UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

In this action, Plaintiff Maniilaq Association (Maniilaq) asks the Court to hold the Secretary of Health and Human Services (the Secretary) and the Indian Health Service (IHS) to the clear requirements of federal statute and to the Secretary's own implementing regulations under the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 450 *et seq.*

The statutory and regulatory scheme is straightforward. Once Maniilaq submitted its ISDEAA Title V final offer, the Secretary was required to respond within 45 days with any valid objections. 25 U.S.C. § 458aaa-6(b). When the Secretary failed to respond, the proposal was deemed accepted by operation of law. *Id*. Further, the Secretary was required to enter into the facilities lease proposed by Maniilaq as part of its final offer, and is required to provide monetary compensation for the lease from among the options specifically listed in the Secretary's own regulations. 25 U.S.C. § 450j(*l*); 25 C.F.R. Part 900, Subpart H. As a portion of the Village Built Clinic (VBC) leasing program which has been included in Maniilaq's annual Funding Agreements (FA) for years, the lease was properly incorporated into Maniilaq's 2013 FA and now has legal force and effect by virtue of § 458aaa-6(b). *See* Funding Agreement Between Maniilaq Association and the Secretary of Health and Human Services of the United States of America, Fiscal Year 2011, Dkt. No. 25 at 85 (hereinafter "2011 FA"), at § 3(a)(2)(xiv) (provision including the VBC Leasing Program).[1]

[1] In its memorandum in support of its Motion for Summary Judgment, Maniilaq mistakenly referred to the 2009 FA as the most recent FA still in effect between Maniilaq and IHS. The Administrative Record filed by the Defendants on September 3, 2013 includes the 2011 FA. However, all material provisions cited by Maniilaq are identical in the 2011 FA.

Contrary to Defendants' assertions, Maniilaq does not seek double payment for its Ambler clinic facility. It seeks only the full amount to which it is entitled under the ISDEAA mandatory leasing authority, 25 U.S.C. § 450j(*l*). By Defendants' own admission, funding for Maniilaq's VBC facilities, including the Ambler clinic facility, has remained static for 13 years in Maniilaq's FA. Declaration of Paula M. Poncho, Dkt. No. 21-1, at ¶¶ 19-20 (hereinafter "Poncho Decl."). Yet Maniilaq is legally entitled to full lease payments for its Ambler facility under a § 450j(*l*) ISDEAA lease at Maniilaq's option. 25 U.S.C. § 450j(*l*); 25 C.F.R. Part 900, Subpart H. Accordingly, in order to ensure that the provision of critical (and otherwise absent) health services to the rural, Alaska Native and American Indian population of Ambler remains financially viable, Maniilaq proposed to *return* the Ambler facility VBC funding it had received through its FA and instead enter into a § 450j(*l*) lease with the IHS. Memorandum to Indian Health Service from Maniilaq Association, dated Feb. 29, 2012, Exhibit C, Dkt. No. 17-5, at 3. Its proposal was submitted as a final offer pursuant to ISDEAA Title V procedures. Consistent with the text of the ISDEAA and its implementing regulations, the final offer is deemed agreed to by the Secretary and must be added to the FA in the absence of a timely response.

The Defendants' brief in support of their motion to dismiss and cross-motion for summary judgment flouts these specific and mandatory statutory and regulatory requirements, while ignoring the ISDEAA's unique statutory scheme and purpose. The ISDEAA is not an ordinary statute, and this is not an ordinary case for agency deference. Rather, the ISDEAA "took the extraordinary step of requiring the IHS … to turn over the direct operation of its federal programs" to tribes and tribal organizations and "to divest themselves of the authority as well as the associated funding to operate their programs." *Cherokee Nation of Oklahoma v.*

U.S., 190 F. Supp. 2d 1248, 1257-58 (E.D. Okla. 2001), *rev. on other grounds by Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005).

In enacting Title V of the ISDEAA, Congress declared a policy to "call for full cooperation from the Department of Health and Human Services and its constituent agencies in the implementation of self-governance," including, among other things, "to permit an orderly transition from Federal domination of programs and services to provide Indian tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer programs, services, functions, and activities (or portions thereof) that meet the needs of the individual tribal communities[.]" Pub. L. No. 106-260, § 3, 114 Stat. 712 (Aug. 18, 2000).

Disregarding these Congressional directives and the ISDEAA itself, Defendants here seek to exercise substantial discretion and ask this Court to grant them substantial deference – neither of which they are entitled to under the ISDEAA. They seek to turn back the clock and impose discretionary agency policies from which tribal contractors like Maniilaq are specifically exempt under the ISDEAA. 25 U.S.C. § 458aaa-16(e). And in making their case, they rely on unrelated authority that has no force or relevance in the ISDEAA context, and which has nothing to do with Maniilaq's final offer. This Court should not permit the Defendants to ignore Congress' will as expressed in the ISDEAA and avoid the mandatory statutory directive that final offers must be awarded as proposed when the Secretary fails to timely respond.

II. Standard of Review is De Novo and No Deference is Owed

This Court has resolved the question of what standard of review to apply when a plaintiff brings claims pursuant to the ISDEAA and no other statute. *Seneca Nation of Indians v. U.S. Dep't of Health and Human Servs.*, No. 12-1494, 2013 WL 2255208, at *6 (D.D.C. May 23, 2013). That standard is *de novo*. Defendants seek instead, in error, to invoke the far more

deferential Administrative Procedure Act (APA) standard of review. Maniilaq makes no claim pursuant to the APA, and this is not an APA case. Rather, Maniilaq only brings claims under the ISDEAA, a fact which establishes *Seneca Nation* as the controlling precedent. *See generally*, Compl.

In spite of *Seneca Nation* and the authorities cited therein, Defendants assert that the APA standard of review applies even in the absence of any APA claims because the APA "provides a default standard of judicial review … where a statute does not otherwise provide a standard." Defs. MSJ, Dkt. No. 21, at 16 (citing *Workplace Health & Safety Council v. Reich,* 56 F.3d 1465, 167 (D.C. Cir. 1995)). But the ISDEAA *does* provide otherwise, in several of its provisions. Courts have found that the APA arbitrary and capricious standard of review is entirely inconsistent with the statutory provisions of the ISDEAA because:

> (1) the use of the phrase "civil action" in § 450m–1(a) contemplates a trial *de novo;* (2) § 450m–1(a) refers to "original jurisdiction" and not "review" or "appeal;" (3) it is anomalous to obtain full discovery for an ISDEA administrative appeal under 25 U.S.C. § 450f(b)(3), but not in a district court proceeding; (4) the APA bans monetary damages which the ISDEA expressly allows a district court to award; and (5) the legislative history of the ISDEA supports a civil trial, rather than review under the APA.

Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala, 988 F. Supp. 1306 (D. Or. 1997). *See also, Cheyenne River Sioux Tribe v. Kempthorne,* 496 F. Supp. 2d 1059, 1067 (D.S.D. 2007); *Cherokee Nation,* 190 F. Supp. 2d at 1256-58.

Arguing that the ISDEAA "provides no standard of review," Defendants selectively cite from two cases that undermine their argument for an arbitrary and capricious standard. Defs. MSJ at 16 (citing *Cherokee Nation,* 190 F. Supp. 2d 1248; *Shoshone-Bannock Tribes,* 988 F. Supp. 1306). While the district courts in those cases found that Congress did not explicitly state the standard of review in the ISDEAA, *Shoshone-Bannock,* 988 F. Supp at 1313, *Cherokee*

Nation, 190 F. Supp. 2d at 1254, they nevertheless held that "the plain language of the statute, along with its legislative history, indicates [that] a *de novo* review of an action brought pursuant to the [ISDEAA] was intended by Congress." *Cherokee Nation*, 190 F.Supp.2d at 1257. *See also, Shoshone-Bannock*, 988 F. Supp at 1314 ("Section 450m-1(a) of the ISDEA grants district courts 'original jurisdiction' over 'civil actions' with authorization not only to enjoin or compel agency action, but to 'order appropriate relief including money damages.' This language is certainly less direct than it might have been if Congress had stated, for example, that 'review shall be *de novo*.' However, in combination, these three phrases are sufficient to connote the right to *de novo* review.").

This Court recently and unambiguously joined the *Shoshone-Bannock* and *Cherokee Nation* courts in applying *de novo* review to claims brought under the ISDEAA. *Seneca Nation*, 2013 WL 2255208 at *6. Defendants argue that this court should ignore the precedent set by *Seneca Nation* in this District, because "IHS agreed that the review was *de novo*" in that case but Defendants do not agree in this case. Defs. MSJ at 16-17. But the proper standard of review is a question of law that is not subject to the Agency's consent.

Defendants further argue that IHS only agreed to a *de novo* standard of review in *Seneca Nation* because the plaintiffs in that case brought claims under the Contract Disputes Act (CDA). Defs. MSJ at 17. But neither one of the cases cited by this Court in adopting a *de novo* standard in *Seneca Nation* involved any claims under the CDA, and nothing in the *Seneca Nation* opinion itself suggests such a limitation. *See Seneca Nation*, 2013 WL 2255208 at *6 (citing *Shoshone-Bannock*, a case which did not involve the CDA, for the conclusion that "the ISDEAA's text and legislative history and the presumption favoring Indian rights favor *de novo* review"). In fact, the *Seneca Nation* court held that the CDA did not apply because the dispute was over a pre-

award declination decision and not breach of contract claims as the Government urged.[2] *Id*. at *12-13.

Defendants cite only one instance in which the APA's arbitrary and capricious standard was applied in a case involving ISDEAA claims. Defs. MSJ at 16 (citing *Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103 (D.D.C. 2009)). In its memorandum of law in support of its motion for summary judgment, Maniilaq noted that *Citizen Potawatomi* is inapplicable to determine the standard of review here because that case involved claims under both the APA and the ISDEAA. Plt. MSJ, Dkt. No. 17, at 16 n.3. This Court adopted precisely the same reasoning in *Seneca Nation*, when it distinguished *Citizen Potawatomi* and applied *de novo* review because the Seneca Nation "[brought] claims only under the ISDEAA, as opposed to both the ISDEAA and APA[.]" *Seneca Nation*, 2013 WL 2255208 at *6 n.5. Even the *Citizen Potawatomi* court itself limited its holdings to "the particular set of procedural facts presented by this case[,]" 624 F. Supp. 2d at 109, which unlike this case involved not only APA claims and but also an appeal from a full hearing before the Interior Board of Contract Appeals, *id*. at 107.[3]

In pressing the APA standard of review, Defendants ignore the unique nature of the ISDEAA. This is a statute that was specifically designed to "limit the Secretary's discretion as much as possible[,]" *Cherokee Nation*, 190 F. Supp. 2d at 1258, and to address "bureaucratic recalcitrance." *Shoshone-Bannock*, 988 F. Supp. at 1315. "Given this history of Congressional

[2] As noted, "any lingering doubt regarding Congress' intent [to require *de novo* review] is dispelled by its authorization of money damages for violations of the ISDEA." *Shoshone-Bannock*, 988 F. Supp. at 1315. The ISDEAA's authorization of money damages, 25 U.S.C. § 450m-1(a), exists entirely separately from the CDA and does not require a CDA claim. *See Ramah Navajo School Board v. Leavitt*, No. 07 CV 0289, Memorandum Opinion and Order at 2, 43-45 (D.N.M. May 9, 2013) (awarding damages under 450m-1(a) and rejecting a Magistrate Judge's determination that the ISDEAA did not permit such damages in the absence of a contract). Accordingly, application of a *de novo* standard of review is unrelated to whether or not an ISDEAA case includes a CDA claim.

[3] Section 450m-1 allows ISDEAA contractors to pursue administrative appeals in the Interior Board of Contract Appeals, in addition to the option to file an original claim in district court. 25 U.S.C. § 450m-1(d).

concern with agency malfeasance, it would be ironic indeed if Congress offered the tribes nothing more than a record-based, deferential court review of agencies' actions which they already enjoyed under the APA for administrative appeals." *Id*. at 1317. Accordingly, "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." *Id*. at 1316.

Further, no deference is owed by this Court to Defendants' statutory interpretations. In this Circuit, *Chevron*-type deference is not applied where "[t]he governing canon of construction requires that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985), and declining to afford any deference to the Secretary of the Interior's interpretation of the Indian Trust Fund Management Reform Act, even where the Act was ambiguous). In the case of the ISDEAA, it is not only the *Blackfeet* common law canon of construction that trumps the usual rules of deference, but also the *statutory* requirement 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." 25 U.S.C. § 458aaa-11(f). *See also* 25 U.S.C. § 458aaa-11(a).

Thus, "[i]f the ISDA can reasonably be construed as the Tribe would have it construed, it must be construed that way. This canon of construction controls over more general rules of deference to an agency's interpretation of an ambiguous statute." *S. Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1078 (10th Cir. 2011) (internal quotations and brackets omitted).

III. The Lease Proposal Was Clearly a "Final Offer" and Met All Regulatory Requirements

The Defendants argue that, even if the lease is subject to the final offer process, Maniilaq did not comply with "mandatory requirements" for submitting a final offer and that IHS's failure to respond within the statutory time period should be excused. Defs. MSJ at 20. To the contrary, Maniilaq fully complied with all of the requirements of 42 C.F.R. § 137.132 and § 137.133.

As required under 42 C.F.R. § 137.131, Maniilaq submitted its final offer after the parties were "unable to agree." Correspondence between Maniilaq and IHS prior to Maniilaq's final offer clearly established that the parties did not agree on Maniilaq's lease and 2013 FA proposal. Exhibit C; Letter to Ian Erlich, President/CEO of Maniilaq, from Evangelyn "Angel" Dotomain, Director of Tribal Programs, AANHS, dated May 15, 2012, Exhibit D, Dkt. No. 17-6. Based on that correspondence, and fully consistent with § 137.131, Maniilaq submitted its final offer.

Defendants do not explicitly argue that Maniilaq's submission of a final offer was improper under 42 C.F.R. § 137.131. Instead, Defendants mischaracterize what the regulation requires, *implying* that Maniilaq's submission was improper. Citing 42 C.F.R. § 137.131, Defendants state that "Before a final offer is submitted to the Indian Health Service, a tribal contractor must first discuss the issue with IHS and determine that the parties are unable to reach agreement." Defs. MSJ at 20. However, § 137.131 provides – in full – that "A final offer should be submitted when the Secretary and an Indian Tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels)." There is no requirement for a "discussion" under § 137.131. IHS's assertion that such a requirement applies is a misleading attempt to excuse its failure to respond and is not supported by the regulations.

The parties clearly disagreed over the lease proposal, and it was therefore proper for Maniilaq to submit its final offer.[4]

The Defendants also argue that Maniilaq failed to comply with two of the requirements for a final offer in 42 C.F.R. § 137.132. In making their argument the Defendants misquote § 137.132(b), which provides that "The document should be separate from the compact, funding agreement, or amendment and clearly identified as a 'Final Offer,'" by adding the word "completely" in front of "separate" and making other editorial changes to the phrasing of the regulation. *See* Defs. MSJ at 21. This regulation is intended to ensure that tribal contractors fairly alert IHS to their proposed final offer by way of a separate letter or other communication explaining and identifying the final offer, and it prohibits contractors from submitting an amended compact or a funding agreement proposal without separately identifying or explaining any new proposed terms. Otherwise, IHS would be shouldered with the burden of identifying the proposed changes and determining, without any guidance, whether or not the tribal contractor intended the proposal to constitute a final offer.

Maniilaq fully complied with the requirements of 42 C.F.R. § 137.132(b) by submitting the proposed lease as well as a separate letter (the August 13 and November 28 letters) describing the substance and effect of the final offer and specifically identifying proposed language for Maniilaq's 2013 FA. Dkt. No. 25 at 180; Dkt. No. 25 at 198 (also Exhibit E). The letter also described in detail the disagreements between Maniilaq and IHS which led Maniilaq to invoke the final offer process. *Id.* Maniilaq provided the proposed Ambler lease as a separate

[4] In its statement of material facts and memorandum in support of its motion for summary judgment, Maniilaq referred only to its November 28, 2012 submission of the final offer (submitted as Exhibit E, Dkt. No. 17-7). Though Maniilaq first submitted the final offer by an identical letter dated August 13, 2012, Maniilaq was unable to locate proof of receipt and so re-submitted the final offer. However, the Administrative Record filed by Defendants on September 3, 2013, Dkt. No. 25 at 180, shows that IHS in fact received Maniilaq's final offer on September 10, 2012. Consequently, IHS thus in fact waited 137 days – approximately four and one-half months – before responding to Maniilaq's final offer, rather than the 58 days reflected in the parties' earlier briefs. The Defendants also omitted the August 13, 2012 final offer from their statement of facts.

document, attached to the final offer letter, and explicitly stated in the letter that the lease was "submitted in accordance with the final offer provisions of Section 507 of the ISDEAA, 25 U.S.C. § 458aaa-6[.]" Exhibit E at 4.

The Defendants similarly seek to stretch the second requirement of 42 C.F.R. § 137.132(b), that the document be "clearly identified as a 'Final Offer,'" well beyond its clear and reasonable meaning. Maniilaq unequivocally stated in the August 13 and November 28 letters that the documents were submitted as a final offer, even citing the relevant statutory provision. Exhibit E at 4. The regulation demands exactly that – a clear statement of identification – and imposes no specific format in terms of where or how many times the term "final offer" should be used. 42 C.F.R. § 137.132(b). Nevertheless, Defendants argue that IHS was not fairly put on notice that Maniilaq intended the November 28 letter as a final offer.[5] Defs. MSJ at 22.

In *Seneca Nation*, the Secretary advanced a similar "notice" argument that was rejected by this Court. In that case, the Secretary argued that an April 29, 2011 letter from the Seneca Nation to the IHS was "not a valid proposed amendment because it was merely a 'claim' for additional funds" and, based on the text of the letter, IHS was justified in treating the letter as a claim rather than a proposed amendment.[6] *Seneca Nation*, 2013 WL 2255208 at *11-12. The

[5] IHS appears to suggest that Maniilaq intentionally buried any notice that it was invoking the final offer process by drafting a letter that was longer than reasonably necessary. In fact, the three pages of the letter were necessary to provide "a description of the disagreement between the Secretary and [Maniilaq] and [Maniilaq's] final proposal to resolve the disagreement." 42 C.F.R. § 137.133. This content is also a requirement for final offers imposed by IHS regulations, and its inclusion in Maniilaq's letter is yet another factor that served to put IHS on notice that the letter constituted a written final offer.

Defendants also argue, in a footnote, that Maniilaq "failed to follow the terms of its own FA" because Section 12(g) of the FA requires Maniilaq to send proposed amendments to the IHS Office of Tribal Self Governance. Defs. MSJ at 23 n.4. However, that requirement was not applicable since Maniilaq and IHS were negotiating a new FA for 2013, not seeking to "amend" the existing (2011) FA.

[6] Because the Seneca Nation's contract was a Title I Self-Determination contract, *Seneca Nation* deals with the Title I proposal provisions as opposed to the Title V final offer provisions. Nonetheless, *Seneca Nation* governs this case. The Title I amendment proposal provisions require the Secretary to respond to a proposal to amend the contract within 90 days, and to either approve the proposal and award the contract or provide written notification to the tribal

letter, which is attached to this memorandum as Exhibit J, notified IHS of a population undercount that the Nation believed had affected its funding amount. Letter from Robert Odawi Porter to Martha Ketcher, dated April 29, 2011, Exhibit J. The first page of the letter described the undercount and the reason for its occurrence. The second page asked IHS to correct the errors and requested certain information from the IHS, in addition to requesting that IHS agree to preserve the Nation's rights to appeal its funding allocations. The word "claim" appeared throughout the letter. Exhibit J; *Seneca Nation*, 2013 WL 2255208 at *12. On the bottom of the second page, the Nation first used the word "amendment," stating: "pursuant to Pub. L. 93-638, as amended, we hereby propose an amendment to Seneca Nation's Contract # 285-00-0002, for FY 2010 to increase Modification #71 by $3,774,392, plus interest, and request that this amendment proposal be handled pursuant to 25 CFR 900, Subpart D." Exhibit J.

This Court rejected as "unfounded" the Secretary's argument that the letter could be treated as a claim rather than an amendment because it was not clearly labeled as such. *Seneca Nation*, 2013 WL 2255208 at *12. Rather, this Court held: "While the word 'claim' does appear in the document several times, the Nation's intent is unmistakable … This letter *put IHS on notice* that the Nation intended to propose an amendment and believed that it was doing so[.]" *Id*. (emphasis added). In their brief, the Defendants themselves acknowledge that the *Seneca Nation* letter "put the IHS properly and clearly on notice" and "clearly made a proposal under Title I[.]" Defs. MSJ at 22, 29. The same is true of Maniilaq's letter: just like the Seneca Nation, Maniilaq set forth the parties' disagreement in the first two pages of its letter and thereafter stated its intention to submit a final offer pursuant to cited legal authority. The clear

---

contractor that clearly demonstrates that one of five statutory reasons for denial applies. 25 U.S.C. § 450f(a)(2); *Seneca Nation*, 2013 WL 2255208 at *8. Likewise, Title V requires a response to a final offer within 45 days of receipt. Under both Titles, if the Secretary does not respond within that time period, the Secretary is deemed as a matter of law to have agreed to the final offer.

notice provided in the Seneca Nation's letter cannot be meaningfully distinguished from the clear notice contained in Maniilaq's letter, and the Defendants' efforts to advance the same weak notice arguments that failed earlier in *Seneca Nation* should be rejected by this Court.

It is also worth noting that this Court found that the intent of the Seneca Nation's letter was clear even though there was no previous correspondence with the Secretary that may have alerted her to the likelihood of a forthcoming amendment proposal. *See Seneca Nation,* 2013 WL 2255208 at *1 (noting that "the parties' dispute focuses almost exclusively on the legal effect to be ascribed to a *single letter* sent by the Nation to IHS") (emphasis added); *id*. at *1-*4 (recounting the facts of the case, which do not include any correspondence between the Seneca Nation and the IHS regarding the subject matter of the amendment proposal prior to the April 29, 2011 letter). If anything, the context and form of Maniilaq's letter provided *greater* notice to IHS than the Seneca Nation letter, because it came on the heels of prior correspondence clearly establishing a disagreement between the parties and because Maniilaq's reference to the ISDEAA final offer provisions did not follow unrelated requests for information and other action from the IHS. *Compare* Exhibit E, Exhibit J.

Throughout their argument, Defendants imply that they were unfairly blindsided by Maniilaq's final offer and subsequent request for deemed acceptance when the IHS failed to timely respond. That is simply not the case, and the Defendant's accusation that Maniilaq engaged in "obfuscation" is entirely unsupported by the facts. Defs. MSJ at 22. IHS *was* on notice. Defs. MSJ at 22 ("IHS must be put on notice."). IHS was on notice because Maniilaq clearly stated that the proposed lease was "submitted in accordance with the final offer provisions of Section 507 of the ISDEAA, 25 U.S.C. § 458aaa-6." Exhibit E at 4. IHS was on notice because the August 13 and the November 28 letters both contained a detailed "description

of the disagreement between the Secretary" and Maniilaq as well as Maniilaq's "final proposal to resolve the disagreement," as required by the final offer regulations. 42 C.F.R. § 137.133. And IHS was on notice because IHS and Maniilaq had been engaged in an ongoing exchange which involved substantial disagreement over a proposal for Maniilaq's 2013 FA – precisely the circumstance in which a final offer is designed to be, and commonly is, invoked by tribal contractors. 25 U.S.C. § 458aaa-6(b). Given the overall context as well as the specific facts and content of the August 13 and November 28 letters, IHS cannot now credibly claim to have been taken by surprise.

IV. The Lease Proposal was Subject to the Final Offer Process, and is Properly Attached to and Incorporated into the Funding Agreement

The ISDEAA provides that:

> Each funding agreement . . . shall, as determined by the Indian tribe, authorize the Indian tribe to plan, conduct, consolidate, administer, and receive full tribal share funding . . . for all programs, services, functions, and activities (or portions thereof), that are carried out for the benefit of Indians because of their status as Indians without regard to the agency or office of the Indian Health Service within which the program, service, function, or activity (or portion thereof) is performed.

25 U.S.C. § 458aaa-4(b)(1). Programs, services, functions, and activities (PSFA) are 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." Plt. MSJ at 27 (citing H.R. Rep. No. 106-477 at 21 (1999), *reprinted in* 2000 U.S.C.C.A.N. 573, 579). The ISDEA further requires that:

> [T]he 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 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.

25 U.S.C. § 458aaa-11(a). In addition, "Each provision of [Title V] 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." 25 U.S.C. § 458aaa-11(f).

Contrary to the statutory canons of construction noted above, Defendants take a narrow view of the terms "programs," "services," "functions," "activities," and "provision" as used in the statute, referring to dictionary definitions that supposedly exclude the Ambler facility lease.[7] Defs. MSJ at 26. However, leasing VBCs for use by the Community Health Aide Program (CHAP) is certainly a "function" and an "activity" carried out by the IHS through its reality office. Leasing VBC facilities is also a vital component of the CHAP "program" which Maniilaq administers under its FA. The statutory language thus clearly includes leases like the Ambler facility lease, and Maniilaq is hardly the first to characterize a lease as an "activity" or part of a "program." *See, e.g.*, *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 473 (D.C. Cir. 2009) (noting that "Under Section 18 [of the Outer Continental Shelf Lands Act], the Secretary [of the Interior] is required to prepare, periodically revise, and maintain 'an oil and gas leasing program' that consists of "a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which he determines will best meet national energy needs for the five-year period following its approval or reapproval.'") (emphasis added).

IHS has provided funding in Maniilaq's FA since 1997 for what is termed a "Village Built Clinic Lease/Construction Program" – first to allow Maniilaq to manage the VBC leases

[7] Defendants also rely on dictionary definitions that make little sense in the context in which Congress used them in the ISDEAA. It is doubtful, for example, that by "activity" in 25 U.S.C. § 458aaa-4(b) Congress meant that tribes and tribal organizations could enter into agreements to carry out "vigorous or energetic action" that otherwise would be carried out by the IHS for the benefit of Indians. Defs. MSJ at 26.

through a "buy back" arrangement with the IHS, and then (beginning in 2003) for maintenance and operation in lieu of a lease. Poncho Decl. ¶¶ 11, 15, 20; *See* 2011 FA at § 5(d) and App. E (incorporating and attaching a Buyback/Withholding Agreement relating to the VBC Lease Program among other services). Maniilaq has now elected to retrocede operation of the VBC Lease/Construction Program with respect to the Ambler clinic facility through its FA (thus returning the funding IHS provided to the Agency under the previous arrangement), and instead incorporate as a matter of right a lease of that facility under 25 U.S.C. § 450j(*l*) into its FA.

Incorporation of the mandatory lease is simply another way for Maniilaq to receive funding to carry out the VBC Lease/Construction Program. IHS's objection to the incorporation of a VBC Lease into Maniilaq's FA on the basis that the lease is not a program is illogical and unconvincing in light of the Agency's previous agreements to include the VBC Lease/Construction program in various forms in the parties past FAs. Defendants' tortured reading of the statute further requires them to conclude that the proposed lease of a VBC clinic is not a "portion" of the VBC Lease Program – a proposition that cannot be supported by the statutory language, past practice between the parties, or common sense.

The lease itself is not meaningfully distinguishable from other types of documents that are routinely attached to and incorporated into an FA, though such documents, like leases, are not explicitly listed in the statute. For example, Maniilaq's most recent FA, as in several previous years, includes as an attachment Resolution 10-09, A Resolution of the Maniilaq Board Association to Provide Health Services to the Community. 2011 FA at App. D. Through this resolution, Maniilaq elected to provide health care services to individuals not otherwise eligible for IHS services (referred to as non-beneficiaries). Section 15 of the FA further references and incorporates the Resolution into the FA. *Id*. at § 15. The Resolution itself is not a PSFA, but

like other documents attached to FAs (and like the Ambler VBC lease document) it relates to how PSFAs will be carried out and is an appropriate attachment that became a provision of the FA.

Maniilaq's FAs have also included provisions relating to the utilization of federal real property and real property assets, which set the terms for property use agreements between Maniilaq and the IHS. 2011 FA at § 18; Funding Agreement Between Maniilaq Association and The Secretary of Health and Human Services, FY 2008, Exhibit K, at § 18. For purposes of how such terms fit within the statutory definition of what may be provided in an FA, they are not meaningfully different from a lease. Also, various forms and other documents have been attached to Maniilaq's FAs for the purpose of carrying out provisions relating to those federal real property assets, as referenced in the FA itself. Exhibit K, App. F. These and other documents themselves do not fit within the overly constrained definitions of PSFA that the Defendants offer in their brief, nor are they specifically listed in the statute – yet the IHS has agreed to include them in Maniilaq's past FAs. It seems clear, then, that the Defendants urge an unreasonably narrow interpretation of the statutory terms in this case only in an effort avoid the inevitable consequences of their failure to timely respond to Maniilaq's final offer.

An FA may also include "the responsibilities of the Secretary" and "any other provision with respect to which the Indian tribe and the Secretary agree." 25 U.S.C. § 458aaa-4(d). Clearly a § 450j(*l*) lease delineates "the responsibilities of the Secretary" with respect to funding operation, maintenance, and other allowable costs with respect to use of the Ambler clinic facility to deliver services under the CHAP program. Further, through the language proposed by Maniilaq incorporating the lease into the FA, the lease became a "provision" of the FA which is

now agreed to by the Secretary as a matter of law.[8] If the Secretary wanted to object, she should have done so within the 45 day period. She cannot now avoid her statutorily deemed-approved agreement under Maniilaq's final offer. *Seneca Nation,* 2013 WL 2255208 at *14.

Defendants ask this Court to conclude that Congress intentionally (but without explicitly so stating) excluded leases from the otherwise broad range of programs, services, functions, activities, and "any other provision[s]" which may be included in ISDEAA compacts and funding agreements under 25 U.S.C. § 458aaa-4(d).[9] Defendants' reliance on a long-past moratorium on IHS leasing, Defs. MSJ at 24-25, offers no coherent basis for that conclusion.

First, Title V of the ISDEAA was enacted in 2000, *nine years after* the 1979-1991 ban was lifted. Pub. L. No. 106-260, § 4, 114 Stat. 712 (2000). The historical ban therefore sheds no light on what may be included in a funding agreement under § 458aaa-4, which is part of Title V.

Second, in the years between the historical ban and the enactment of Title V, Congress passed the 1994 amendments to the ISDEAA *requiring* IHS to enter into leases at the request of an Indian tribe or tribal organization. Pub. L. No. 103-413, § 102(10), 108 Stat. 4253 (1994) (enacting, among other provisions, 25 U.S.C. § 450j(*l*)). Indeed, the 1994 amendments fundamentally changed the statutory scheme and rules under which IHS enters into leases with ISDEAA tribal contractors. These statutory provisions eliminated the discretionary leasing authority delegated to the agency by the General Services Administration (GSA) and moved to a

[8] Indeed, the lease language was a provision to which the Secretary was *required* to agree pursuant to 25 U.S.C. § 450j(*l*), which mandates that the Secretary must upon request enter into a lease with an Indian tribe or tribal organization for a facility used by the tribe or tribal organization in the administration or delivery of services under an ISDEAA contract or compact.

[9] Defendants also argue that because Congress specifically provided that PSFA includes grants, but did not similarly mention leases, this Court should infer that leases were intentionally excluded. Defs. MSJ at 28; 25 U.S.C. § 458aaa-4(b)(2). But "including grants" does not mean "only grants and not leases." *See, e.g., Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"). Grants are the only PSFA that Congress mentions with specificity, yet it is clear that the meaning of PSFA is far broader.

mandatory scheme, codified through legislation and negotiated rulemaking, that removed discretion and authority from IHS and intentionally located it in the hands of ISDEAA tribal contractors. *See* 61 Fed. Reg. 32482 (June 24, 1996).

In the absence of even the slightest textual evidence in Title V of the ISDEAA that Congress' intent in passing that statute was to curtail IHS's leasing authority, and in light of the fact that the ISDEAA explicitly *requires* IHS to enter into leases at the request of an Indian tribe or tribal organization, the Defendants' reference to the historical ban on IHS leases is irrelevant at best and misleading at worst.[10] Finally, though the statute on its face allows for the provisions proposed by Maniilaq incorporating the Ambler VBC lease into the FA, any ambiguities on that point must, pursuant to the statute, be resolved in favor of Maniilaq. 25 U.S.C. § 458aaa-11(f).

V. Proper Remedy is Approval and Award, Not Remand

Title V and its implementing regulations are unambiguous with regard to the consequences of the Secretary's failure to reject a final offer within the 45 day time period: "In the absence of a timely rejection of the offer, in whole or in part, … the offer shall be deemed agreed to by the Secretary." 25 U.S.C. § 458aaa-6(b). *See also* 42 C.F.R. § 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."); 42 C.F.R. § 137.137 ("[i]f the 45 day review period or extension thereto, has expired, [then] the Tribe[']s offer is

[10] The Defendants' inferences of Congressional intent cannot be squared with Congress' actual *stated* intent in enacting Title V (including the provisions which Defendants argue exclude a lease). The Title V self-governance program was enacted following a Self-Governance Demonstration Project, which was "designed to improve and perpetuate the government-to-government relationship between Indian Tribes and the United States and to strengthen tribal control over Federal funding and program management[.]" Pub. L. No. 106-260, § 2, 114 Stat. 711 (Aug. 18, 2000). In permanently codifying the self-governance program, Congress observed: "Congress has reviewed the results of the Tribal Self-Governance Demonstration Project and finds that transferring full control and funding to tribal governments, upon tribal request, over decision making for Federal programs, services, functions, and activities (or portions thereof) – (a) is an appropriate and effective means of implementing the Federal policy of government-to-government relations with Indian tribes; and (B) strengthens the Federal policy of Indian self-determination." *Id.*

deemed accepted by operation of law."). To issue a remand in this case as requested by the Defendants is inappropriate because doing so would contravene the clear remedy prescribed by the statute and regulations.

Referring to the ISDEAA's requirement of automatic approval and award upon the Secretary's failure to respond, this Court recently recognized that "Congress designed self-determination contracts to work in this manner for a specific remedial purpose, and the ISDEAA, its regulations, and the resulting contracts between Indian tribes and the United States must be read with that remedial intent in mind." *Seneca Nation*, 2013 WL 2255208 at *16. When the Secretary failed to respond within the statutory timeframe in that case, based on her belief that the Nation's proposed amendment was a claim not subject to the statutory timeframe, this Court did not remand but held that "[b]y ignoring her deadline, the Secretary became bound to the proposed Contract amendments." *Id*.

Defendants cite *Aleutian Pribilof Islands Ass'n, Inc. v. Kempthorne*, 537 F. Supp. 2d 1 (D.D.C. 2008), in which this Court remanded a tribal contractor's proposal for further consideration after the tribal contractor challenged the Secretary's failure to fully meet the statutory declination criteria under both the ISDEAA and the APA. Defs. MSJ at 29. Again, the Defendants confuse APA claims and remedies with those of the ISDEAA. In *Aleutian Pribilof*, this Court specifically declined to reach the ISDEAA claims, instead reviewing the Secretary's decision only under the APA. 537 F.Supp.2d at 6. Remand is an appropriate remedy under the APA, where the Plaintiff asks a court only to determine whether an agency decision is arbitrary and capricious or contrary to law. *Id*. at 12 ("[T]he appropriate remedy under the APA is to remand to the BIA for further consideration.") (emphasis added). It is not appropriate here, however, where Maniilaq makes no claim under the APA and asks the Court pursuant to the

ISDEAA to compel the Secretary to comply with the clear and specific statutory remedy to which Maniilaq is entitled. *See Seneca Nation*, 2013 WL 2255208 at *6 n.5 (distinguishing *Cherokee Nation* because that case involved APA claims).

In seeking a remand, Defendants also argue that IHS was not put on notice of Maniilaq's final offer. For the reasons discussed on pages 10-13 above, this argument is disingenuous. IHS was clearly on notice and cannot now claim otherwise in order to get a second bite at the apple. It is of no consequence that "IHS replied within 60 days explaining that the 'IHS does not agree that the lease proposal in your letter could be submitted as a final offer under the authority of Title V of the ISDEAA.'" Defs. MSJ at 30.[11] This Court has held that, when it is clear that a tribal contractor intended to propose an amendment, "ordinary principles of good faith dealing in contracts behooved the Secretary to notify the [tribal contractor] in a timely manner that it disagreed, rather than simply wait for the [statutory] period to expire." *Seneca Nation*, 2013 WL 2255208 at *12.[12] To remand this case would reward IHS for ignoring its statutory obligations, and only encourage IHS to do so again in the future.

VI. IHS Must Compensate Maniilaq for the Lease

Defendants acknowledge that the ISDEAA leasing provision requires that IHS enter into the proposed lease, but argue that IHS has the discretion to determine what type of compensation to provide, including no monetary compensation at all if the agency opts to provide "nonmonetary compensation" instead. Defs. MSJ at 30-33. This argument fails for several reasons:

[11] Nor was the response made within 60 days of IHS's initial receipt of Maniilaq's final offer – the August 13 letter.

[12] 25 U.S.C. § 458aaa-6(e) requires that "i[n] 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."

First, the plain language of the ISDEAA and IHS's own regulations requires monetary compensation. This fact was admitted by the IHS Director in a 2009 letter to Maniilaq. Letter from IHS Director Yvette Roubideaux to Mr. Ian Erlich, President/CEO of Maniilaq, dated November 19, 2009, Exhibit I, Dkt. No. 17-11, at 8. Second, Defendants' argument that monetary compensation for the proposed lease would be "inappropriate," Defs. MSJ at 9, is wrong based on the undisputed facts. Third, the "nonmonetary compensation" Defendants propose consists primarily of benefits that Maniilaq, as an ISDEAA contractor carrying out its ISDEAA compact, already enjoys without the lease, and which therefore cannot be considered compensation for the lease. We discuss each of these reasons more fully below.

A. The Statute and Regulations Require Monetary Compensation

Maniilaq proposed a lease under 25 U.S.C. § 450j(*l*), which provides that "The Secretary shall compensate each Indian tribe or tribal organization that enters into a lease" under that section. (Emphasis added.) The language could not be plainer; IHS must compensate Maniilaq for the § 450j(*l*) lease. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'") (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

The Defendants argue that certain "nonmonetary benefits are considered compensation" for § 450j(*l*) leases. Defs. MSJ at 9. Defendants do not state according to whom and under what legal authority these nonmonetary "benefits" are "considered compensation," but they are certainly not considered compensation under the Secretary's own regulations.

The regulations implementing § 450j(*l*) are codified at 25 C.F.R. Part 900, Subpart H (§§ 900.69-900.74). If there were any doubt as to what type of compensation is required under §

450j(*l*), that doubt is put to rest by the regulations. *See Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (regulations serve to "fill any gap left, implicitly or explicitly, by Congress."). The regulations clearly state that "[t]here are three options available" for compensation of leases under § 450j(*l*). 25 C.F.R. § 900.74 (emphasis added). Those three options are:

> (a) The lease may be based on fair market rental.
> (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.

Id. "Nonmonetary" compensation is not one of the three options listed in the regulations.[13] Section 900.74 further provides that a tribal contractor entitled to request a lease under § 450j(*l*) may propose any one of the three options to the Secretary: "How may an Indian tribe or tribal organization propose a lease to be compensated for the use of facilities? There are three options available … ." *Id*.

Though the statute does provide that the Secretary may determine "other reasonable expenses" that may constitute compensation for a § 450j(*l*) lease, those other expenses must be determined by regulation, and have been determined by the Secretary in 25 C.F.R. § 900.70. 25 U.S.C. § 450j(*l*). Section 900.70 identifies several additional monetary expenses – including rent, depreciation, contributions to a reserve for replacement of facilities, principle and interest paid or accrued, operation and maintenance expenses, repairs and alterations expenses, other reasonable expenses, and fair market rental – but neither § 900.70 nor any other regulation

[13] *See also*, 25 C.F.R.. § 900.69: "Section 105(*l*) of the Act requires the Secretary, at the request of an Indian tribe or tribal organization, to enter into a lease with the Indian tribe or tribal organization for a building owned or leased by the tribe or tribal organization that is used for administration or delivery of services under the Act. The lease is to include compensation as provided in the statute as well as 'such other reasonable expenses that the Secretary determines, by regulation, to be allowable.' This subpart contains requirements for these leases." (emphasis added).

provides for the nonmonetary compensation that the Defendants now claim is appropriate.[14] Moreover, the term "expenses" itself connotes monetary expenditures and corresponding compensation.

The regulations do not give the Secretary a choice, do not leave room for additional compensation options, and do not mention "nonmonetary benefits" as allowable compensation. The Defendants self-serving efforts to force Maniilaq to accept certain "nonmonetary benefits" as compensation if Maniilaq chooses to lease its Ambler facility to the IHS under § 450j(*l*) are neither supported nor allowed by these regulations.

Defendants also accuse Maniilaq of unreasonably arguing that the tribal contractor is given the ability to "choose its compensation." Defs. MSJ at 32. But the regulations are clear that Maniilaq may propose any one of the three options provided in 25 C.F.R. § 900.74. The Secretary may not "choose" a fourth option of non-monetary compensation. The Secretary may only respond to the tribal proposal in a timely manner if she wishes to negotiate for allowable compensation other than what was proposed.

Because the Secretary failed to respond to Maniilaq's final offer, as in the *Seneca Nation* case, she relinquished her right and opportunity to negotiate for different compensation. As this Court held in *Seneca Nation*, "The Contract and the statute do not preserve any place for the Secretary's discretionary authority to determine funding levels *post facto* of her failure to carry

[14] Nor does § 900.70 permit nonmonetary compensation through its use of the word "may." The Defendants' argument that "[t]he list of possible compensation in the statue and regulation are not closed lists … because of the use of the word may" ignores the plainly closed list of *three options* adopted in 25 C.F.R. § 900.74. Defs. MSJ at 31. Rather, as Maniilaq noted in its memorandum in support of its motion for summary judgment, Plt. MSJ at 24, the word "may" is used because the tribal contractors may choose among the listed options for compensation, so that some leases may include some elements of compensation, but may not necessarily include others. It does not mean that the IHS is free to ignore the remainder of the statutory and regulatory language, including the clear statutory directive that "The Secretary shall compensate each Indian tribe or tribal organization that enters into a lease" under 25 U.S.C. § 450j(*l*) (emphasis added). *Citizens to Save Spencer Cnty. v. U.S. Envtl. Prot. Agency*, 600 F.2d 844, 870 (D.C. Cir. 1979) ("[M]aximum possible effect should be afforded to all statutory provisions, and, whenever possible, none of those provisions rendered null or void."); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008) (a court's statutory construction should "to the extent possible, ensure that the statutory scheme is coherent and consistent.").

out a non-discretionary obligation to respond within [the statutory timeframe] or face the consequences of not doing so." 2013 WL 2255208 at *14. *See also, id*. at *16, noting that "it is a matter properly addressed through contract negotiations or through declination of the proposed amendment … if the Secretary truly believed the amount was unsupported." But because the Secretary failed to respond to Maniilaq's final offer as required under 25 U.S.C. § 458aaa-6(b), Maniilaq's final offer has been deemed accepted by operation of law. *Id*.

Finally, and most damaging to the Defendants arguments and credibility, the Defendants' arguments are completely inconsistent with IHS Director Dr. Roubideaux's own interpretation of the regulatory requirements in a letter to Maniilaq, dated November 19, 2009:

> 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. … 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.

Exhibit I at 8.[15] The Director's words clearly recognized the Secretary's duty to pay compensation when the Agency enters into a section 105(*l*) lease and that the regulations specify the available options for consideration – all of which are monetary. IHS may not now argue that nonmonetary "benefits" are "considered compensation" under § 450j(*l*).[16]

[15] Though the Director offered in that letter to enter into a non-monetary lease with Maniilaq, that offer was made only because IHS *rejected* Maniilaq's final offer proposal to enter into a § 450j(*l*) lease. Exhibit I at 3. Precisely because a § 450j(*l*) lease would require monetary compensation, and because the proposed lease was for a federally constructed building, the IHS determined that to accept the lease proposal under those circumstances would result in double payment contrary to the ISDEAA. The IHS therefore rejected Maniilaq's final offer within the 45 day period, citing the Title V statutory rejection criteria as required by 25 U.S.C. 458aaa-6(c)(1). Exhibit I at 3 (citing the Secretary's authority to decline a Title V final offer if "the amount of funds proposed in the final offer [would exceed] the applicable funding level to which the Indian Tribe is entitled" under 25 U.S.C. 458aaa-6(c)(1)(a)(i)).

[16] Because the Defendants' argument is in conflict with the IHS's own prior interpretation, it is entitled to no deference even under ordinary rules of deference. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012).

B. Monetary Compensation is Appropriate

Nor would compensation for the lease result in any double payment to Maniilaq, as IHS determined in the 2009 letter. As previously noted, as part of its final offer and its lease proposal, Maniilaq announced its intent to retrocede the VBC program with respect to the Ambler facility. [17] Exhibit E at 3. Having retroceded the program, Maniilaq can no longer receive VBC program funding for the Ambler facility through its funding agreement independent of the incorporated lease. Exhibit C. In fact, in announcing its intent to retrocede, Maniilaq explicitly provided: "Maniilaq will no longer be responsible for the VBC program, and no funding for the program will be included in Maniilaq's 106(a)(1) amount." Exhibit C at 2. Maniilaq then requested that IHS identify the amount of the Ambler share of the VBC program so that it could return that amount, but IHS did not respond within the statutory period. Exhibit E at 1. Maniilaq is still prepared to return this amount, which was later identified by IHS as $29,932.12 (Letter to Ian Erlich, President/CEO of Maniilaq, from Christopher Mandregan, Jr., Director, AANHS, dated January 25, 2013, Exhibit F, Dkt. No. 17-8, at 1), or to apply an offset in this amount to lease payments owed by IHS, if IHS can demonstrate that this is the correct amount associated with the Ambler share under 25 U.S.C. § 450j-1(a)(1).

Defendants argue that nonmonetary benefits "are considered compensation in situations when it would be inappropriate for the IHS to provide monetary compensation. For example, when the IHS builds a hospital or clinic and then transfers ownership to a tribe under the ISDEAA, IHS grants the § 450j(*l*) lease a zero amount." Defs. MSJ at 9. This argument is not relevant to the facts at hand. It is undisputed that Maniilaq took ownership of the Ambler clinic from the City of Ambler, not from the IHS, Poncho Decl. ¶ 8, nor is the Ambler lease part of the

[17] Defendants omit from their statement of facts the fact that Maniilaq retroceded the VBC program with respect to the Ambler facility, but do not deny it. *See* Defs. Response to Pla. Statement of Material Facts, Dkt. No. 23.

Joint Venture Construction Program. Defs. MSJ at 9. Defendants offer no other valid reason why monetary compensation would be "inappropriate" in this case.

C. Defendants' Proposed "Nonmonetary Compensation" Is No Compensation At All

Finally, the nonmonetary "benefits" that Defendants list in their brief are not elements of compensation; instead, they are benefits that are available to tribes and tribal organizations when they carry out responsibilities as tribal contractor under the ISDEAA.

For example, tribes and tribal organizations are covered under the Federal Tort Claims Act (FTCA) for carrying out their contract or compact under the ISDEAA – not for occupying a federally owned or leased facility. Under 25 U.S.C. § 450f(d), for purposes of 42 U.S.C. § 233 (making the United States the exclusive defendant under the FTCA), "an Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under sections 450f or 450h of [the ISDEAA] is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement[.]" Employees of such contractors are also "deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement[.]"[18] *Id.* Therefore, tribal contractors are protected under the FTCA by virtue of carrying out an ISDEAA contract or compact, and such coverage is entirely unrelated to whether or not the tribal contractor utilizes federally owned or leased facilities.[19]

[18] In a parenthetical, § 450f(d) provides that such employees "includ[es] an individual who provides health care services pursuant to a personal services contract with a tribal organization for the provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service[.]" IHS regulations specifically interpret this parenthetical to include personal services contractors in facilities owned by an Indian tribe or tribal organization that is operated under a self-determination contract with the IHS. 25 C.F.R. § 900.193.

[19] Section 450f(d) specifically applies to Title V compacts like Maniilaq's through 25 U.S.C. § 458aaa-15(a). Maniilaq's FA further provides that the FTCA applies to Maniilaq's PSFAs under the FA and therefore "There is no requirement that Maniilaq purchase liability insurance[,]" though such insurance to supplement FTCA coverage is an allowable cost under the FA. Dkt. No. 25 at 83 (2011 FA) at § 3(b).

In another example, state taxation of Indian tribes (including local property tax) is determined by a federal preemption analysis that largely insulates Indian tribes from state taxes, even when the property is neither owned nor leased by the federal government; thus, most tribal contractors would receive no added tax benefit as a result of a lease that could be considered compensation for the lease. Under general principles of federal Indian law, states lack the authority to tax tribes or tribal members in Indian Country. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) ("[W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, 'a more categorical approach: '[A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation lands and reservation Indians.'") (citing *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258 (1992)); *see also United States v. Rickert*, 188 U.S. 432 (1903) (state may not tax Indian trust lands, personal property, or permanent improvements located on those lands).

Even outside of Indian Country,[20] state taxation of Indian tribes is subject to a preemption analysis that balances state, federal, and tribal interests. *E.g., Ketchikan Gateway Borough v. Ketchikan Indian Corp.*, 75 P.3d 1042, 1046 (Alaska 2003) (quoting *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 (1982)); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 8.03 (2012 ed.) (State Taxes) ("In the Indian law context, the preemption doctrine, buttressed by longstanding principles protecting tribal self-government from state-law incursions, provides a significant barrier to many forms of state taxation."). With regard to the operation of tribally-owned health facilities under ISDEAA contracts and compacts,

[20] In Alaska, the vast majority of tribal land is not reservation land and not considered "Indian Country" under 18 U.S.C. § 1151. *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998).

"[clear] and [strong] federal and tribal interests as expressed in the ISDEAA and IHCIA [Indian Health Care Improvement Act], as well as the explicit congressional desire for Indian tribes to have the same funding that the federal government would have to provide health services" weigh heavily in favor of preemption of state taxing authority. *Ketchikan Gateway Borough*, 75 P.3d at 1050 (dissenting opinion). Therefore, even in Alaska, tribal health facilities are generally immune from local property taxes without regard to the federal status of the property.[21]

Finally, Defendants' argue that nonmonetary compensation includes "being considered a facility of Public Health Service for compensation under Social Security Act authorities." Defs. MSJ at 32. Defendants provide no citations to support their argument, so it is not clear precisely what Social Security Act (SSA) benefits they believe flow from a lease. We assume, however, that Defendants are referring to Medicare and Medicaid reimbursement and, as discussed more fully below, we believe that this argument has no merit.

Provisions in Title IV of the IHCIA amend the Social Security Act (SSA) to authorize Medicare and Medicaid reimbursement to IHS and tribally-operated facilities. With respect to Medicare, the IHCIA added section 1880 to the Social Security Act, 42 U.S.C. § 1395qq, authorizing Medicare reimbursement to "a hospital or skilled nursing facility of the Indian Health Service, whether operated by such Service or by an Indian tribe or tribal organization (as those terms are defined in section 1603 of Title 25) . . ." With respect to Medicaid, the IHCIA added section 1911 to the SSA, 42 U.S.C. § 1396j, authorizing reimbursement to "a facility of the Indian Health Service (including a hospital, nursing facility, or any other type of facility which provides services of a type otherwise covered under the State plan) whether operated by

[21] Accordingly, the Alaska Supreme Court held in *Ketchikan Gateway Borough* that the Borough could levy a tax on the portion of a tribally-owned facility that was not committed to use by the health clinic, but assumed that the portion used for the clinic program was immune. *Id*. The dissenting opinion, quoted above, would have exempted the entire facility. *Id*. at 1049.

such Service or by an Indian tribe or tribal organization (as those terms are defined in section 1603 of Title 25) . . ." The IHCIA also amended section 1905(b) of the SSA, 42 U.S.C. § 1396d(b), to provide that "the Federal medical assistance percentage shall be 100 per centum with respect to amounts expended as medical assistance for service which are received through an Indian Health Service facility whether operated by the Indian Health Service or by an Indian tribe or tribal organization (as defined in section 1603 of Title 25)."

Defendants' argument that tribal contractors would be compensated by "nonmonetary benefits" of a lease with respect to compensation under SSA authorities appears to assume that the authorizing language in § 1395qq and § 1396j excludes tribally owned and operated facilities not leased by the federal government. At one time, that was the Health Care Financing Administration's (HCFA) interpretation. *See* Memorandum of Agreement Between the Indian Health Service and the Health Care Financing Administration, Exhibit L. However, that interpretation was reversed by the Secretary and a contrary interpretation memorialized in a Memorandum of Agreement with the Indian Health Service in 1996. *Id*.

In fact, the policy reversal followed the enactment of the § 450j(*l*) leasing authority and was intended precisely to eliminate the types of "benefits" of federal facility status that Defendants claim still may be considered compensation. Due to the 100% "Federal Medical Assistance Percentage" (FMAP) provided under 42 U.S.C. § 1396d(b), IHS and the HCFA were concerned that states would pressure tribes and tribal organizations to request § 450j(*l*) leases, potentially resulting in hundreds of requests for mandatory leases, in order to access the 100% FMAP. Therefore, "[i]n light of the [lease] amendment and underlying Federal Indian policy," HCFA, upon the Secretary's explicit approval, reversed its interpretation and determined that the language in § 1396d(b) included "*any* tribal facility operating under [an ISDEAA] agreement."

Exhibit L at 2 (emphasis added). This interpretation logically extends to the same language in 42 U.S.C. § 1396j authorizing Medicaid reimbursement, as well as 42 U.S.C. § 1395qq, authorizing Medicare reimbursement.

The 1996 MOA interpretation, which as noted in the MOA was approved by the Secretary, Exhibit L at 2, is reflected in Maniilaq's own FA, which at Section 3(c) lists all of Maniilaq's tribal health facilities (including the Ambler Health Clinic) and provides that those facilities shall be included in the annual list "provide[d] to the Centers for Medicare and Medicaid Services (CMS) (Formerly Health Care Financing Administration) pursuant to the Memorandum of Agreement between the Health Care Financing Administration and the Indian Health Service (December 19, 1996)."[22] 2011 FA at § 3(c). Thus, like the other "nonmonetary benefits" that Defendants claim may be considered compensation for a lease, the SSA compensation benefits are already available to Maniilaq as a tribal organization carrying out a Title V compact, and are unrelated to any federal lease.[23]

VII. The Lease Priority System Does Not Apply.

In addition to their argument that IHS may insist on nonmonetary compensation for the proposed lease, Defendants also argue that they have discretion to use the IHS Lease Priority

[22] The MOA requires the IHS to maintain a list of eligible facilities and requires HCFA to "revise its payment policy to provide 100 percent FMAP with respect to amounts expended by the state for Medicaid services to eligible AI/ANs received through tribally owned facilities operating under a 638 agreement." Exhibit L at 3-4.

[23] The 1996 MOA interpretation is carried forward in recent revisions to the IHCIA under the re-authorization. A new section 408 of the IHCIA, 25 U.S.C. § 1674(a), requires a "Federal health care program" defined in 42 U.S.C. § 1320a-7b(f) of the SSA (including Medicare and Medicaid) to accept an entity that is operated by the Service, an Indian tribe, tribal organization, or urban Indian organization as a provider eligible to receive payment under the program for health care services furnished to an Indian on the same basis as any other qualified provider. Under a new section 401(d) of the IHCIA, 25 U.S.C. § 1641(d), a "tribal health program" may elect direct reimbursement from Medicare and Medicaid. Reimbursement may be used to provide additional services and improvements in health care facilities and tribal health programs. Section 4(25) of the IHCIA defines a "tribal health program" as: "an Indian tribe or tribal organization that operates any health program, service, function, activity, or facility funded in whole or in part, by the Service through, or provided for in, a contract or compact with the Service under the [ISDEAA]." 25 U.S.C. § 1603(25). Medicare and Medicaid reimbursement to a tribal health program, as defined, is not tied to operating a federally owned or leased facility under these new provisions.

System (LPS) to determine compensation (including nonmonetary compensation). But the LPS does not apply to Maniilaq's lease proposal.

The Defendants acknowledge that the IHS technical handbook specifically exempts VBC leases from the LPS process. Defs. MSJ at 39; IHS Technical Handbook for Environmental Health and Engineering, Exhibit A, Dkt. No. 17-3, at § 33-3.1.5 (hereinafter "Technical Handbook"). Defendants nevertheless argue that the LPS applies to Maniilaq's lease proposal because Maniilaq "made a 105(*l*) lease request not a VBC lease request[,]" and "Plaintiff's lease request under 105(*l*) is not exempt." Defs. MSJ at 36.

Defendants' argument fails on at least two counts. First, the Ambler facility lease is a VBC lease, requested pursuant to the § 450j(*l*) leasing authority (as there is no separate authority for VBC leases specifically, but VBCs are within the scope of § 450j(*l*) when requested by ISDEAA tribal contractors). Second, § 450j(*l*) leases are *not* subject to LPS because the ISDEAA specifically exempts tribes and tribal organizations from such discretionary agency policies. 25 U.S.C. § 458aaa-16(e).

A. The Ambler Facility Lease is a VBC Lease Entered Into Under IHS's Section 450j(l) Leasing Authority

First, the Defendants' distinction between a VBC lease and a § 450j(*l*) lease is a false one. This lease is both. Section 450j(*l*) provides the mechanism by which Maniilaq requests the lease, and the authority under which IHS must accept the lease proposal. At the same time, the Ambler facility is a VBC used to carry out the CHAP, and therefore, the lease is a VBC lease. Technical Handbook at 33-3.3-1 ("The Village Built Clinics Leasing Program is intended to lease space in isolated Alaskan locations where the Community Health Aide is the primary health care provider."). Section 450j(*l*) allows for the lease of any "facility used by the Indian

tribe or tribal organization for the administration and delivery of services under this subchapter[,]" and the lease of a VBC facility is within its scope. 25 U.S.C. § 450j(*l*)(1).

Defendants argue that the Ambler lease is not a VBC lease because "Plaintiff requested a 105(*l*) lease pursuant to ISDEAA and did not request a VBC lease pursuant to the Department of Interior and Related Agencies Appropriations Act of 1989." Defs. MSJ at 37. But the 1989 Appropriations Act does not provide IHS with any separate leasing authority and Maniilaq could not have requested a lease "pursuant to" such non-existent authority. The 1989 Act provided only: "That notwithstanding any other provision of law, there are 170 village built clinics authorized to be operated in Alaska." Pub. L. No. 100-446, 102 Stat. 1774, 1817 (1988). This language does not enact any permanent legislation and relates only to the expenditure of funds appropriated for fiscal year 1989.

Though Congress "can enact general or permanent legislation in appropriation acts, … its intent to do so must be clear" and the presumption is to the contrary. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-33 (3d ed. 2004) (citing *Building & Construction Trades Department, AFL-CIO v. Martin*, 961 F.2d 269, 273 (D.C.Cir.), cert. denied, 506 U.S. 915 (1992)). "The presumption can be overcome if the provision uses language indicating futurity or if the provision is of a general character bearing no relation to the object of the appropriation[,]" *id*. at 2-34, but the absence of such language is "telling evidence that Congress did not intend a provision to be permanent[,]" *id*. at 2-37. Moreover, "the words 'notwithstanding any other provision of law' are not words of futurity and, standing alone, offer no indication as to the duration of the provision." *Id*. at 2-36. The VBC language in the 1989 Appropriations Act includes no language of futurity and indicates no intent on the part of Congress to create new, permanent leasing authority separate from other

IHS leasing authority. Thus, the 1989 Appropriations Act does not provide IHS with separate VBC leasing authority and does not remove VBCs from the broad scope of the § 450j(*l*) leasing authority.

Defendants' own practices apparently recognize that the 1989 Appropriations Act does not provide separate or specific VBC leasing authority, since the Defendants claim in their brief to rely on their categorical space delegation of authority from GSA to lease VBCs. Defs. MSJ at 5, 7 at n.2. Defendants' argument that Maniilaq did not propose a VBC lease because it did not request the lease pursuant to authority conferred by 1989 Appropriations Act is, therefore, clearly wrong.

B. A Section 450j(l) Lease is an ISDEAA Lease that is Not Subject to the LPS or Other Agency Policies or Circulars, and Agency Discretion to Adopt Such Policies Under Other Leasing Authorities is Irrelevant

Defendants' argument that Maniilaq's Ambler facility lease is subject to the LPS system as a § 450j(*l*) lease is contrary to the relevant statutory provision. Section 450j(*l*) is unique from other IHS leasing authority because it arises under the ISDEAA – a statutory scheme designed specifically to "limit the Secretary's discretion as much as possible[,]" *Cherokee Nation*, 190 F. Supp. 2d at 1258, in order to give "Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities[.]" 25 U.S.C. § 450(a)(1).

To that end, the ISDEAA specifically prohibits IHS from binding tribal contractors to agency policies not adopted through negotiated rulemaking pursuant to 25 U.S.C. § 458aaa-16, and states that agency circulars, policies, manuals, guidances, and rules *do not apply* to participating tribal contractors unless the tribal contractor consents. 25 U.S.C. § 458aaa-16(e).

Maniilaq's funding agreement further states that Maniilaq does not agree to be subject to any such IHS policy documents. 2011 FA at § 8. Also, § 450j(*l*) *requires* IHS to enter into a lease for a facility used by an ISDEAA tribal contractor for the administration and delivery of services under the ISDEAA, at the tribal contractor's option. It would be plainly contrary to these statutory and contractual provisions for IHS to insist that Maniilaq's lease proposal be submitted through the LPS, which Defendants acknowledge is a "policy" from which Maniilaq is exempt pursuant to § 458aaa-16(e) and which contemplates the exercise of agency discretion well outside the statutory bounds of § 450j(*l*)'s mandatory language. *See* Defs. MSJ at 11 (referring to LPS as a "policy"); *id*. at 35 (admitting that Maniilaq has the right not to participate in LPS).

In fact, the Defendants' argument that Maniilaq's lease proposal is subject to Agency discretion to impose the LPS "as a means to decide" whether and under what conditions to grant Maniilaq's lease proposal is completely inapplicable to ISDEAA leases under § 450j(*l*). The Agency may have such discretion under other leasing authorities cited in the Defendants' brief. But that authority is irrelevant here because Maniilaq has requested an ISDEAA lease under § 450j(*l*), and had every right to do so as an ISDEAA tribal contractor. Maniilaq does not seek a lease under IHS's IHCIA leasing authority, 25 U.S.C. § 1674(b), or under IHS's categorical space delegation of authority from the GSA, pursuant to 41 C.F.R. §§ 102-73.145-155, or under any Agency Circular. *See* Defs. MSJ at 37. Accordingly, those provisions have no bearing on the resolution of this case and the Defendants' discussion of them is a non sequitur.

Defendants claim that IHS relies on its categorical space delegation of authority from GSA to lease VBCs,[24] suggesting that Maniilaq may only propose a VBC lease pursuant to that authority. Defs. MSJ at 5. The VBC authorization does not require IHS to use its GSA authority

[24] Defendants cite 43 C.F.R. §§102-73.145-155; however, we assume that the intended citation was to 41 C.F.R. §§ 102-73.145-155.

to lease VBCs, but only provides "That notwithstanding any other provision of law, there are 170 village built clinics authorized to be operated in Alaska." Pub. L. No. 100-446, 102 Stat. 1774, 1817 (1988).

GSA authority to enter into leases is contained in the Federal Property and Administrative Services Act of 1949 and is codified at 40 U.S.C. § 585(a)(2), which provides that the lease agreement "shall be on terms the Administrator considers to be in the interest of the Federal Government and necessary for the accommodation of the federal agency." The Act further provides that the Administrator may delegate this leasing authority to other federal agencies. 40 U.S.C. § 121 (c)-(d). GSA implementing regulations are promulgated as the Federal Management Regulation System (FMRS) at 41 C.F.R. Part 102. The regulation provides for delegation of leasing authority to other federal agencies, 41 C.F.R. § 102-72.25, and delegations relating to leasing real property include categorical space delegations, 41 C.F.R. § 102-72.30(a). A categorical space delegation is a standing delegation of authority under which other federal agencies may acquire various types of space including medical clinics. 41 C.F.R. § 102-73.145-155.

It is no surprise that IHS wants to use its GSA delegated authority to lease VBCs, because under that authority the IHS can decide what terms of a lease "are in the best interest of the Federal Government." 40 U.S.C. § 585(a). However, the mandatory ISDEAA leasing authority in § 450j(*l*) precludes that approach with regard to tribal contractors. In fact, GSA regulations provide that "Federal agencies possessing independent statutory authority to acquire leased space are not subject to GSA authority and, therefore, may not be subject to the requirements of this part." 41 C.F.R. § 102-73.50. Neither are tribes or tribal organizations subject to GSA authority as Defendants' argue, because the IHS must use § 450j(*l*) to lease

VBCs used by tribes and tribal organizations to deliver services under an FA if the tribe or tribal organization requests it. This is a mandatory statutory obligation on the IHS. It is not a defense for Defendants to argue that the IHS uses delegated GSA leasing authority instead.

The legislative history also shows that Congress intends for IHS to use its separate statutory leasing authority for the VBC program, rather than its GSA delegated authority. The House Report issued prior to Congress' enactment of IHS's discretionary leasing authority under the IHCIA, 25 U.S.C. § 1674(a), shows that Congress specifically intended that the IHCIA leasing authority be used by the IHS to lease VBCs at that time. It states: "In Alaska, several hundred villages are entering into similar leasing arrangements in order to provide local health services where inclement weather, poor roads, or both make travel to existing IHS facilities virtually impossible." H.R. Rep. No. 94-1026 at 123 (Apr. 9, 1976), reprinted in 1976 U.S.C.C.A.N. 271. Later, Congress enacted the ISDEAA mandatory leasing authority, 25 U.S.C. § 450j(*l*), which the Senate Report said "overcomes existing impediments to the leasing of facilities owned by Indian tribes and tribal organizations and which are used in the operation of programs contracted under the Act." S. Rep. No. 103-374, 103rd Cong., 2d Sess. (1994), 1994 WL 530979 at 6.

In light of IHS's specific statutory leasing authority, Congress' intent that IHS use that authority to carry out VBC leases, and GSA regulations excluding agencies possessing independent statutory authority, it was entirely appropriate for Maniilaq to propose a VBC lease under IHS's ISDEAA leasing authority and to expect IHS compliance with ISDEAA requirements. By the same token, it is inappropriate for IHS to ignore the mandatory nature of § 450j(*l*) and to insist on using its GSA delegated authority for a VBC lease in this context. Nor may IHS to attempt to skirt its responsibilities under the ISDEAA by seeking to apply limitations

that are only relevant to leases carried out pursuant to GSA delegated authority. The Defendants' confusing references to IHS circulars relating to its GSA delegated authority in their brief are also entirely unhelpful and irrelevant.[25]

Throughout their brief, Defendants also put forward an argument that the IHCIA and ISDEAA leasing authorities together provide the IHS with discretionary choices that would defeat Congress' objectives regarding lease compensation. *See* Defs. MSJ at 9: "If a tribal contractor wants to be assured of receiving funds to compensate it for facility costs, it may make a lease proposal under the IHCIA … On the other hand, if a tribal contractor can be content with the possibility of receiving no monetary compensation … then it may make a lease proposal under the ISDEAA." But there is no basis for the conclusion that, simply because IHS must compensate tribes for a lease under its discretionary § 1674(b) authority, no such monetary compensation is required under its mandatory § 450j(*l*) authority. The plain language of § 450j(*l*) says otherwise, and § 1674(b) is simply not relevant.

Maniilaq proposed a VBC lease pursuant to 25 U.S.C. § 450j(*l*) and no other leasing authority. Under § 450j(*l*) the Secretary must negotiate a lease upon Maniilaq's request. Under 25 U.S.C. § 458aaa-16(e), IHS may not require Maniilaq to be bound by agency policy that is not embodied in regulations promulgated pursuant to the negotiated rulemaking process. And under the IHS's own Technical Handbook, VBC leases – like the one Maniilaq proposed pursuant to § 450j(*l*) – are exempt from the LPS. The LPS therefore did not and does not apply to Maniilaq's lease proposal and IHS has no authority to insist otherwise.

[25] Defendants state that, by regulation, VBC leases are capped at $50,000 and dependent on a formula set by IHS. *See* Defs. MSJ at 5, 37. However, Defendants cite only the Alaska Area Circular, which is not a regulation, and which does not apply to ISDEAA contractors without their consent. 25 U.S.C. § 458aaa-16(e). Moreover, the Circular dates from 1991, three years before Congress enacted the mandatory leasing provision and five years before the ISDEAA regulations established the compensation scheme. IHS may have discretion to limit the exercise of its leasing authority under any GSA delegations, but it does not have the same discretion under the ISDEAA.

C. Defendants Provide No Legal Basis for their Policies in Seeking This Court's Deference, and None is Owed

Defendants cite to Paula Poncho's declaration for the assertion that "105(*l*) lease requests are subject to the LPS process." Defendants cite to no statute or any other law, however, that supports their conclusion that the Court should "give deference to the IHS's use of the LPS, whether or not the Indian tribe chooses to participate[.]" Defs. MSJ at 35-36. This omission can perhaps be explained by the fact that the assertion is plainly contrary to the ISDEAA as provided in 25 U.S.C. § 458aaa-16(e). Even outside of the ISDEAA context, this Court owes no deference to the unsupported declaration of an agency official that is clearly contrary to statute and regulations. *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2169 (U.S. 2012).[26]

If Defendants intend to rely on the "no-reduction" clause of Title V of the ISDEAA, that clause offers them no assistance. Section 458aaa-18(b) does not "mandate that the agency never reduce funding for one Tribe in order to make funds available to another[,]" as Defendants claim. Defs. MSJ at 36.[27] Rather, the language of § 458aaa-18(b) is permissive, and the Supreme Court has recognized that identical language in 25 U.S.C. § 450j-1(b) (Title I of the ISDEAA, also cited by Defendants in their brief) "itself makes clear that the BIA may allocate funds to one tribe at the expense of another." *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2190 (2012).

[26] In *Christopher*, the Supreme Court held that deference to an agency's interpretation of its own regulations under *Auer v. Robbins*, 519 U.S. 452 (1997) is inappropriate when the interpretation is "plainly erroneous or inconsistent with the regulation;" "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;" "when the agency's interpretation conflicts with a prior interpretation;" or "when it appears that the interpretation is nothing more than a convenient litigation position." *Christopher*, 132 S.Ct. at 2166-67. The Court further held that the lesser deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), which only applies to the extent that the agency's reasoning has the power to persuade, does not extend to agency interpretations that are contrary to statute. *Id*. at 2169. The Defendants' repeated requests for deference to their "practices" suffer from each of these defects.

[27] Defendants cite 25 U.S.C. § 458aaa-15(a), but the reference appears to be to 25 U.S.C. § 458aaa-18(b).

Further, Defendants similarly cite no legal basis for "AANHS practice" to limit VBC leases to third parties and not to ISDEAA contractors. Perhaps IHS may adopt such a discretionary policy when entering into VBC leases under its GSA authority. But when it comes to § 450j(*l*) leases – the only type of IHS leases relevant to this case – such a policy is contrary to statute.[28] The whole purpose of § 450j(*l*) is to provide ISDEAA *tribal contractors* with a means of entering into a non-discretionary lease with IHS for any facility used by the tribal contractor for the administration and delivery of services under the ISDEAA.

VIII. Conclusion.

For the reasons stated above, Maniilaq Association respectfully requests that this Court deny the Defendants' motion to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, as well as the Defendants' cross motion for summary judgment under Rule 56, and grant summary judgment in Maniilaq's favor.

[28] This Agency "practice" is therefore entitled to no deference. *See* Note 26 and accompanying text.

Respectfully submitted,

s/ Caroline Mayhew

Caroline Mayhew (DC Bar No. 1011766)
Hobbs, Straus, Dean, & Walker LLP
2120 L St. NW, Suite 700
Washington, DC 20037
202-822-8282 (Tel.)
202-296-8834 (Fax)

Geoffrey D. Strommer
Stephen D. Osborne
Hobbs, Straus, Dean & Walker, LLP
806 SW Broadway, Suite 900
Portland, OR 97205
503-242-1745 (Tel.)
503-242-1072 (Fax)

Attorneys for the Maniilaq Association

DATED: September 6, 2013.