the governing law[.]" *Id*. at 248.

The courts "have determined that Congress intended a *de novo* review for civil actions brought under the ISDEAA." *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F. Supp. 2d 1059, 1067 (D.S.D. 2007) (citing *Cherokee Nation of Oklahoma v. U.S.*, 190 F.Supp.2d 1248, 1258 (E.D. Okla. 2001), *rev. on other grounds by Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala et al.*, 988 F.Supp. 1306, 1318 (D. Or. 1997)). First, "Congress' use of the phrase 'civil action' in combination with 'original jurisdiction' supports *de novo* review" as does its authorization for money damages. *Shoshone-Bannock Tribes*, 988 F. Supp. at 1314, 1315. Second, the legislative history illustrates that a more limited and deferential review would utterly fail to effectuate Congressional intent. In creating the federal district court remedy, Congress was motivated by "bureaucratic recalcitrance" and noted: "The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated …" *Id.* at 1315-16 (citing S. Rep. No. 100–274, at 7–8 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2619).

This appeal implicates a different standard of review than the deferential arbitrary and capricious standard applied where relief is sought under the Administrative Procedure Act

(APA).[2] "The ISDEA's object and policy are best achieved, and any agency mischief best redressed, by affording tribes the right to *de novo* review of their claims. The Secretary does not merely act as an impartial regulator, but has an obvious conflict of interest when enforcing the ISDEA's mandate to transfer federal programs and funds to tribes on demand." *Shoshone-Bannock Tribes*, 988 F. Supp. at 1316.

Agency decisions respecting final offers must be reviewed not only *de novo*, but also in accord with the requirements Congress has placed on the IHS in the ISDEAA. Congress has circumscribed how the IHS must make its decisions regarding final offers. The IHS must reject a final offer by clearly demonstrating by a specific finding or controlling legal authority that one or more of four listed rejection criteria apply. 25 U.S.C. § 458aaa-6(c). Finally, Congress has mandated specific rules for interpretation of statutes, regulations, and ISDEAA agreements which favor tribes and are inconsistent with application of the deferential *Chevron* analysis applicable to judicial review under APA-like statutes.[3]

RULES OF CONSTRUCTION

Congress made clear its intention that Title V of the ISDEAA be liberally construed to favor tribes and further tribal self-governance by including in the statute a special rule for the interpretation of federal laws and regulations. 25 U.S.C. § 458aaa-11(a), provides that:

> Except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive Orders, and regulations in a manner that will facilitate—(1) the inclusion of programs, services, functions, and activities (or portions thereof) and

[2] *Cf., Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103 (D.D.C. 2009) (applying the APA "arbitrary and capricious" standard of review where an Indian tribe sought relief primarily under the APA, with a secondary claim based on the ISDEAA). That case did not involve an appeal of a final offer.

[3] *See, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841, 842-844 (1984). The Court reviewed the Environmental Protection Agency regulation as issue in *Chevron* under 42 U.S.C. § 7607(d)(9) providing for an arbitrary and capricious standard of review similar to that under the APA.

> funds associated therewith, in the agreements entered into under this section; (2) the implementation of compacts and funding agreements entered into under this part; and (3) the achievement of tribal health goals and objectives.

Section 458aaa-11(f) provides that: "Each provision of this part and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe." *See also, Samish Indian Nation v. United States*, 419 F.3d 1355, 1367 (Fed. Cir. 2005) (the ISDEAA should be construed "to advance its remedial purpose, namely, removing the financial burden incurred by tribes and tribal organizations when implementing federal programs under self-determination contracts.").

The ATHC itself incorporates this rule of interpretation, providing: "In the implementation of this Compact, the Secretary, to the extent feasible, shall interpret all federal laws, executive orders, and regulations and this Compact in a manner that effectuates and facilitates the purpose of this Compact and achievement of the Co-Signers' health goals and objectives in accordance with section 512(a) of Title V." Exhibit B at Art. V, § 16. This mandate is consistent with the more general rule that "the standard principles of statutory construction do not have their usual force in cases involving Indian law" but rather, because of the "unique trust relationship between the United States and the Indians[,] ... statutes are to be construed liberally in favor of the Indians," *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444-45 (D.C. Cir. 1988), even when a competing canon might otherwise require deference to an agency interpretation. *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991).

BURDEN OF PROOF

Under the ISDEAA, the burden is on the Secretary to establish, by clear and convincing evidence, the validity of the grounds for rejecting a final offer. 25 U.S.C. § 458aaa-6(d); 42 C.F.R. § 137.150; 25 U.S.C. § 458aaa-17.

SUMMARY OF ARGUMENT

IHS did not timely respond to Maniilaq's final offer, nor did IHS identify one of the listed rejection criteria, as required under 25 U.S.C. § 458aaa-6(c). Accordingly, the Secretary cannot meet her burden of establishing a valid rejection and Maniilaq's final offer is deemed accepted by operation of law. 25 U.S.C. §§ 458aaa-6(b), (d). IHS cannot circumvent the ISDEAA statutory scheme and its result in this case by belatedly inventing new rejection criteria that Congress did not adopt, as it seeks to do by arguing that the lease may not be incorporated into the funding agreement and therefore the final offer process does not apply.

Because IHS did not timely or properly reject Maniilaq's final offer, and Maniilaq's proposal was thereby deemed approved by operation of law, the IHS is required to add the terms of the proposal to Maniilaq's funding agreement under 42 C.F.R. § 137.138. There are no exceptions to this regulatory requirement.

Regardless of the final offer process, IHS may not require Maniilaq to submit a lease proposal for the Ambler VBC facility through the Lease Priority System. The ISDEAA requires IHS to lease facilities used by tribes and tribal organizations to administer and deliver compacted services "[u]pon the request of an Indian tribe or tribal organization[.]" 25 U.S.C. § 450j(*l*). Moreover, the Lease Priority System is adopted through the IHS Technical Handbook – agency guidance from which Maniilaq is specifically exempt under 25 U.S.C. § 458aaa-16(e) and to which it has not agreed to be bound. And even by its own terms, as set forth in the Technical

Handbook, the Lease Priority System does not apply to VBC leases. Exhibit A at §§ 33- 3.1.2 and 33-3.1.5(C). Nor is compensation for the lease discretionary: 25 U.S.C. 450j(*l*)(2) plainly states that the Secretary "*shall compensate* each tribe or tribal organization that enters into a lease" under the ISDEAA. (Emphasis added). Regulations permit tribes to elect the elements of compensation and do not vest or reserve any discretion in the IHS. 25 C.F.R. § 900.74. The mandatory nature of compensation for § 450j(*l*) leases was confirmed in a November 19, 2009 letter from IHS Director Yvette Roubideaux to Maniilaq. Exhibit I at 8.

Finally, IHS may not claim that the proposed lease was a separate agreement outside the scope of the final offer process because that process only applies to compacts and funding agreements. Maniilaq's proposal specifically incorporated the lease into the funding agreement, and the proposal involved other changes to the text of the funding agreement designed to implement the lease. IHS failed to timely object to that incorporation or to support its objection with reference to one of the listed rejection criteria. IHS thus could not later claim that the lease was not incorporated into the funding agreement but remained a completely separate document.

ARGUMENT

I. Because IHS did not timely respond to Maniilaq's final offer with a proper statutory reason for rejection, the final offer (including the proposed lease) was deemed accepted as a matter of law.

In the absence of a timely rejection within 45 days of receipt, the ISDEAA provides that a tribe's final offer shall be deemed agreed to by the Secretary. 25 U.S.C. § 458aaa-6(b). There are no exceptions to this rule. 42 CFR § 137.137. Even if IHS does timely reject a final offer, IHS must do so on the basis of one of the statutory rejection criteria stated in the ISDEAA. 25 U.S.C. § 458aaa-6(c). Under the ISDEAA, the burden is on the Secretary to establish the validity of declining a proposal. 25 U.S.C. § 458aaa-6(d); 42 C.F.R. § 137.150.

IHS's response to Maniilaq's final offer, 58 days after receipt via email, was not timely under the statute. For that reason alone, the final offer is deemed accepted by operation of law.

Nor did IHS's response identify any of the statutory rejection criteria for rejecting a final offer or explain how any of those criteria might apply. *Susanville Indian Rancheria v. Leavitt*, 2008 WL 58951 at *6 ("Section 458aaa-6(c)(1) requires that the written notification to the Indian tribe … *'contain[ ] a specific finding* that clearly demonstrates, or that is supported by a controlling legal authority,' that one of the four rejection criteria is met.") (emphasis in opinion). IHS's untimely response only stated – incorrectly – that the lease is a separate document and therefore outside the scope of the final offer process. However, that conclusion does not fit within any of the statutory criteria for rejection. *See* 25 U.S.C. § 458aaa-6(c). These statutory rejection criteria provide the only exceptions to the general rule that IHS must approve a tribe's final offer, and IHS may not invent new exceptions that are not supported by the text or purpose of the ISDEAA or its implementing regulations.

The limitations set by Congress in specifying the only criteria for which the IHS may reject a tribe's final offer are significant and quite critical to the ISDEAA's core purpose. Recognizing agency resistance to turning over resources to tribes, Congress intentionally limited the Secretary's discretion throughout the ISDEAA contracting and funding process. *See, e.g., Ramah Navajo School Bd. Inc. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996) (Congress "clearly expressed … its intent to circumscribe as tightly as possible the discretion of the Secretary" in the ISDEAA). As a part of that effort, Congress provided, among several other provisions restricting the Secretary's discretion, specific criteria for which the Secretary may reject a contract or funding agreement proposed by a tribe, thereby prohibiting the Secretary from rejecting a proposal for any other reason without the tribe's agreement. *See* 25 U.S.C. §§

458aaa-4(a) (directing the Secretary to negotiate and enter into funding agreements) and 458aaa-4(b) (agreements to include PSFAs at the discretion of the tribe, not the Secretary); 25 U.S.C. § 458aaa-6(c) (requiring the Secretary to provide a written finding that one of four enumerated criteria applies if the Secretary rejects a final offer); 25 U.S.C. §458aaa-11(a) (prescribing rules of interpretation of federal laws to be followed by the Secretary in implementing the ISDEAA).

Thus, a final offer may only be rejected if one of the statutory criteria applies. Those statutory criteria do allow the IHS to reject a final offer that includes certain proposals outside the scope of the ISDEAA. For example, if a final offer involves a PSFA that is "an inherent federal function that cannot legally be delegated to an Indian tribe" it is outside the scope of ISDEAA compacts and funding agreements and the IHS may reject the final offer. 25 U.S.C. § 458aaa-6(1)(A)(ii). The same applies if "the Indian tribe is not eligible to participate in self-governance" under the ISDEAA. 25 U.S.C. § 458aaa-6(1)(A)(iv). In these instances, Congress determined that such a final offer would propose an agreement outside the scope of what the ISDEAA permits, and therefore the IHS may reject it. The reasoning of IHS's response to Maniilaq (claiming that a lease is necessarily separate and therefore outside the scope of the ISDEAA process) is similar to these statutory exceptions, but was *not* included by Congress in the statutory list. If Congress had determined that the incorporation of certain types of agreements into a funding agreement in a final offer would remove the final offer from the proper scope of the ISDEAA, it would have permitted the IHS to reject a final offer on that basis just as it did with the listed exceptions. *Cont'l Cas. Co. v. United States*, 314 U.S. 527, 533 (1942) ("The conditions for action make action without meeting the conditions, we think, contrary to Congressional purpose, as expressed in the statute.").

The IHS did not timely respond with a specific, written finding that one of the four statutory rejection criteria applied. Therefore, Maniilaq's final offer, which specifically incorporated the proposed Ambler VBC lease, was deemed accepted by operation of law.

II. Because the final offer is deemed accepted as a matter of law, IHS is required to add the terms of the final offer to the funding agreement.

42 C.F.R. § 137.138 clearly states: "After the Indian Tribe's final offer is accepted or deemed accepted, the terms of the Indian Tribe's final offer and any funds included therein, shall be added to the funding agreement or compact within 10 days of the acceptance or deemed acceptance." The regulations do not provide any exceptions to this rule. Maniilaq's final offer was deemed accepted as a matter of law because IHS did not timely respond and did not meet its burden of identifying and supporting a statutory reason for rejection as stated in 25 U.S.C. § 458aaa-6(c). Therefore, the IHS was required to add the terms of the final offer to Maniilaq's funding agreement.

III. Under the ISDEAA, the ATHC, and the FA, AANHS may not require Maniilaq to submit the lease to the IHS Lease Priority System pursuant to the IHS Technical Handbook.

Under § 105(*l*) of the ISDEAA, the IHS is required to lease facilities used by tribes and tribal organizations to administer and deliver health services "[u]pon the request of an Indian tribe or tribal organization[.]" 25 U.S.C. § 450j(*l*). Neither the statute nor the applicable regulations require a tribe requesting such a lease to submit the lease proposal through the IHS Lease Priority System, which is an administrative process adopted by the IHS in its Technical Handbook for Environmental Health and Engineering, Chap. 33. *See* 25 C.F.R. Part 900, Subpart H – Lease of Tribally-Owned Buildings by the Secretary.

The ISDEAA itself specifically provides that circulars, policies, manuals, guidances, and rules do not apply to participating tribes, expect in limited circumstances not applicable here or

where the tribe has agreed to be bound. 25 U.S.C. § 458aaa-16(e). Article II, Section 9(a) of the ATHC incorporates Section 517(e) with respect to Co-Signers such as Maniilaq. Exhibit B. Maniilaq has not agreed to be subject to the Lease Priority System contained in the IHS Technical Handbook. In fact, Maniilaq's funding agreement states that Maniilaq does not agree to be subject to any such IHS policy documents. Exhibit G at § 8.

Further, the Lease Priority System by its own terms does not apply to the lease of VBC facilities by IHS. Section 33-3.1.2 of the IHS Technical Handbook for Environmental Health and Engineering, governing applicability of the Lease Priority System states: "Leases not applicable to the LPS process include Village Built Clinic (VBC) leases, land leases, tribally-leased space leased by P.L. 96-638 contractors, and GSA-assigned space." Exhibit A. Section 33-3.1.5(C), "Exclusions from LPS Process," further provides: "Certain leases are exempt from the LPS process and none of the LPS worksheets need to be prepared as provided below: … Village Built Clinic leases (leases not to exceed 1 year)[.]" *Id.*

AANHS's assertion that Maniilaq must submit its VBC lease proposal to the Leasing Priority System is thus contrary to the plain language of the ISDEAA, as well as the plain language of the IHS's own guidance creating the Leasing Priority System (the Technical Handbook).

IV. Compensation for the lease is not discretionary.

The ISDEAA is clear that the Secretary "shall compensate each Indian tribe or tribal organization that enters into a lease" under section 105(*l*). 25 U.S.C. 450j(*l*)(2) (emphasis added). The statute provides that such compensation "may include rent, depreciation based on the useful life of the facility, principal and interest paid or accrued, operation and maintenance

expenses, and such other reasonable expenses that the Secretary determines, by regulation, to be allowable." *Id.*

Consistent with the statutory requirement, the implementing regulations also state that the lease "is to include compensation as provided in the statute[,]" 25 C.F.R. § 900.69 (emphasis added), and tribes may choose one of three options for that compensation under 25 C.F.R. § 900.74: (1) fair market rental; (2) a combination of fair market rental and other elements of expense listed in 25 C.F.R. § 900.70 (provided there is no duplication), or (3) those other elements listed in 25 C.F.R. § 900.70 only. Thus, if a tribe elects not to base compensation solely on fair market rental value, it may instead include other elements of compensation as provided in the statute and regulations. 25 C.F.R. § 900.70 ("To the extent that no element is duplicative, the following elements may be included in the lease compensation[…]"). The word "may" here does not mean that it is within IHS's discretion to provide any or no compensation at all; only that it is within the tribe's discretion to elect whether to receive the elements listed in § 900.70 in combination with or in place of fair market rental value.

IHS in fact agrees that compensation is mandatory for leases entered into under § 450j(*l*). This was confirmed in a letter from IHS Director Yvette Roubideaux to Mr. Ian Erlich, President/CEO of Maniilaq, dated November 19, 2009. Exhibit I. In that letter, Director Roubideaux stated that "The Secretary must compensate the tribal organization with whom it enters into the lease of the facility *for rent and other costs* to the owners[,]"citing 25 U.S.C. § 450j(*l*)(2) (emphasis added), except that Tribes may choose to recover such costs other than rent as part of their direct and indirect costs paid under an FA rather than through the lease. Exhibit I at 8. Director Roubideaux further stated:

> Implementing Federal regulations at Part 900 of Title 25 of the Code of Federal Regulations restate the mandate in Section 105(*l*)(2) that a Tribe receives various

> forms of compensation for a lease with the IHS for the use of its facilities. 25 [C.F.R.] § 900.69. These regulations lay out the various types of costs that a Tribe must receive compensation for under a lease agreement. 25 [C.F.R.] § 900.70.

Id.

AANHS's interpretation that the ISDEAA and its regulations grant the IHS discretion to determine what compensation a requesting tribe will receive – including whether a tribe is entitled to any monetary compensation at all – is invalid because it is plainly contrary to the statute and the regulations. *Hornbeck Offshore Transp., LLC v. U.S. Coast Guard*, 424 F. Supp. 2d 37, 45 (D.D.C. 2006) (agency's interpretation is not entitled to deference where it "unduly compromises the statute's purposes") (internal quotations omitted); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) ("Deference is undoubtedly inappropriate, … when the agency's interpretation is 'plainly erroneous or inconsistent with the regulation.'"). It is also inconsistent with the IHS's position as stated in the letter from IHS Director Yvette Roubideaux only two years earlier. *Christopher*, 132 S. Ct. at 2166 ("[D]eference is likewise unwarranted when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.' … This might occur when the agency's interpretation conflicts with a prior interpretation[.]") (internal citations omitted). *See also, Kaiser Found. Hospitals v. Sebelius*, 828 F. Supp. 2d 193, 199 (D.D.C. 2011) *aff'd*, 708 F.3d 226 (D.C. Cir. 2013) ("[I]f an agency's interpretation of a regulation shifts such that the agency is treating like situations differently without sufficient reason, the court may reject the agency's interpretation as arbitrary.")

In any event, Maniilaq's final offer specifically elected from among the three options for compensation listed in 25 C.F.R. § 900.74, choosing in its August 13, 2012 letter to receive compensation based on the elements listed in 25 C.F.R. § 900.70 only. Because the IHS did not

timely respond in order to prevent the final offer from being deemed accepted by operation of law, Maniilaq's election of compensation was also deemed accepted by operation of law and is now binding on the IHS. Therefore, compensation for the lease is not, as the IHS claims, within the Agency's discretion.

V. Contrary to AANHS's claim, the Ambler VBC lease, as incorporated into Maniilaq's funding agreement through Maniilaq's final offer, is subject to the ISDEAA final offer process.

25 U.S.C. § 458aaa-4(b) requires that each funding agreement shall, "as determined by the Indian tribe," include all PFSAs administered by the IHS under certain listed laws, including the Indian Health Care Improvement Act, 25 U.S.C. § 1601, *et seq.*, which authorizes the CHAP in Alaska utilizing the VBCs, 25 U.S.C. § 1616*l*. Pursuant to § 458aaa-4(b), Maniilaq chose to include the "Village Built Clinic Lease/Construction Program" among the PSFAs in its funding agreement, and the VBC program is in fact so included. Exhibit G at § 3(a)(2)(xiv). Proposed changes to the operation and implementation of the VBC program by or for Maniilaq thus implicate, and must be reflected in, Maniilaq's annual funding agreements.

Title V's final offer process applies "[i]n the event the Secretary and a participating Indian tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement" and permits tribes to submit proposed changes to their funding agreements as a final offer. 25 U.S.C. § 458aaa-6(b). That is precisely what Maniilaq did when it became clear that Maniilaq and IHS were not in agreement over the proposed changes to the VBC program operated under Maniilaq's funding agreement. The final offer submitted by Maniilaq proposed the new VBC lease, specifically incorporated the proposed lease into the FA, and proposed other specific changes to the FA language itself to carry out the lease. Maniilaq's entire proposal, including the lease, is both a vital part of carrying out the PFSAs under the compact and FA and

directly incorporated into the FA itself under Maniilaq's final offer and proposed changes to the FA. As a result, Maniilaq's proposal, including the lease, is necessarily subject to the final offer process that applies to all FA proposals when a tribe and the IHS disagree on the terms.

In its January 2013 Letter, AANHS asserted that the final offer process did not apply to the proposed VBC lease. However, AANHS offered only one reason for its conclusion: that the lease was a "stand-alone" agreement to which the statutory final offer provisions do not apply. That reason is plainly incorrect as applied to Maniilaq's final offer proposal. Exhibit F at 1.

Nothing in the ISDEAA prohibits either a tribe or the IHS from incorporating a separate agreement, in particular a lease specifically authorized and required under the ISDEAA itself, into the terms of the tribe's FA. In fact, 25 U.S.C. § 458aaa-4(d) expressly provides that funding agreements may include "any other provision with respect to which the Indian Tribe and the Secretary agree," and under 25 U.S.C. § 450j(*l*) the Secretary is required to agree to the proposed lease agreement. Once such agreements are incorporated into the FA, they are no longer "stand-alone agreements separate from the compact or the funding agreement" as the AANHS states in its January 2013 letter. For example, a Tribe may include in its FA grants, which also begin as "stand-alone agreements" before inclusion. 25 U.S.C. § 458aaa-4(b)(2). In fact, Congress intended that "this section is to be interpreted broadly by affording a presumption in favor of including in a tribe's self-governance funding agreement any federal funding administered by that agency." H.R. Rep. No. 106-477 at 21 (1999), *reprinted in* 2000 U.S.C.C.A.N. 573, 579.

Maniilaq specifically proposed to incorporate the lease and associated funding into its FA, as permitted by the ISDEAA. The IHS did not timely respond with a proper, statutorily mandated rejection of Maniilaq's proposal to incorporate the lease, which was vital to carrying out Maniilaq's PSFAs under the FA. Given its failure to timely object to Maniilaq's proposal to

incorporate the lease, IHS was not permitted to later treat the lease as a "stand-alone" agreement not subject to the final offer process.

Given that it is contrary to the plain language of the ISDEAA, the "presumption" in favor of inclusion intended by Congress, and the statutory rule that every provision of Title V be liberally construed for the benefit of Maniilaq,[4] the IHS's interpretation that Maniilaq's proposed VBC lease is outside of the final offer process is not entitled to deference. *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994); *Chevron*, 467 U.S. at 865 n.9; *Hornbeck Offshore Transp.*, 424 F. Supp. 2d at 47, *supra*. The ISDEAA's language plainly includes all PSFAs as determined by the Indian tribe (including, by reference, the VBC program) in that tribe's FA. 25 U.S.C. § 458aaa-4(b). It plainly applies the final offer process to any instance where "the Secretary and a participating Indian tribe are unable to agree, … on the terms of a compact or funding agreement" with no exceptions. 25 U.S.C. § 458aaa-6(b). Maniilaq's proposal incorporated the lease into the FA, elected the compensation for that lease as provided by statute and regulation, and proposed conforming changes to the language of the FA, thereby bringing the proposed lease and compensation into the scope of the FA and the ISDEAA final offer process.

CONCLUSION

As stated above, the IHS's refusal to enter into the Ambler clinic lease and to incorporate the lease and other proposed language into Maniilaq's funding agreement, after failing to properly reject the final offer within the statutory time frame, was contrary to the ISDEAA and

[4] *See* 25 U.S.C. § 458aaa-11(f) ("Each provision of this part and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe.").

its implementing regulations. Because the material facts are not in dispute, Maniilaq requests that this Court grant the accompanying Motion for Summary Judgment.

Respectfully submitted,

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Attorneys for the Maniilaq Association

DATED: May 14, 2013.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MANIILAQ ASSOCIATION	)	
	)	
PLAINTIFF,	)	
	)	
v.	)	
	)	Civil Action No. 1:13-cv-380 (JDB)
KATHLEEN SEBELIUS, et al.	)	
	)	
DEFENDANTS.	)	
	)	
	)	

PLAINTIFF'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure and LCvR 7(h)(1), Plaintiff Maniilaq Association ("Maniilaq") sets forth the following material facts that are not in genuine dispute.

1. Maniilaq is an Alaska Native Regional Non-Profit Corporation which operates a comprehensive health services delivery program for its twelve member Alaska Native village tribes, and other eligible American Indians and Alaska Natives, in the Northwest Arctic Borough and Point Hope region of Northwest Alaska. *See* Exhibit B (Alaska Tribal Health Compact (amended and restated Oct. 1, 2010) (hereinafter "ATHC"); Exhibit G (Funding Agreement (FA) Between Certain Alaska Native Tribes Served by the Maniilaq Association and the Secretary of the Department of Health & Human Services of the United States of America, Fiscal Year 2009[1]) at § 3(a). Maniilaq, on behalf of its member village tribes, operates its health services delivery

[1] Maniilaq and the IHS last executed a funding agreement in FY 2009. Pursuant to Title V and the 2009 Funding Agreement, that Funding Agreement remains in full force and effect until a subsequent funding agreement is executed. 25 U.S.C. § 458(e); Exhibit G at § 24.

program as a co-signer to the self-governance ATHC, and under funding agreements with the Indian Health Service ("IHS"), authorized by Title V of the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 458aaa, *et seq.* *See* Exhibit G.

2. Under its funding agreement and as part of its compacted health services program, Maniilaq delivers health services through paraprofessionals (community health aides and practitioners) under the Community Health Aide Program ("CHAP"), 25 U.S.C. § 1616*l*, who provide basic health care services to Alaska Natives in remote areas where access to health care providers would otherwise be severely restricted. Exhibit G at § 3(a)(2)(ix). In conducting the CHAP, Maniilaq delivers health services in remote village locations using Village Built Clinic ("VBC") facilities located in the villages, and Maniilaq assumed the IHS Village Built Clinic Lease/Construction Program as part of its compacted health services program. Exhibit G at § 3(a)(2)(xiv). This program is described in Maniilaq's funding agreement as providing funds to eligible entities to support the rental of Community Health Practitioner/Aide clinic space and providing construction, maintenance and upkeep of Village Clinic Facilities. *Id*. Maniilaq owns the Ambler VBC clinic. Exhibit F at 1.

3. By Memorandum dated February 29, 2012 to the IHS, Maniilaq notified the IHS of its intent to retrocede the Village Built Clinic Lease/Construction program back to the IHS under section 506(f) of the ISDEAA, 25 U.S.C. § 458aaa-5(f). Exhibit C at 1. The February Memorandum also notified IHS of Maniilaq's intention to negotiate new VBC leases with the IHS under § 105(*l*) of the ISDEAA, 25 U.S.C. § 450j(*l*). Exhibit C at 1-2. The February Memorandum further proposed specific changes to the 2013 funding agreement and its appendices to implement the new VBC arrangements. *Id*. at 2-3.

4. The IHS responded to the February Memorandum by letter to Ian Erlich, President/CEO of Maniilaq, from Evangelyn "Angel" Dotomain, Director of Tribal Programs, Alaska Area Native Health Service ("AANHS") on May 15, 2012. Exhibit D. In the May Letter, which was characterized by the AANHS as technical assistance, Exhibit D at 1, Ms. Dotomain agreed that leasing of tribal facilities under § 105(*l*) is mandatory. Exhibit D at 2. However, she asserted that paying monetary compensation for a § 105(*l*) lease is not mandatory, but entirely within the discretion of the IHS. *Id*.

5. The AANHS May Letter also states that "requests by tribes for facility leases under Section 105(*l*) of the ISDEAA are not negotiated." Exhibit D at 2. Rather, the letter provides that requests for § 105(*l*) leases must be submitted to the AANHS in accordance with the Lease Priority System, which is described in the letter as follows:

> Since June 24, 2007, the IHS has established an administrative process for all Tribes and tribal organizations with ISDEAA contracts/compacts who request leases under this section of the ISDEAA—the Lease Priority System. Section 33 of the *IHS Technical Handbook for Environmental Health and Engineering*, lays out the entire process and has been enclosed with this letter for your convenience. Should Maniilaq decide to continue to request a lease of its VBCs under Section 105(*l*), Maniilaq must first submit a written proposal in accordance with Section 33-3.1.5 of the IHS Technical Handbook. Please see Exhibit B, Worksheet A for the proposal form, and Exhibit C, Worksheet B.
>
> *Id*.

6. Maniilaq submitted its final offer by letter to Christopher Mandregan, Jr., Area Director, AANHS, from Ian Erlich, President/CEO of Maniilaq Association on November 28, 2012. Exhibit E. The final offer was submitted via email as well as certified mail. Exhibit H. The final offer revoked Maniilaq's earlier retrocession of the VBC program in the February Memorandum, except for that portion of the program associated with the Village of Ambler clinic facility. Exhibit E at 1. The final offer provided that this partial retrocession of the VBC

program for the Ambler clinic would take effect on September 30, 2012, as agreed by IHS in the May Letter. *Id*.

7. In the final offer, Maniilaq stated, "We do not agree that IHS has the 'discretion' to fund leases under Section 105(*l*) at any amount the agency wishes, including $0." Exhibit E at 2. The final offer further noted that:

> IHS has no basis for asserting that facility leases under Section 105(*l*) 'are not negotiated,' but rather subject to an 'administrative process' set forth in the *IHS Technical Handbook for Environmental Health and Engineering* (Handbook). The IHS Handbook is an internal agency manual that is not binding on Maniilaq under the express terms of the ISDEAA, the ATHC and Maniilaq's FA.

Id. The final offer also stated: "Finally, Maniilaq does not agree with IHS's objections to the specific changes in the FA proposed by Maniilaq. In particular, we believe the new lease should be attached to, and deemed part of, the FA." Exhibit E at 3.

8. In the final offer, Maniilaq concluded: "Enclosed please find a proposed lease for the Ambler Clinic, submitted in accordance with the final offer provisions of Section 507 of the ISDEAA, 25 U.S.C. § 458aaa-6. Of the three options available for lease compensation under 25 C.F.R. § 900.74, Maniilaq elects the option in subsection (c): compensation 'based on paragraphs (a) through (h) of § 900.70 only.'" Exhibit E at 3. The final offer also contained a breakdown of the compensation pursuant to § 900.70 (a) through (h) totaling $172,536. Exhibit E at 4. The final offer concluded: "We would be happy to discuss these costs and the other terms of the lease with IHS over the next 45 days." *Id*.

9. The IHS responded to the final offer 58 days later, by letter to Ian Erlich, President/CEO of Maniilaq, from Christopher Mandregan, Jr., Director, AANHS, on January 25, 2013. Exhibit F. In the January Letter, Mr. Mandregan took the position that Maniilaq's November Letter and proposed lease was not a final offer subject to the final offer provisions of

§ 507 of the ISDEAA. Exhibit F at 1. Mr. Mandregan asserted that the ISDEAA grants the Agency "full discretion" in determining what compensation a requesting tribe will receive for a § 105(*l*) lease as stated in AANHS's earlier May 2012 Letter. Exhibit F at 2. Mr. Mandregan agreed to issue a lease, but asserted, in accordance with the May 15, 2012 letter, that Maniilaq's proposed lease for the Ambler clinic under § 105(*l*) must be processed through the IHS Lease Priority System. *Id*. Mr. Mandregan concluded that; "If you need further technical assistance with the Maniilaq proposal for the IHS Lease Priority System, please contact Paula Poncho, Lease Contracting and Realty Management Officer. . . ." *Id*.

10. Maniilaq filed this action to challenge IHS's belated rejection of the final offer, as authorized by 25 U.S.C. § 458aaa-6(c)(1)(C).

Respectfully submitted,

s/ Caroline Mayhew

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