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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

SOUTHCENTRAL FOUNDATION, )  
an Alaskan corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
 )  
YVETTE ROUBIDEAUX, DIRECTOR, )  
U.S. INDIAN HEALTH SERVICE, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No. 3:13-cv-00164-SLG

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

This is an appeal from a decision of the Indian Health Service (IHS), an administrative agency within the U.S. Department of Health and Human Services, refusing certain contract terms proposed by Plaintiff Southcentral Foundation (SCF).

The contract amendments SCF proposed were to the Alaska Tribal Health Compact. The Compact is a type of contract IHS awarded to SCF to carry out various federal Indian health care programs based in Anchorage, the Mat-Su Valley and surrounding areas. Beginning in 2008,

SCF applied for and was awarded annual contract amendments covering the new federal Methamphetamine and Suicide Prevention Initiative (MSPI). Beginning the next year, SCF applied for and was awarded similar annual contract amendments to operate another new federal program, the Domestic Violence Prevention Initiative (DVPI). Each year the parties have disagreed over the extent to which SCF is entitled to contract terms recognizing IHS's duty to award SCF certain "contract support costs" associated with carrying out the contracted MSPI and DVPI programs. These disagreements came to a head in the cycle of amendments that were to be awarded in the summer of 2012. SCF proposed language which the agency rejected in a final decision, leading to this appeal.

It is equally important to note what this appeal is not about. This appeal does not seek to compel IHS to actually pay any specific sums to SCF, nor will it lead IHS to pay any additional sums to SCF. All available FY 2012 contract support cost appropriations have undeniably been spent, and therefore, this is not a suit for specific performance. Indeed, every time predecessor amendments were at issue, the relevant events took place at the end of a fiscal year, when IHS has already spent all of the contract support cost appropriations it had on hand. It is for this reason that the parties have always understood and acknowledged that, regardless of the ultimate language used, no additional "contract support cost" funds would actually be "paid" by the agency nor "received" by SCF.

Initially, this regime may seem odd to the Court, but it is in fact common practice. That is, for years SCF and other tribal contractors have been at odds with IHS over the nature of the government's obligation to pay the contract support costs which Congress directed must be added into each contract in full. IHS has argued that when it runs out of appropriations to pay

the full amount of the contract support costs which would otherwise be paid to a contractor, the agency obviously cannot pay more and the United States therefore cannot be held liable for failing to pay more. But the Supreme Court has on two occasions disagreed with this view, accepting that the agency cannot pay more than it has on hand but nevertheless holding the United States liable for such sums, thereby allowing the contractor to pursue a damages claim under the Contract Disputes Act (41 U.S.C. § 7101) for the unpaid amount.<sup>1</sup> This is why the contract language at issue in this appeal is of more than academic interest, and it also explains why prior contract amendments have acknowledged that all appropriations had been exhausted and the agency would therefore not actually be paying SCF anything more in the way of contract support costs.

Negotiations over these issues became more charged in the wake of the Supreme Court's *Ramah* decision. This is because the *Ramah* decision made plain that if a Tribe was entitled to contract support costs but the agency ran out of funds to pay those costs, the government would later be answerable in damages for the underpayment. Language was therefore critical, with the agency now seeking language which would effectively waive any future damages claim, and SCF seeking language which would preserve such claims. After nearly a year of failed negotiations over FY 2012 MSPI and DVPI contract amendments, SCF submitted two final offers to the agency proposing contract language covering each program and the associated contract support costs supporting each program. IHS rejected those offers and this appeal followed. Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 16.3, SCF now respectfully moves for summary judgment as a matter of law.

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<sup>1</sup> *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005); *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181(2012).

## FACTUAL AND PROCEDURAL BACKGROUND

### I. Legislative Background of the MSPI and DVPI Initiatives.

In the 1975 Indian Self-Determination and Education Assistance Act (ISDA), Congress authorized Indian Tribes and tribal organizations to contract with IHS and the Bureau of Indian Affairs (BIA) to operate federal programs and services that otherwise would continue to be provided by the federal government.<sup>2</sup> Today Tribes and tribal organizations do so by entering into self-determination contracts (under Title I of the ISDA)<sup>3</sup> or self-governance compacts (under Title V of the ISDA).<sup>4</sup>

When a Tribe contracts or compacts with IHS or the BIA, it is “entitled” to the payment of certain administrative costs known as contract support costs.<sup>5</sup> But IHS (along with the BIA) has historically failed to fully fund these costs,<sup>6</sup> leading tribal contractors either to subsidize the contracts from other funds or to divert program funds (and thus reduce services) in order to make up for the difference.<sup>7</sup> IHS annually reports these underpayments—the difference between the

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<sup>2</sup> 25 U.S.C. § 450b(j); H.R. REP. NO. 93-1600 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7775, 7776; S. REP. NO. 100-274 at 1 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620; Docket 37 at 2 (Order).

<sup>3</sup> 25 U.S.C. §§ 450-450n.

<sup>4</sup> 25 U.S.C. §§ 458aaa-458aaa-15.

<sup>5</sup> 25 U.S.C. § 450j-1(a)(2); *Cherokee*, 543 U.S. at 634-35.

<sup>6</sup> *See Ramah*, 132 S. Ct. at 2187 (In the BIA context, “[b]etween FY 1994 and 2001, appropriations covered only between 77% and 92% of tribes’ aggregate contract support costs.”); *Cherokee*, 543 U.S. at 635 (In the IHS context, “The Government refused to pay the full amount promised [for CSCs] because, the Government says, Congress did not appropriate sufficient funds.”).

<sup>7</sup> S. REP. NO. 100-274 at 8-9; *see also Ramah*, 132 S. Ct. at 2187 (When Tribes lacked adequate contract support cost funding, they had to “reduc[e] ISDA services to tribal members, divert[] tribal resources from non-ISDA programs, and forgo[] opportunities to contract in furtherance of Congress’ self-determination objective.” (internal citation omitted)).

contract support costs due and what IHS actually pays—in a certified report to Congress.<sup>8</sup>

Congress first appropriated funds to IHS to support the Methamphetamine and Suicide Prevention Initiative (MSPI) in fiscal year 2008.<sup>9</sup> These funds were appropriated in the portion of the Appropriations Act covering “Indian Health Services” funding, which appropriates funds pursuant to the authority of “the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act . . . .”<sup>10</sup> Regarding the specific MSPI funds, Congress stated:

That \$14,000,000 is provided for a methamphetamine and suicide prevention and treatment initiative [MSPI] . . . . *Provided further*, That notwithstanding any other provision of law, these funds shall be allocated outside all other distribution methods and formulas at the discretion of the Director of the Indian Health Service and shall remain available until expended[.]<sup>11</sup>

In the related House Report explaining this appropriation, the Committee said it was “extremely concerned about the rising use of methamphetamine in Indian Country.”<sup>12</sup> The Committee recognized that this issue was “not just a law enforcement problem and therefore . . . included \$15,000,000 within this amount for the Indian Health Service for substance abuse treatment and

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<sup>8</sup> 25 U.S.C. § 450j-1(c); *see also* 2010 Alaska Tribal Health Compact, Article II, Section 5; *Cherokee Nation of Okla. v. United States*, 190 F.Supp.2d 1248, 1250 (E.D. Okla. 2001), *aff’d* 311 F.3d 1054 (10th Cir. 2002), *aff’d in part, rev’d in part* 543 U.S. 631 (2005) (“The IHS issues a shortfall report which reflects the deficiency in contract support costs. In this shortfall report, the IHS summarizes each tribes “full” contract support cost needs from the prior year, how much IHS paid against the need, and the resulting shortfall, if any.”).

<sup>9</sup> Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2135 (2007); Docket 37 at 2.

<sup>10</sup> *Id.* at 2134-35.

<sup>11</sup> *Id.* at 2135.

<sup>12</sup> Dep’t of the Interior, Env’t, and Related Agencies Appropriations Bill, 2008, H.R. Rep. No. 110-187 at 5 (2007).

mental health issues, including youth suicide, associated with methamphetamine use.”<sup>13</sup> The Committee stated that it “expects the Director[] of the Indian Health Service . . . to distribute this funding outside of the normal formulas and methodologies to target the areas with the highest needs in Indian Country.”<sup>14</sup> In short, Congress wanted the money to go where it was most needed.

The following year (fiscal year 2009), Congress added funds for the Domestic Violence Prevention Initiative (DVPI).<sup>15</sup> Chairman Obey’s joint explanatory statement described the impetus for the new initiative:

Domestic violence within the American Indian and Alaska Native (AI/AN) communities continues to be an area of serious concern. Children in these communities have the second highest rate of maltreatment in the country, and one in three AI/AN women will be physically or sexually abused in her lifetime. In order to provide the Indian Health Service (IHS) with additional tools to better address child and family violence in AI/AN communities, the bill includes \$7,500,000 to implement a nationally coordinated domestic violence prevention initiative. With these funds, the IHS is encouraged to further expand its outreach advocacy programs into Native communities, expand the Domestic Violence and Sexual Assault Pilot project already in operation; and use a portion of the funding for training and the purchase of forensic equipment to support the Sexual Assault Nurse Examiner program (SANE).<sup>16</sup>

The statement also addressed the MSPI program, explaining:

The bill provides \$16,391,000 to continue the grant program to treat and prevent methamphetamine abuse. This is an increase of \$2,609,000 over the amount provided in fiscal year 2008, and it is expected that the Service will use a portion

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<sup>13</sup> *Id.* at 5 (emphasis added).

<sup>14</sup> *Id.* at 5; Docket 37 at 3.

<sup>15</sup> Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, 735 (2009); Docket 37 at 3.

<sup>16</sup> Explanatory Statement Submitted By Mr. Obey, Chairman of the House Committee on Appropriations, Regarding H.R. 1105, Omnibus Appropriations Act, 2009, 155 Cong. Rec. H1653, H2112 (Feb. 23, 2009) (emphasis added).

of the funding for the treatment of behavioral and mental health problems associated with methamphetamine use.<sup>17</sup>

Consistent with these statements, the 2009 appropriations bill under “Indian Health Services” stated:

That \$16,391,000 is provided for the [MSPI] and \$7,500,000 is provided for the [DVPI] and, notwithstanding any other provision of law, the amounts available under this proviso shall be allocated at the discretion of the Director of the Indian Health Service and shall remain available until expended[.]<sup>18</sup>

Appropriations for these initiatives in later years used similar language.<sup>19</sup> In short, Congress wanted all of these funds to go where the service needs were greatest.

## **II. IHS Actions Regarding the MSPI and DVPI Initiatives.<sup>20</sup>**

IHS has always chosen to award contract amendments covering the MSPI and DVPI initiatives at the end of a fiscal year, in August or September.<sup>21</sup> This has two consequences. First, the funds from a given fiscal year will end up being carried over and spent in the subsequent year. Second, IHS will have already spent its entire appropriation for contract support costs.<sup>22</sup> Thus, the parties have always acknowledged that, regardless of what the

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<sup>17</sup> *Id.* at H2112 (emphasis added).

<sup>18</sup> Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. at 735; Docket 37 at 3.

<sup>19</sup> *See* Interior Dep’t and Further Continuing Appropriations, Fiscal Year 2010, Pub. L. No. 111-88, 123 Stat. 2904, 2946 (2010); Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786 (2012).

<sup>20</sup> This section is offered merely as helpful background, for the core legal issue ultimately before the Court does not turn on the historical record but on whether the MSPI and DVPI programs are covered by the ISDA.

<sup>21</sup> *See, e.g.* Docket 5-1 at 8 (Ex. 2: FY 2009 FA Amendment 11) (effective August 31, 2009); Docket 5-1 at 15 (Ex. 5: FY 2010 FA Amendment 14) (effective September 20, 2010).

<sup>22</sup> *See* Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2135 (2007) (“That notwithstanding any other provision of law, of the amounts provided herein, not to exceed \$271,636,000

contract documents ultimately say about contract support costs, there would never be money available on hand to actually pay these costs.

This distinction is captured by the model language the parties briefly agreed to use for the MSPI and DVPI amendments on August 10, 2012.<sup>23</sup> Section 1 of that amendment would have recited the amount of contract support costs the Tribe was entitled to, stating “the Tribe’s CSC requirement under the foregoing statutory provisions for the fiscal year covered by this agreement has been estimated to be \$XX, including \$XX for direct CSC and \$XX for indirect or indirect-like CSC.”<sup>24</sup> By contrast, Section 2 would have recited that the amount IHS was agreeing to actually pay was a lesser sum, and possibly zero, given the limited amount of funding available from congressional appropriations: “From the amount Congress appropriates for CSC for FY 2013, and, to the extent not inconsistent with applicable law, . . . IHS will pay \$YY to the Tribe for the fiscal year covered by this agreement, including \$YY for indirect or indirect-like CSC, . . .”<sup>25</sup> The model contractual provisions also preserved a Tribe’s right to pursue contract damage remedies for the amounts it was entitled to if it did not receive adequate funding.<sup>26</sup>

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shall be for payments to tribes and tribal organizations for contract or grant support costs associated with contracts, grants, self-governance compacts, or annual funding agreements between the Indian Health Service and a tribe or tribal organization . . . prior to or during fiscal year 2008, of which not to exceed \$5,000,000 may be used for contract support costs associated with new or expanded self-determination contracts, grants, self-governance compacts, or annual funding agreements[.]”).

<sup>23</sup> Docket 5-2 at 10, 12-13 (Ex. 9: 8/10/2012 Model Language with E-mails showing agreement of parties).

<sup>24</sup> *Id.* at 10.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 11; *see also Salazar v. Ramah Navajo Chapter*, 132 S.Ct. 2181, 2187 (2012) (“[T]he Act makes clear that if the Government fails to pay the amount contracted for, then tribal contractors are entitled to pursue ‘money damages’ in accordance with the Contract Disputes Act. § 450m-1(a).”).



The distinction between CSC need and the amount IHS was agreeing to pay has been evident since these programs began. On April 28, 2009, IHS Headquarters circulated an “Area Guidance” for distribution of the then-accumulated FY 2008 and FY 2009 MSPI funds.<sup>27</sup> The guidance indicated that “[t]he Director has decided to use a demonstration project model through which each Area Director may distribute these non-recurring funds to Area Tribes and Tribal Organizations utilizing self-determination contracts and self-governance compacts and related funding agreements.”<sup>28</sup> IHS later explained that the “MSPI [distribution] formula takes into consideration three quantifiable metrics that helped determine how the funds would be distributed”: “area population; poverty burden; and disease burden.”<sup>29</sup> The Area Guidance also included a sample contract amendment, which stated that “[n]othing in the FA/AFA or the associated compact/contract creates a promise on the part of the IHS to pay the [Tribe] CSC funding in connection with the MSPI funds,” but that “IHS will include the CSC need associated with the MSPI funds in the annual CSC Shortfall Report to Congress.”<sup>30</sup> This approach was consistent with the historic approach to such issues in the general context of ISDA contracts and compacts: CSC funds might not be paid in full due to limited appropriations, but each Tribe’s full CSC entitlement would be reported to Congress consistent with 25 U.S.C. § 450j-1(c).

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<sup>27</sup> Docket 17-3 at 1 (Def. Ex. 3: 4/28/09 Area Guidance from DHHS to Area Directors re: MSPI); Docket 37 at 3.

<sup>28</sup> Docket 17-3 at 2 (4/28/09 Area Guidance).

<sup>29</sup> Docket 17-5 at 5 (5/3/10 IHS Report to Congress); Docket 21 at 2 ¶ 6 (Rose Weahkee Decl.).

<sup>30</sup> Docket 17-3 at 11 (4/28/09 Area Guidance) (emphasis added); Docket 37 at 4.

In order to obtain project funds, each Tribe was required to submit a budget.<sup>31</sup> From the beginning, SCF and IHS disagreed on how contract support costs should be addressed in these budgets, and whether they would be part of the MSPI and DVPI budgets, or outside those budgets. This issue flowed over into the contract amendment language that would be used.<sup>32</sup> The outcome of this disagreement would have a profound impact on the scope of SCF's program: if program funds were devoted to cover fixed contract support costs, there would be fewer program dollars and therefore fewer services.

If IHS were going to actually pay the agreed upon contract support costs, a separate budget would be appropriate for those costs and they would not be included within the MSPI program budget. But if IHS was not going to pay any contract support cost funds, the opposite might be true, because (right or wrong) these fixed costs might indeed need to be covered by diverting program funds for this purpose.

IHS originally instructed SCF to keep its indirect contract support costs outside of and separate from the MSPI budget.<sup>33</sup> SCF followed that instruction in each year's MSPI budget proposal. IHS took a contrary position when it came to direct contract support costs: it decided that additional personnel costs (*i.e.*, fringe benefits, which are the majority of direct contract

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<sup>31</sup> Docket 28 at 1 ¶ 1 (Supp. Lee Olson Decl.) (“In order to receive SCF’s MSPI and DVPI funding, the IHS has required that SCF submit budgets covering [these] programs.”); Docket 21 at 2 ¶ 6 (Weakhee Decl.) (“The tribe/tribal organization was required to submit a budget with a scope of work outlining how the awarded funds would be used to carry out the project.”); Docket 37 at 5.

<sup>32</sup> *See, e.g.*, Docket 6 at 11-12 ¶¶ 25-26 (Olson Decl.) (“IHS included language stating that IHS would report to Congress on the contract support costs associated with these funds, and on the shortfall between those requirements and the actual amount that was paid (which was zero).”); Docket 28 at 3 ¶ 9 (“SCF has always believed SCF was entitled to contract support costs on these funds . . .”); Docket 21 at 2 ¶ 6 (Weakhee Decl.) (“IHS considered these awards to be full-cost recovery awards . . .”).

<sup>33</sup> Docket 28 at 2, 4 ¶¶ 3-5, 12 (Supp. Lee Olson Decl.).

support costs), should be included within the MSPI budgets, even though doing so would effectively chip away at the amount of services SCF could provide.<sup>34</sup> The record indicates that IHS did not include any similar guidance for DVPI funds.<sup>35</sup>

In the first MSPI contract amendment (effective August 31, 2009), IHS insisted upon using the contract language suggested in the Area Guidance. As IHS saw it, that language would waive any right SCF would otherwise have under the ISDA to contract support costs of any kind including any right to recover damages as in the *Cherokee* and *Ramah* cases.<sup>36</sup> But in a January 2010 letter, the IHS Director wrote that for contract support cost purposes, MSPI funds were to be treated identically to any other ISDA funds that are newly added to an ISDA agreement.<sup>37</sup> Consistent with that historic practice, the contract amendments stated that IHS would report to Congress on SCF's unfunded contract support cost need associated with the MSPI program, and the agency subsequently reported to Congress on these unpaid contract support cost

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<sup>34</sup> Docket 28 at 2, 4 ¶¶ 3, 12 (Supp. Olson Decl.); Docket 37 at 5. Fringe benefits are personnel costs, such as workers compensation insurance or costs associated with providing employee health insurance. IHM 6-3.2.D(1). The federal fringe rate is lower than the tribal fringe rate because the federal government can keep these costs lower by doing things like self-insuring for worker's compensation and negotiating with health insurance providers more effectively than private employers. Since the federal fringe rate portion are costs the federal government would incur if running the program, they are generally included within the program budget. IHM 6-3-H; *see also* Docket 6 at 13-14 ¶¶ 29-31 (Olson Decl.).

<sup>35</sup> Docket 28 at 2 ¶ 6 (Supp. Olson Decl.); Docket 37 at 5.

<sup>36</sup> Docket 5-1 at 9 (Ex. 2: FY 2009 FA Amendment 11) ("No contract support cost (CSC) funding is associated with the MSPI funds, and nothing in the FA or the associated compact creates a promise on the part of the IHS to pay the SCF CSC funding in connection with the MSPI funds.").

<sup>37</sup> Docket 5-1 at 11 (Letter dated Jan. 13, 2010 from Director Roubideaux) ("The language required for the MSPI awards is the same language IHS requires for other new and expanded programs. However, in the case of the MSPI, additional contract support cost (CSC) funds were not available because the IHS had allocated all available CSC funds to existing Tribal contracts and compacts.").

requirements.<sup>38</sup> These contract provisions carried over to the August 20, 2010 award of MSPI funds,<sup>39</sup> and were also included in the September 20, 2010 award of DVPI funds.<sup>40</sup>

In August 2011, IHS agreed to change the language used in these contract amendments in response to requests from Tribes and tribal organizations, and in an attempt to avoid ongoing disputes with project participants regarding contract support cost language.<sup>41</sup> IHS developed new language acknowledging that SCF was entitled to both indirect and direct contract support costs associated with the DVPI funds paid that year, even though it also indicated that IHS was not promising to actually pay any amount for contract support costs (again, given that all appropriated CSC funds had already been spent).<sup>42</sup> Accordingly, the 2011 DVPI contract amendment included the following provision:

The parties agree that the Contract Support Cost (CSC) funding under this FA will be calculated and paid in accordance with Sections 508(c), 519(b) and 106 of the Act, IHS CSC Policy (Indian Health Manual – Part 6, Chapter 3); and any Congressional restrictions in appropriations or other statutes. In accordance with these authorities and subject to available appropriations for CSC, the parties agree that under this Amendment Southcentral Foundation will receive direct CSC in

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<sup>38</sup> Docket 5-1 at 9 (Ex. 2: FY 2009 FA Amendment 11) (“The IHS will include the CSC need associated with the MSPI funds in the annual CSC Shortfall Report to Congress.”); INDIAN HEALTH SERV., DEP’T OF HEALTH AND HUMAN SERVS., FISCAL YEAR 2010 REPORT TO CONGRESS ON FUNDING NEEDS FOR CONTRACT SUPPORT COSTS 7 (2012), *available at* [http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support/IHS\\_FY\\_2010\\_CSC\\_Shortfall\\_Report\\_-\\_2009\\_Narrative\\_and\\_Data.pdf](http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support/IHS_FY_2010_CSC_Shortfall_Report_-_2009_Narrative_and_Data.pdf) (identifying “a total CSC need of \$3,685,676 associated with FY 2009 MSPI-funded projects”).

<sup>39</sup> Docket 5-1 at 13 (Ex. 4: FY 2010 FA Amendment 10) (noting the Amendment “continues the terms and conditions of [the 2009] amendment”).

<sup>40</sup> Docket 5-1 at 15 (Ex. 5: FY 2010 FA Amendment 14).

<sup>41</sup> Docket 20 at 3 ¶ 9 (Robert McSwain Decl.); Docket 37 at 6.

<sup>42</sup> Docket 20 at 3 ¶ 9 (McSwain Decl.); Docket 5-2 at 2 (Ex. 6: FY 2011 FA Amendment 10). This new language was not immediately added to amendments covering MSPI funds, because the MSPI awards skipped the FY 2011 cycle.

the amount \$ 0 and indirect CSC in the amount of \$ 0. These amounts may be adjusted as set forth in the IHS CSC Policy (IHM 6-3) as a result of changes in program bases and/or Tribal CSC need, and available CSC appropriations. Any adjustments to these amounts will be reflected in future Amendments to this FA.<sup>43</sup>

Despite the zero payment amounts—and despite the agency’s current position that SCF is not entitled to “direct” contract support costs—the agency continued to include SCF’s “direct” contract support cost need from the MSPI and DVPI programs in the agency’s annual shortfall report to Congress.<sup>44</sup>

### **III. SCF’s MSPI and DVPI Contracting History.**

Southcentral Foundation is a “tribal organization”<sup>45</sup> and, as such, is considered an “Indian tribe”<sup>46</sup> authorized to provide certain health care services to IHS patient beneficiaries and other eligible individuals.<sup>47</sup> SCF is a co-signatory to the Alaska Tribal Health Compact (“the Compact”), a contract entered into by numerous Tribes and tribal organizations in Alaska and the IHS Director pursuant to Title V of the ISDA, 25 U.S.C. § 458aaa *et seq.* Each co-signatory to the Compact receives its own funding agreement, which is generally awarded on an annual

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<sup>43</sup> Docket 5-2 at 2 (FY 2011 FA Amendment 10) (emphasis added). This action occurred one month before the Tenth Circuit held that IHS cannot demand a Tribe agree to contract language stating that IHS “owes the Tribe \$0 in CSC funds,” a decision the Supreme Court left undisturbed after the Court’s decision in *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2191 (2012). *Southern Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1082 (10th Cir. 2011), *cert. denied* 133 S. Ct. 24 (2012); Docket 37 at 6.

<sup>44</sup> INDIAN HEALTH SERV., DEP’T OF HEALTH AND HUMAN SERVS., FISCAL YEAR 2011 REPORT TO CONGRESS ON FUNDING NEEDS FOR CONTRACT SUPPORT COSTS 4 (undated), *available at* [http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support/FY2011\\_IHS\\_CSC\\_Data.pdf](http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support/FY2011_IHS_CSC_Data.pdf) (including these costs in column I).

<sup>45</sup> 25 U.S.C. § 450b(l).

<sup>46</sup> 25 U.S.C. § 458aaa(b).

<sup>47</sup> Docket 37 at 2.

basis.<sup>48</sup> There are often mid-year amendments to these funding agreements in order to distribute newly appropriated funds.<sup>49</sup> In years such as fiscal year 2013, when SCF and IHS have been unable to agree on the language to be used in these agreements, a new funding agreement has not been executed and the funding agreement from the previous year remains in effect for the subsequent fiscal year (with appropriate funding modifications to continue compacted operations).<sup>50</sup>

In August 2009, SCF submitted an application and began receiving MSPI funds through an amendment to its fiscal year (FY) 2009 funding agreement.<sup>51</sup> Additional funds for the MSPI initiative were awarded in August 2010 through amendments to the FY 2010 funding agreement.<sup>52</sup> The combined amounts awarded in FY 2010 provided funding for three fiscal years, so the next MSPI award was scheduled for August 2012.<sup>53</sup> DVPI funds began to be awarded in September 2010, a second round of awards occurred in July 2011, and the next award of DVPI funds was to occur in August 2012.<sup>54</sup>

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<sup>48</sup> 25 U.S.C. § 458aaa-4(a); *see also* 2010 Alaska Tribal Health Compact Article II, Section 1.

<sup>49</sup> FY 2012 Funding Agreement § 6(a), 15(d) (“The parties to this FA recognize that the total amount of funding in this FA is subject to adjustment, due to Congressional action in appropriations Acts or other law affecting availability of funds to the IHS and the Department of Health and Human Services.”).

<sup>50</sup> 25 U.S.C. § 458aaa-4(e).

<sup>51</sup> Docket 5-1 at 8 (Ex. 2: FY 2009 FA Amendment 11).

<sup>52</sup> Docket 5-1 at 13 (Ex. 4: FY 2010 FA Amendment 10).

<sup>53</sup> *Id.*

<sup>54</sup> Docket 5-1 at 14 (Ex. 5: FY 2010 FA Amendment 14); Docket 5-2 at 1 (Ex. 6: FY 2011 FA Amendment 10).

The current dispute concerns the awards of DVPI and MSPI funds which should have occurred in August 2012. The amounts of these program awards are not in dispute, as SCF accepted the sums IHS specified in the contract amendment documents.<sup>55</sup> But since IHS did not timely award the August 2012 MSPI and DVPI program funds to SCF, SCF had to use reserve funds to maintain operation of the programs.<sup>56</sup>

In a letter dated August 2, 2012, SCF submitted proposed budgets for Project Year 4, which was to include funds for FY 2011 and 2012.<sup>57</sup> As in other years, SCF included fringe benefits (direct CSC) inside its MSPI budget, but kept indirect cost calculations outside that budget. In accordance with agency instructions from earlier years, SCF included both kinds of contract support costs within its DVPI budget.<sup>58</sup> But the budgets aside, the parties could not agree upon language. On August 10, 2012, IHS and the Alaska Tribal Health Compact co-signors (of which SCF is one) agreed to “model” contract support cost language for use in the new amendments.<sup>59</sup>

On August 21, 2012, IHS advised SCF that SCF had been awarded \$599,596 in MSPI funds for the new funding cycle.<sup>60</sup> For this purpose IHS proposed “Amendment No. 15” to

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<sup>55</sup> Docket 5-2 at 5 (Ex. 7: 7/13/12 email from Miranda Carmen to Bobbi Outten and Marie Stewman); Docket 5-2 at 15 (Ex. 10: 8/21/2012 email from Pamela End of Horn to Michelle Baker et al.); Docket 6 at 6 ¶¶ 13-15 (Lee Olson Decl.).

<sup>56</sup> Docket 6 at 11 ¶ 24 (Olson Decl.).

<sup>57</sup> Docket 17-8 at 1 (Def. Ex. 8: Project Year 4 MSPI Proposed Budget); Docket 37 at 7.

<sup>58</sup> Docket 17-8 at 18 (Project Year 4 MSPI Proposed Budget); 17-9 at 21 (Def. Ex. 9: Project Year 3 DVPI Proposed Budget); Docket 37 at 7.

<sup>59</sup> Docket 5-2 at 10 (Ex. 9: August 10, 2012 Model Amendment language).

<sup>60</sup> Docket 5-2 at 15 (Ex. 10: 8/21/2012 email from Pamela End of Horn to Michelle Baker et al.).

SCF's FY 2012 funding agreement.<sup>61</sup> Paragraph III-A of that proposal addressed contract support costs, but it did not reflect the "model" contract support cost language which had been negotiated and agreed upon on August 10, 2012.<sup>62</sup> The proposed amendment also failed to estimate amounts for SCF's "indirect" and "direct" contract support costs. Basically, IHS seemed to be taking the position that SCF was not entitled to any contract support costs despite the August 10 agreement.

Similar events played out for the DVPI funds. IHS informed SCF that the next DVPI funding cycle would be for \$482,554.<sup>63</sup> IHS proposed a contract amendment containing the same contract support language as in the MSPI amendment.<sup>64</sup> The negotiations were handled together with the MSPI negotiations, and ended with the same result: IHS asserting SCF was not entitled to any contract support costs.<sup>65</sup>

SCF and IHS then attempted to negotiate the language of these amendments, focusing on the contract support cost provisions.<sup>66</sup> By letter dated September 7, 2012, the Alaska Tribal Health Compact co-signors wrote to IHS proposing language which would require that MSPI contract support costs be paid "in accordance with this Funding Agreement and applicable law,"

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<sup>61</sup> Docket 5-3 at 3 (Ex. 11: FY 2012 FA Proposed Amendment 15).

<sup>62</sup> *Id.* at 5; Docket 5-2 at 10, 12-13 (Ex. 9: CSC Model language agreed upon by IHS and tribal Attorneys).

<sup>63</sup> Docket 5-2 at 5 (Ex. 7: 7/13/12 email from Miranda Carmen to Bobbi Outten and Marie Stewman).

<sup>64</sup> Docket 5-2 at 8 (Ex. 8: FY 2012 FA Proposed Amendment 14).

<sup>65</sup> Docket 5-3 at 19 (Ex. 15: 4/12/13 Letter from IHS Lead Negotiator Max Tahsuda) (referring to MSPI/DVPI agreement); Docket 6 at 9-10 ¶¶ 20-22 (Olson Decl.).

<sup>66</sup> Docket 37 at 6.



a reference to the model language agreed upon on August 10.<sup>67</sup> (This language would permit IHS not to actually pay these funds if appropriations were no longer available to do so.) IHS Lead Negotiator Max Tahsuda asserts that on or about December 4, 2012, he:

explained that IHS would be willing to include the same CSC language in the MSPI/DVPI agreements that ANTHC requested be inserted in the [ISDA] agreements . . . [but] IHS made this decision only in an effort to reach agreement and because the proposed language continued to make it clear that no CSC associated with the MSPI/DVPI would actually be paid.<sup>68</sup>

The reference was to the three-paragraph formulation which acknowledged the contractor's need, specified a lower amount that was actually being paid, and reserved the contractor's remedies for the difference.

On December 12, 2012, the Alaska Tribal Health Compact proposed language which the Compact co-signors believed improved on the “model” language negotiated that summer. SCF adopted this proposed language, which included references to the controlling provisions of the ISDA, but unlike its budget proposal submitted earlier during the summer, SCF did not specify dollar amounts for its direct and indirect contract support cost requirements.<sup>69</sup> IHS rejected this proposal.<sup>70</sup> Offers and counteroffers followed, and eventually IHS agreed to restate the August 10 model language—the language which included estimating precise amounts of SCF's “direct” and “indirect” contract support cost requirements—inside the MSPI amendment itself.<sup>71</sup>

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<sup>67</sup> Docket 17-10 (9/7/12 Letter from Alaska Tribal Health Compact to IHS); Docket 37 at 7.

<sup>68</sup> Docket 19 at 2 ¶ 7 (Tahsuda Decl.) (emphasis added).

<sup>69</sup> Docket 6 at 8 ¶ 17 (Olson Decl.); Docket 19 at 3 ¶ 10 (Tahsuda Decl.).

<sup>70</sup> Docket 6 at 8 ¶ 17 (Olson Decl.); Docket 19 at 3 ¶ 11 (Tahsuda Decl.).

<sup>71</sup> Docket 5-3 at 8, 10-11 (Ex. 12: 1/9/2013 E-mail from IHS Lead Negotiator Max Tahsuda to Attorney Myra Munson accepting language in attached proposed amendment). Tahsuda had authority to bind the

When SCF sought to negotiate with IHS over the precise amounts for those costs, IHS reversed course again. This occurred at the March 19-20, 2013 preliminary negotiation session between 25 Alaska Self-Governance Tribes and tribal organizations and IHS. IHS “informed the tribal representatives that [it] would not agree to estimate a need for direct CSC for the MSPI/DVPI due to the initiatives’ non-recurring nature.”<sup>72</sup> That is, indirect contract support costs would be recognized as a need (even if unfunded), but not direct contract support costs. After this statement was made, SCF received a letter from the IHS lead negotiator that “the estimated direct CSC need is \$0 . . . [b]ecause the MSPI/DVPI programs are by nature non-recurring, [so] it would be problematic to identify an amount should the program end since direct CSC is considered recurring.”<sup>73</sup> Piling on, the letter also stated that some program budgets included fringe benefits on salaries, so that “including amounts for these items as direct CSC would be duplicative of the amounts already awarded.”<sup>74</sup> IHS did agree to estimate a need of indirect contract support costs for these initiatives.<sup>75</sup>

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agency. Docket 19 at 2 ¶ 3 (Tahsuda Decl.) (“As Acting ALN [Agency Lead Negotiator], I am given the authority to complete and conclude final negotiations with tribes.”).

<sup>72</sup> Docket 5-6 at 3 (Ex. 21: IHS Decision Letter). This statement is contrary to the one provided in Mr. Tahsuda’s declaration where he stated that he expected the parties to estimate an amount for contract support costs. Docket 19 at 3 ¶ 13 (“IHS and SCF never negotiated an amount to include for SCF’s estimated CSC need . . . Although SCF shared its initial thoughts, I anticipated that SCF and IHS would negotiate these amounts.”).

<sup>73</sup> Docket 5-3 at 19 (Ex. 15: 4/12/13 Letter from IHS Lead Negotiator Max Tahsuda); Docket 6 at 9-10 ¶¶ 19-21 (Olson Decl.).

<sup>74</sup> Docket 5-3 at 19 (4/12/13 Letter from Max Tahsuda); Docket 37 at 7.

<sup>75</sup> Docket 5-6 at 3 (Ex. 21: IHS Decision Letter).

During ensuing negotiations, IHS continued to insist that SCF was not entitled to “direct” contract support costs associated with these programs.<sup>76</sup> IHS insisted that the contract language must state that the “CSC requirement . . . has been estimated to be . . . \$0 for direct CSC . . . ,” and some other tribal contractors agreed to accept that language.<sup>77</sup> But SCF refused, concerned that such a statement might constitute a waiver of any future claim to damages over the agency’s failure to pay these costs.<sup>78</sup> In subsequent weeks, SCF reviewed its contract support calculations with IHS in preparation for SCF’s final offer.<sup>79</sup> On April 23, 2013, SCF sent revised budgets to IHS. The revised budgets provided estimates for both kinds of contract support costs for both initiatives.<sup>80</sup>

After nearly a year of negotiations, the only remaining dispute appeared to center on SCF’s entitlement to “direct” contract support costs.<sup>81</sup> But nonetheless, throughout this year IHS refused to pay SCF any DVPI or MSPI base program funding, even though that funding was due in August of 2012.<sup>82</sup> Given IHS’s refusal to acknowledge that SCF did two things. First, it would incur “direct” contract support costs in carrying out these programs, on June 25, 2013,

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<sup>76</sup> Docket 6 at 10 ¶¶ 21-22 (Olson Decl.).

<sup>77</sup> See, e.g., Docket 5-4 at 2 (Ex. 16: Amendment 11 to SEARHC’s FY 2011-2013 FA adding MSPI funds); Docket 5-4 at 5 (Ex. 17: Amendment 10 to SEARHC’s FY 2011-2013 FA, adding DVPI funds).

<sup>78</sup> Docket 6 at 9-10 ¶ 20 (Olson Decl.).

<sup>79</sup> *Id.* at 9-10 ¶ 22.

<sup>80</sup> Docket 28-1 at 1, 3 (Ex. 22: 4/23/2013 Revised Budgets); Docket 37 at 7.

<sup>81</sup> Docket 6 at 10-11 ¶ 23 (Olson Decl.).

<sup>82</sup> *Id.* at 11 ¶ 24. The funding agreement amendments providing these program funds were not signed until September 10, 2013. Docket 17-1 at 3 (MSPI Program Funds); Docket 17-2 (DVPI Program Funds).

SCF prepared draft amendments containing the agreed-upon terms (the MSPI and DVPI program funds plus the associated “indirect” contract support costs). Second, it prepared a final offer on the disagreed terms (the disputed “direct” contract support costs issue). SCF separated the two issues into two letters.<sup>83</sup> The agreed-upon-terms letter went to the local IHS Alaska Area Director.<sup>84</sup> The disputed-terms letter went to the IHS Director and contained a final offer on the “direct” contract support cost issue.<sup>85</sup> By Decision Letter dated August 7, 2013, the IHS Director considered the letters together and rejected both proposals.<sup>86</sup>

#### **IV. Procedural History.**

SCF filed this appeal on August 21, 2013, seeking an injunction compelling IHS to enter into contract amendments awarding the FY 2012 program costs and an award of direct and indirect contract support costs.<sup>87</sup> SCF simultaneously filed a Motion for Preliminary Injunction, seeking an immediate order compelling the relief requested.<sup>88</sup> On September 10, 2013, while the Motion for Preliminary Injunction was pending, IHS finally issued one-year old amendments and paid the base program amounts of \$599,596 for the MSPI program and \$482,554 for the DVPI program.<sup>89</sup> On October 23, 2013, this Court denied SCF’s Motion for a Preliminary Injunction

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<sup>83</sup> See 25 U.S.C. § 258aaa-6(c)(1)(D); Docket 37 at 7.

<sup>84</sup> Docket 5-5 at 1 (Ex. 19: 6/25/13 Letter to Chris Mandregan, Alaska Area IHS Director).

<sup>85</sup> Docket 5-5 at 9 (Ex. 20: 6/25/13 Final Offer Letter from SCF to IHS Director Roubideaux); FY 2012 Funding Agreement § 15(c).

<sup>86</sup> Docket 5-6 at 1 (Ex. 21: IHS Decision Letter); Docket 37 at 7.

<sup>87</sup> Docket 1 at 13-14 (Complaint).

<sup>88</sup> Docket 3 (PI Mot.); Docket 5 (PI Mot. Memo).

<sup>89</sup> Docket 17-1 at 3 (FY 2012 FA Amendment 15); Docket 17-2 at 3 (FY 2012 FA Amendment 14).

without addressing the merits.<sup>90</sup> SCF now seeks an order that it is entitled to judgment as a matter of law.

## STANDARD OF REVIEW

The applicable standard of review depends on whether these initiatives are covered by the ISDA. Thus, we present the first part of our argument—explaining why the ISDA governs this appeal—before discussing the appropriate standard.

## ARGUMENT

### I. The MSPI and DVPI Initiatives Are Covered by the ISDA.

In order to determine whether the MSPI and DVPI initiatives are covered by the provisions of the ISDA, the Court must interpret both the ISDA and the MSPI and DVPI appropriations. Generally, when a court interprets a statute, it “must first determine whether the statutory text is plain and unambiguous.”<sup>91</sup> If it is, the court “must apply the statute according to its terms.”<sup>92</sup> “Where the language is not dispositive, [the court must] look to the congressional intent revealed in the history and purposes of the statutory scheme.”<sup>93</sup> In addition, in the case of the ISDA Congress has directed courts to resolve any ambiguities in the Tribes’ favor.<sup>94</sup>

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<sup>90</sup> Docket 37.

<sup>91</sup> *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (interpreting the Indian Reorganization Act (citing *United States v. Gonzalez*, 520 U.S. 1, 4 (1997))).

<sup>92</sup> *Id.* (internal citations omitted).

<sup>93</sup> *Artichoke Joe’s California Grand Casino v. Norton*, 353 F.3d 712, 720 (9th Cir. 2003) (quoting *United States v. Buckland*, 289 F.3d 558, 565 (9th Cir. 2002)).

<sup>94</sup> 25 U.S.C. § 458aaa-11(f); *Salazar v. Ramah Navajo Chapter*, 132 S.Ct. 2181, 2191 (2012)

A. *Statutory Language*

1. The controlling statutory provisions indicate the ISDA applies

The Government asserts that the MSPI and DVPI funds are “not [ISDA] PSFAs to which CSC is applicable.”<sup>95</sup> But, the ISDA’s text is plain and unambiguous. The ISDA embraces:

[s]uch programs, services, functions, or activities (or portions thereof), including grants (which may be added to a funding agreement after an award of such grants), with respect to which Indian tribes or Indians are primary or significant beneficiaries, administered by the Department of Health and Human Services through the Indian Health Service . . . under the authority of . . . any other Act of Congress authorizing any agency of [DHHS] to administer, carry out, or provide financial assistance to such a program . . . that is carried out for the benefit of Indians because of their status as Indians[.]<sup>96</sup>

IHS does not dispute that MSPI and DVPI funds are “carried out for the benefit of Indians because of their status as Indians,”<sup>97</sup> that “programs, services, functions, or activities” covered by the ISDA “include[s] grants,”<sup>98</sup> that “tribes or Indians are [the] primary or significant beneficiaries” of these two programs, or that “the Indian Health Service” “administer[s]” these programs. The MSPI and DVPI initiatives plainly fit the controlling language of the ISDA.

Moreover, the ISDA provides 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 . . . .”<sup>99</sup> Thus, the ISDA requires IHS to interpret laws

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<sup>95</sup> Docket 5-7 at 1 (Ex. 21: IHS Decision Letter).

<sup>96</sup> 25 U.S.C. § 458aaa-4(b)(2)(F) (emphasis added).

<sup>97</sup> 25 U.S.C. § 458aaa-4(b)(1).

<sup>98</sup> 25 U.S.C. § 458aaa-4(b)(2).

<sup>99</sup> 25 U.S.C. § 458aaa-11(a).

in a way that will facilitate the inclusion of programs into the Tribes' contracting agreements. Further, the ISDA contemplates all forms of agreements, including "grant" or "cooperative agreements" that may be used in lieu of contracts.<sup>100</sup> What is controlling is not the type of instrument nor the formula for allocating funds, but the type of funds at issue. Plainly these are IHS program funds.

The appropriations acts also compel the conclusion that these funds are covered by the ISDA. This is because the funds were appropriated for "Indian Health Services," and because they were appropriated "to carry out the Act of August 5, 1954 (68 Stat. 674) [BIA-IHS Transfer Act], the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act" (addressing Indian health).<sup>101</sup> The ISDA expressly incorporates funds appropriated under such authority, as it governs "programs, services, functions activities . . . administered under the authority" of the Act of August 5, 1954, the Indian Health Care Improvement Act, or "any other Act of Congress authorizing any agency of DHHS" to provide services for the benefit of Indians because of their status as Indians.<sup>102</sup> IHS cannot escape this directly controlling statutory language.

Because of this formidable authority, IHS is left with the peculiar argument that these funds are not covered by the ISDA because they are of "limited duration," and are "non-recurring."<sup>103</sup> But nothing in the controlling statutory language contains an exception for

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<sup>100</sup> 25 U.S.C. § 450e-1.

<sup>101</sup> See, e.g., Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2134-35 (2007).

<sup>102</sup> 25 U.S.C. § 458aaa-4(b)(2)(C), (D), (F).

<sup>103</sup> See Docket 17 at 16 n. 10 (clarifying IHS's position); Docket 5-7 at 1 (Ex. 21: IHS Decision Letter).

“limited duration” or “non-recurring” Indian program funds. Put differently, how funds are distributed, or for how long they are distributed, has nothing to do with whether they are subject to the ISDA so long as they are distributed. Indeed, “non-recurring funds” are routinely paid to Tribes under the ISDA, as reflected in the second column of every IHS shortfall report submitted to Congress.<sup>104</sup>

If anything more were required, the Government’s position also ignores the ISDA’s command that the Act “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.”<sup>105</sup> In short, there is no credible argument that the MSPI and DVPI programs somehow fall outside the coverage of the ISDA.

## 2. Grants are covered by the ISDA

To be sure, it is within Congress’s power to trump the ISDA and exempt any funds Congress chooses to exempt from the ISDA’s coverage.<sup>106</sup> But a repeal of the ISDA by implication would be highly disfavored, especially in an appropriations Act.<sup>107</sup> IHS’s suggestion

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<sup>104</sup> See, e.g., INDIAN HEALTH SERV., DEP’T OF HEALTH AND HUMAN SERVS., FISCAL YEAR 2011 REPORT TO CONGRESS ON FUNDING NEEDS FOR CONTRACT SUPPORT COSTS 4 (undated), *available at* [http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support/FY2011\\_IHS\\_CSC\\_Data.pdf](http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support/FY2011_IHS_CSC_Data.pdf) (column F shows \$6,359,249 of non-recurring program funds awarded in FY 2010); *see also* IHS Manual 6-3.1(E)(9) (defining non-recurring funds as “[f]unds that require annual rejustification and are awarded based on an annual resource allocation methodology that considers or is dependent on other factors . . .”).

<sup>105</sup> 25 U.S.C. § 458aaa-11(f).

<sup>106</sup> “Each funding agreement . . . authorize[s] the Indian tribe to plan, conduct, consolidate, administer, and receive full tribal share funding, including tribal shares of discretionary Indian Health Service competitive grants (excluding congressionally earmarked competitive grants) . . .” 25 U.S.C. § 458aaa-4(b)(1).

<sup>107</sup> *TVA v. Hill*, 437 U.S. 153, 190-91 (1978).



that Congress did so here by using the word “grants”<sup>108</sup> does not withstand serious review. The use of the term “grants” is immaterial to the ISDA’s application; indeed the ISDA by its very terms broadly sweeps in IHS “grants.”<sup>109</sup> Thus the Act does not exclude grants, even discretionary Indian Health Service competitive grants, unless they fall within the narrow category of “congressionally earmarked competitive grants”—a unique category not at issue here.<sup>110</sup>

The Government has also attempted to lump these funds in with other congressional initiatives, such as those provided in the special diabetes grant or the American Recovery Reinvestment Act (ARRA).<sup>111</sup> But those grants are very different from the MSPI and DVPI programs. With respect to the special diabetes program, Congress commanded that “[t]he Secretary shall make grants . . . .”<sup>112</sup> Thus, neither the Director nor the Tribes had a choice in the matter. But nothing comparable appears in the Acts authorizing and making appropriations for the MSPI and DVPI initiatives. In fact, in the House Report accompanying the appropriations

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<sup>108</sup> See Docket 5-7 at 1-3 (IHS Decision Letter).

<sup>109</sup> 25 U.S.C. §§ 458aaa-2(e), 458aaa-4(b)(2); *see also* 25 U.S.C. § 450e-1 (similar Title I provision).

<sup>110</sup> See 25 U.S.C. § 458aaa-4(b)(1) (excluding “congressionally earmarked competitive grants”). The MSPI and DVPI are not congressionally earmarked competitive grants, they are award programs appropriated to IHS along with its other program funds. Moreover, the appropriations language does not mention “grants.” See *also* Explanatory Statement Submitted By Mr. Obey, Chairman of the House Committee on Appropriations, Regarding H.R. 1105, Omnibus Appropriations Act, 2009, 155 Cong. Rec. H1653, 2112 (Feb. 23, 2009) (explanatory statement of Chairman Obey regarding 2009 appropriations, refers to MSPI/DVPI funds in general IHS section), H2603 (“Congressional Earmarks, Limited Tax Benefits or Limited Tariff Benefits” section, stating no congressional earmarks were part of the provisions referred to the Budget Committee in the Omnibus Appropriations Act).

<sup>111</sup> Docket 17 at 5 (PI Opp.); 42 U.S.C. §254c-3(a) (Special diabetes program for Indians); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 171.

<sup>112</sup> 42 U.S.C. § 254c-3(a).

bill, the MSPI and DVPI funds are categorized under “clinical services” and grouped with funds for the Indian Health Care Improvement Fund and Contract Care, funds that indisputably fall under the ISDA. The ARRA provisions are not comparable either, because ARRA funds were appropriated to carry out the purposes of that statute; they were not appropriated to carry out the ISDA or the Indian Health Care Improvement Act.<sup>113</sup> Congress could easily have trumped the ISDA, but it chose not to do so here (even though it was well aware of the ISDA’s mandatory contracting regime).<sup>114</sup>

3. The allocation language does not abolish the ISDA’s coverage

The Director attempts to derive support for her position by relying on the discretion Congress gave her for dividing up the funds among the Tribes. The controlling language is underscored below:

[N]otwithstanding any other provision of law, the amounts made available within this account for the methamphetamine and suicide prevention and treatment initiative and for the domestic violence prevention initiative shall be allocated at the discretion of the Director of the Indian Health Service and shall remain available until expended[.]<sup>115</sup>

The underscored language means what it says, and nothing more: it gives the Director discretion on how to “allocate” the “amounts” appropriated. An “allocation” is “[a] designation or apportionment for a specific purpose . . . .”<sup>116</sup> The terms “apportion” and “allocate” are

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<sup>113</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. at 171.

<sup>114</sup> *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (noting Congress presumed “knowledgeable about existing law pertinent to the legislation it enacts”).

<sup>115</sup> *E.g.* Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786, 1027 (2011) (emphasis added)

<sup>116</sup> BLACK’S LAW DICTIONARY 75 (7th ed. 1999).

commonly used budgeting terms that mean to divide up money.<sup>117</sup> These are technical terms in appropriations law, and Congress is presumed to know the meaning of such “‘terms of art.’”<sup>118</sup> These terms say nothing about how funds, once allocated, are in turn to be transferred, much less whether the allocated amounts are then spent directly by IHS or are awarded through an amendment to an ISDA compact or contract. The word “allocate” simply does not cover that territory.<sup>119</sup> Again, to place upon this one word an intent to repeal the ISDA’s coverage on these programs is far more weight than controlling law will permit.<sup>120</sup>

To the contrary, were there any mystery about what Congress intended, it would be solved by looking at the legislative history, which shows Congress intended IHS use this discretion to aim funds at certain discrete problems. Thus, for instance, Congress directed that “at least \$5,000,000 should be used for the mental health and behavioral issues associated with

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<sup>117</sup> See generally OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, INSTRUCTIONS ON BUDGET EXECUTION, CIRCULAR NO. A-11, Part 4 (2013) (discussing apportionment and allocation of appropriations), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/a11\\_current\\_year/s120.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s120.pdf).

<sup>118</sup> *INS v. St. Cyr*, 533 U.S. 289, 312 n.35 (2001) (“Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . .” (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)); see also *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 615 (2001) (Scalia, J., concurring) (“Words that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning.” (emphasis in original))).

<sup>119</sup> The legislative history of the first MSPI provision makes abundantly clear that Congress was not focused on the means by which the funds were spent, but on *where* the money would be spent, *i.e.*, “the areas with the highest needs in Indian country.” H.R. REP. NO. 110-187, at 5 (2007).

<sup>120</sup> See *TVA v. Hill*, 437 U.S. 153, 190-91 (1978) (“The doctrine disfavoring repeals by implication applies with full vigor when . . . the subsequent legislation is an *appropriations* measure. This is perhaps an understatement since it would be more accurate to say that the policy applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act.” (emphasis in original; internal citations omitted)).

methamphetamine use, including programs that combat youth suicide.”<sup>121</sup> Nothing in the provision’s history shows an intent to trump the ISDA even assuming, for the moment, that legislative history could ever trump the plain words of an appropriations Act.<sup>122</sup>

4. Language in the contract amendments recognizes the ISDA’s applicability

Although nothing more is required, is worth noting that language in the IHS contract amendments also recognizes the ISDA’s applicability.<sup>123</sup> Both the sample funding amendment included in the IHS Headquarters Area Guidance and SCF’s FY 2009 Amendment awarding MSPI funds contained a detailed provision discussing contract support cost funding. Of course, CSC funding is only associated with a program that is subject to the ISDA.

Although IHS stated it was not in a position to actually pay any funds to cover those costs, both documents recite the agency will report to Congress on SCF’s contract support cost needs—necessarily implying SCF did have a legal right to such funds.<sup>124</sup> Further, beginning in

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<sup>121</sup> Dep’t of the Interior, Env’t, and Related Agencies Appropriations Bill, 2008, H.R. REP. NO. 110-187, at 97 (2007).

<sup>122</sup> See *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 637 (2005) (“[T]his Court has said that it is ‘a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency.’ (quoting *Lincoln v. Vigil*, 508 U. S. 182, 192 (1993))).

<sup>123</sup> Moreover, “under the Contract as agreed upon and performed by the parties, the AFAs are not standalone agreements; they form part of the original Contract as anticipated by the Parties and are subject to its terms.” *Seneca Nation of Indians v. U.S. Dep’t of Health & Human Servs.*, 2013 WL 2255208, at \*10 (D.D.C. 2013).

<sup>124</sup> Docket 17-3 at 11 (4/28/09 Area Guidance); Docket 5-1 at 8 (FY 2009 FA Amendment 11); see also Docket 5-1 at 11 (Ex. 3: Letter dated Jan. 13, 2010 from Director Roubideaux to Jefferson Keel, Chairman, IHS Tribal Self-Governance Advisory Committee) (“The statutory ‘cap’ on CSC precluded the IHS from allocating additional direct or indirect CSC than Congress had appropriated under the CSC line item or from allowing Tribes to build direct or indirect CSC into their proposal budgets. . . . Keep in mind that the MSPI CSC need will be included in the annual CSC Shortfall Report to Congress, and Tribes are

FY 2011, the MSPI and DVPI contract amendments explicitly provided that “Contract Support Cost (CSC) funding under this FA will be calculated and paid in accordance with Sections 508(c), 519(b) and 106 of the Act . . . .”<sup>125</sup> This statement, too, recognizes the ISDA’s applicability. While the agency Decision below maintains that this language was only included “[i]n an effort to reach agreement” with Tribes, and that it was “conditioned upon the [Alaska Tribal Health Compact]’s agreement to include additional language . . . reinforcing the non-recurring and discretionary nature of the MSPI/DVPI,”<sup>126</sup> that explanation is irrelevant. At most, all it shows is that it was permissible to treat these funds as ISDA funds. And if it was permissible to do so, the Director had no discretion under the ISDA not to do so. To borrow from the Supreme Court decision in *Ramah* unless the Director can “demonstrate that [her new] reading is clearly required by the statutory language,” her position must be rejected.<sup>127</sup> Thus, the language in the ISDA, the appropriations bills creating these initiatives, and the MSPI and DVPI contract amendments all indicate the ISDA applies.

*B. Purpose and Intent of Statute*

Even if this language were unclear (and it is not), the purpose and intent of the initiatives and of the ISDA establish that the unique terms of the MSPI and DVPI do not remove them from the ISDA’s purview.

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also authorized to rebudget within their approved budgets to address all allowable contract costs.”). The CSC Shortfall Report is a legally-mandated annual report that IHS submits to Congress, which contains a recording of the deficiencies in contract support cost payments. 25 U.S.C. § 450j-1(c)(2).

<sup>125</sup> Docket 5-2 at 2 (Ex. 6: 2011 DVPI Amendment).

<sup>126</sup> Docket 5-6 at 3 (IHS Decision Letter).

<sup>127</sup> *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2191 (2012).

1. The chosen allocation method does not exclude these initiatives from the ISDA

The Government insists the MSPI and DVPI are not ISDA “programs, services, functions, and activities” because the Director used a unique formula-driven distribution method,<sup>128</sup> (that is, instead of dividing up these funds among all Tribes as a “Tribal share” or using some other “normal methodology”).<sup>129</sup> But again, the fact that the Director divided up these funds by a formula that considered area population, poverty burden, and disease burden<sup>130</sup> says nothing about how these funds are different from the hundreds of millions of other “non-recurring” formula-driven funds controlled by diverse allocation methodologies that are covered by the ISDA.<sup>131</sup> The language may have allowed the Director to choose the formula, but the chosen allocation method does not change the fact that once she chose to distribute funds to certain Tribes through a contract pursuant to the ISDA, the ISDA applies. To the contrary, the Director advised all Tribes that she was treating these funds equally with all other newly contracted ISDA funds.<sup>132</sup>

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<sup>128</sup> See Docket 5-7 at 1-2 (Ex. 21: IHS Decision Letter).

<sup>129</sup> See, 25 U.S.C. § 458aaa-4(b)(1).

<sup>130</sup> See Docket 5-7 at 2 (IHS Decision Letter) (“The 2009 letter also indicates . . . that MSPI funds ‘may not be distributed on the basis of tribal shares,’ which would be the method to distribute the funds if they were ISDEAA PSFAs.”); Docket 17-5 at 5 (5/3/10 IHS Report to Congress) (describing three metrics used to determine areas with highest need).

<sup>131</sup> Supra at 24.

<sup>132</sup> Docket 5-1 at 11 (Ex. 3: 1/13/10 Letter) (IHS originally conceded the ISDA applies: “The language required for the MSPI awards is the same language IHS requires for other new and expanded programs. However, in the case of the MSPI, additional contract support cost (CSC) funds were not available because the IHS had allocated all available CSC funds to existing Tribal contracts and compacts.”).

Also irrelevant is the fact that these programs were coined “demonstration projects;” for over a decade the entire self-governance regime was considered a “demonstration project.”<sup>133</sup> That label makes no difference to the ISDA’s application.

2. The funds provided for these initiatives through ISDA contracts are covered by the ISDA even though some funding was distributed through other mechanisms

IHS also maintains the ISDA cannot apply because organizations that provide services to urban Indians may receive a portion of these funds and such organizations are not eligible to contract under the ISDA.<sup>134</sup> This claim makes no sense. The issue is not what happens to funds that get distributed somewhere else; the issue is what happens to funds that go to Tribes like SCF that have statutory rights under the ISDA.

The Government has explained that IHS delivers health care to eligible Indians through three distinct mechanisms: (1) use of its own facilities; (2) contracts with Tribes and tribal organizations pursuant to the ISDA; and (3) grants to organizations that provide services to urban Indian populations.<sup>135</sup> The fact that some funds were provided to organizations that provide services for urban Indians—the third mechanism—does not change the fact that the ISDA applies to funds provided through the second mechanism—an ISDA contract or compact.<sup>136</sup>

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<sup>133</sup> The Tribal Self-Governance Demonstration Project was originally added as Title III of the ISDA by Pub. L. No. 100-472, Title II, § 209. 102 Stat. 2296 (1988), and was codified as a note under 25 U.S.C. § 450f. Title III was repealed and replaced by Title V on August 18, 2000. Pub. L. No. 106-260, 114 Stat. 711 (2000).

<sup>134</sup> Docket 5-7 at 3 (IHS Decision Letter).

<sup>135</sup> See Docket 17 at 3 (PI Opp.) (citing S. Rep. No. 102-392, 102d Cong., 2d Sess., at 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3943).

<sup>136</sup> See S. REP. NO. 102-392, 102d Cong., 2d Sess., at 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3943 (IHS delivers health care to eligible Indians through three distinct mechanisms: (1) through its own facilities; (2) through contracts with Tribes and tribal organizations pursuant to the ISDA; and (3) through

3. The special terms applicable to these funds do not mean the ISDA does not apply

Last, the Government asserts the ISDA cannot apply because these MSPI and DVPI amendments contain unique terms that are not found in routine ISDA contracts, such as an agreed provision that Tribes would not rebudget or redesign these programs; an agreed provision regarding heightened reporting requirements, and an agreed provision that the amendments would control over other laws.<sup>137</sup> These terms are immaterial to this analysis. What the parties agreed to concerning how to administer these funds does not affect whether they are covered by the ISDA. Indeed (and despite these provisions), even the Director believed these funds would be treated like all other ISDA funds.<sup>138</sup>

For the foregoing reasons, the ISDA applies to the MSPI and DVPI programs.

## **II. Applicable Standard of Review.**

In an ordinary administrative appeal controlled by the Administrative Procedures Act (APA), “the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.”<sup>139</sup> Although this action is not brought pursuant to the APA, the Court must still review the agency

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grants to organizations that provide services to urban Indian populations); *see also* Docket 17 at 8 (PI Opp.) (only 8% of funding went to urban Indian health programs).

<sup>137</sup> Docket 5-7 at 3 (IHS Decision Letter).

<sup>138</sup> Docket 5-1 at 11 (Letter dated Jan. 13, 2010 from Director Roubideaux) (“The language required for the MSPI awards is the same language IHS requires for other new and expanded programs.”).

<sup>139</sup> *Occidental Engineering Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985).



decision in light of the agency record.<sup>140</sup>

But because review here is under the ISDA, the ISDA's review provision controls over the usual APA standard of review. First, review is de novo.<sup>141</sup> Second, "the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer (or portion thereof)."<sup>142</sup> Additionally, the Supreme Court has stated that in interpreting the IHS's obligations, "[c]ontracts made under [the] ISDA specify that '[e]ach provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor . . . .'"<sup>143</sup> The Supreme Court has interpreted this language to mean that the Government "must demonstrate that its reading [of the ISDA] is clearly required by the statutory language."<sup>144</sup>

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<sup>140</sup> See *Shoshone-Bannock Tribes of Fort Hall Reservation v. Shalala*, 988 F.Supp. 1306, 1316 (D. Or. 1997) (Under the ISDA, a tribe has two alternate routes to appeal from a decision of the IHS: (1) appeal to the agency or an administrative law judge, review of this decision is covered by the APA; or (2) shortcut the administrative process and seek relief in federal court, this review is de novo.). Akin to an appeal covered by the APA, this motion for summary judgment should be considered an opening brief. See Local R. Civ. P. 16.3.

<sup>141</sup> 25 U.S.C. § 450m-1; *Shalala*, 988 F.Supp. at 1317-18. Accord *Cherokee Nation of Oklahoma v. United States*, 190 F.Supp.2d 1248, 1256-1258 (E.D. Okla. 2001); *Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, 2013 WL 2255208, at \*6 (D.D.C. 2013); *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F.Supp.2d 1059, 1067 (D.S.D. 2007). But see *Citizen Potawatomi Nation v. Salazar*, 624 F.Supp.2d 103, 109 (D.D.C. 2009) (finding the reasoning of those other district courts not sufficiently persuasive to overcome the strong presumption in favor of the APA standard).

<sup>142</sup> 25 U.S.C. § 458aaa-6(d); see also 25 U.S.C. § 450f(e)(1) (similar Title I provision).

<sup>143</sup> *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2191 (2012); see also 25 U.S.C. § 458aaa-11(f) (similar Title V provision).

<sup>144</sup> *Ramah*, 132 S. Ct. at 1291.

### III. SCF is Entitled to Direct and Indirect Contract Support Costs for Its MSPI and DVPI Contracts.

Since the MSPI and DVPI funds are covered by the ISDA, the Director has a non-discretionary duty to pay contract support costs. This is because the ISDA provides that these funds “shall be added” to the contract and “shall include” certain direct and indirect costs.<sup>145</sup> There may be times when the Director is unable to pay these costs because she has already depleted her contract support cost appropriation, but an insufficiency of appropriations does not wipe out the contractor’s ultimate right to be paid through a later damages remedy if one is pursued.<sup>146</sup>

The Government’s only response begs the question by assuming the government’s answer to be correct. Thus the Director argues that SCF is not entitled to contract support costs (1) because these awards must be treated as “full-cost recovery awards,” which must absorb all contract support cost burdens from within the program amounts, and because (2) SCF’s first proposed budgets—but importantly, not the “final offer” budgets actually at issue here—showed

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<sup>145</sup> 25 U.S.C. §§ 450j-1(a)(2), 450j-1(a)(3)(A); *see also Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 640 (“The Act . . . reflects a congressional concern with Government’s past failure adequately to reimburse tribes’ indirect administrative costs and a congressional decision to require payment of those costs in the future.” (internal citations omitted)); *see also* 25 U.S.C. § 450j-1(g) (“Upon the approval of [the] contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled . . .”); *see also* 25 U.S.C. § 458aaa-7(c) (Title V provision indicating Indian Tribe entitled to same costs it would receive under Title I).

<sup>146</sup> *See Cherokee*, 543 U.S. at 642 (“We recognize that agencies may sometimes find that they must spend unrestricted appropriated funds to satisfy needs they believe more important than fulfilling a contractual obligation. But . . . if necessary, [the Government may use] unrestricted funds for the more essential purpose while leaving the contractor free to pursue appropriate legal remedies arising because the Government broke its contractual promise.” (internal citations omitted)); *Ramah*, 132 S.Ct. at 2189 (“Although the agency itself cannot disburse funds beyond those appropriated to it, the Government’s valid obligations will remain enforceable in the courts.” (internal citation omitted)).

program funds being depleted to cover contract support cost expenses.<sup>147</sup> Naturally, if there are no contract support costs paid, those costs will have to be covered from somewhere, either by SCF reducing the programs to pay those costs or by SCF subsidizing the programs to pay those costs. Neither outcome alters the ISDA's command to "add" contract support costs to the program amounts.

A. *There is No Such Thing as a "Full-Cost Recovery Award" Under the ISDA*

The Director's assertion that these awards are "full-cost recovery awards" just means that she has now adopted the litigating position that no contract support costs are due, and that any fixed overhead requirements must therefore come out of the amounts provided for program funding. The problem for the Director is that she has no discretion under the Act to declare a contracted program to be "full-cost recovery" and thus exempt from the Act's contract support cost mandate.<sup>148</sup> Were it otherwise, the Director could designate any contracted program to be "full cost recovery" and thus ineligible for contract support cost funding—the very result Congress sought to avoid in amending the ISDA.<sup>149</sup>

The Director points to no authority to proclaim these programs to be "full-cost recovery awards." To the contrary, Congress deliberately circumscribed the Director's ability to interpret

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<sup>147</sup> Docket 5-7 at 5 (IHS Decision Letter); Docket 21 at 2 ¶ 6 (Weakhee Decl.).

<sup>148</sup> See *Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996) ("Congress has clearly expressed in the ISDA . . . its intent to circumscribe as tightly as possible the discretion of the Secretary" (internal citations omitted)).

<sup>149</sup> See *id.* ("The statute itself reveals that not only did Congress *not* intend to commit allocation decisions to agency discretion, it intended quite the opposite; Congress left the Secretary with as little discretion as feasible in the allocation of [CSCs]."); 25 U.S.C. § 450j-1(g) ("Upon the approval of a self-determination contract, the Secretary *shall add* to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section . . . ." (emphasis added)).

the ISDA's contract support cost provisions.<sup>150</sup> Indeed, it withheld from the Director any delegated authority whatsoever in contract support cost matters.<sup>151</sup>

The Director thus has no discretion to decide that a given set of program funds must absorb all overhead costs.<sup>152</sup> To suggest otherwise would effectively force Tribes to absorb the fixed cost of running these programs from within the programs themselves, thereby reducing the funds available for patient services—the very problem the ISDA's contract support cost provisions were carefully crafted to remedy.<sup>153</sup> Such a result would also be contrary to the congressional intent reflected in enacting the MSPI and DVPI initiatives, which was to focus the appropriated funds on such direct services as “substance abuse treatment and mental health issues” arising from methamphetamine use, and expanding programs and outreach advocacy into Native communities to implement “additional tools to better address child and family

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<sup>150</sup> *Ramah Navajo School Bd.*, 87 F.3d at 1344; *accord Shoshone-Bannock Tribes of Fort Hall Reservation v. Shalala*, 988 F.Supp. 1306, 1331 (D. Or. 1997) (“Congress never intended to commit the allocation of [CSC], full or partial, to agency discretion.” (internal citations omitted)).

<sup>151</sup> 25 U.S.C. § 450k(a)(1). *See also Ramah Navajo School Bd.*, 87 F.3d at 1344 (“The statute itself reveals that not only did Congress *not* intend to commit allocation decisions to agency discretion, it intended quite the opposite; Congress left the Secretary with as little discretion as feasible in the allocation of [CSCs].”).

<sup>152</sup> *See* 25 U.S.C. § 450j-1(a)(2) (“There shall be added . . . contract support costs . . . .”); *see also Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2189-90 (2012) (“If an agency overcommits its funds such that it cannot fulfill its contractual commitments, even the Government has acknowledged that ‘[t]he risk of over-obligation may be found to fall on the agency,’ not the contractor.” (internal citations omitted)).

<sup>153</sup> S. REP. NO. 100-274 at 8-9 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2627-28 (“Perhaps the single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts. . . . Tribal funds derived from trust resources, which are needed for community and economic development, must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility.”).

violence.”<sup>154</sup> The appropriations statutes say nothing about abrogating the regular contract support cost provisions of the ISDA, and nowhere suggest that if these funds were provided to Tribes a substantial portion would have to be used to cover overhead instead.<sup>155</sup>

Moreover, IHS has already conceded that these are not full-cost recovery awards. At least until this litigation IHS agreed that “indirect” contract support costs are payable on these funds, and it said so repeatedly: (1) in its August 2013 decision, (2) in the proposed MSPI and DVPI amendments, and (3) in other Tribes’ MSPI/DVPI funding amendments.<sup>156</sup> Thus, the Director’s position that SCF is not entitled to direct contract support costs is utterly inconsistent with all of her past positions on the issues, and with her past acknowledgement that “indirect” contract support costs are due on MSPI and DVPI funds consistent with the provisions of §§450j-1(a)(2) and (3)(A)(ii).<sup>157</sup> The weakness of the Director’s position here is further underscored by the fact that the Director has regularly reported to Congress on the total contract support cost requirements needed to carry out MSPI programs, which includes estimates for indirect and

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<sup>154</sup> Dep’t of the Interior, Env’t, and Related Agencies Appropriations Bill, 2008, H.R. Rep. No. 110-187 at 5 (2007); Explanatory Statement Submitted By Mr. Obey, Chairman of the House Committee on Appropriations, Regarding H.R. 1105, Omnibus Appropriations Act, 2009, 155 Cong. Rec. H1653, H2112 (Feb. 23, 2009).

<sup>155</sup> See, e.g., Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, 735 (2009).

<sup>156</sup> Docket 5-7 at 8 (IHS Decision Letter) (“[T]he IHS’s initial offer was to negotiate an amount for indirect CSC in Sections III(A)(1) of the MSPI/DVPI agreements.”); Docket 5-3 at 5 (FY 2012 FA Proposed Amendment 15); Docket 5-2 at 8 (FY 2012 FA Proposed Amendment 14); Docket 5-4 at 2 (Amendment 11 to SEARHC’s FY 2011-2013 FA, adding MSPI funds); Docket 5-4 at 5 (Amendment 10 to SEARHC’s FY 2011-2013 FA, adding DVPI funds).

<sup>157</sup> Docket 5-7 at 8 (IHS Decision Letter).

direct costs associated with these funds.<sup>158</sup> Either the Director was not being forthright there, or she is not being forthright with the Court here.

The Director also claims that IHS only has an obligation to pay “direct” contract support costs under §§450j-1(a)(2) and (3)(A)(i) when the underlying program is “recurring,”<sup>159</sup> a reprise of her earlier argument that characterizing these funds as non-recurring takes them out from under the ISDA. But the fact is that MSPI and DVPI funds have recurred every year since the initiatives began in 2008 (MSPI) and 2009 (DVPI), and they may go on indefinitely. It is also a fact that IHS routinely computes direct contract support costs on hundreds of millions of dollars of other “non-recurring” contracted funds,<sup>160</sup> and the Director offers no reason in her Decision for distinguishing those so-called non-recurring funds from these so-called non-recurring funds.

In short, Congress mandated in the ISDA that contract support costs “shall be added” to the contract amount—categorically, and without regard to the type of program or funding at issue.<sup>161</sup> Even the IHS Manual, which sets forth the internal agency policy on contract support

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<sup>158</sup> See, e.g. INDIAN HEALTH SERV., DEP’T OF HEALTH AND HUMAN SERVS., FISCAL YEAR 2010 REPORT TO CONGRESS ON FUNDING NEEDS FOR CONTRACT SUPPORT COSTS 7 (2012), *available at* [http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support/IHS\\_FY\\_2010\\_CSC\\_Shortfall\\_Report\\_-\\_2009\\_Narrative\\_and\\_Data.pdf](http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support/IHS_FY_2010_CSC_Shortfall_Report_-_2009_Narrative_and_Data.pdf) (identifying “a total CSC need of \$3,685,676 associated with FY 2009 MSPI-funded projects”).

<sup>159</sup> Docket 5-7 at 6 (IHS Decision Letter).

<sup>160</sup> 25 U.S.C. §458aaa-4(d)(2)(B) (funding agreements include recurring and non-recurring funds); Docket 6 at 3 ¶ 6 (Olson Decl.) (SCF’s FAs include funds for recurring and non-recurring programs); *see also* INDIAN HEALTH SERV., DEP’T OF HEALTH & HUMAN SERVS., FY 2012 REPORT TO CONGRESS ON FUNDING NEEDS FOR CONTRACT SUPPORT COSTS OF SELF-DETERMINATION AWARDS 4 (2013), *available at* [http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support/FY2012\\_CSC\\_Data.pdf](http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support/FY2012_CSC_Data.pdf) (columns E & F include funds for “recurring” and “non-recurring” programs).

<sup>161</sup> 25 U.S.C. § 450j-1(a)(2); *see also* 458aaa-7(c) (noting that “[t]he Secretary shall provide ... contract support costs specified under [§450j-1(a)]”).

costs, does not contain an exclusion for “non-recurring” program funds.<sup>162</sup> Thus, IHS’s claim to a non-recurring program exception to the ISDA’s “direct” contract support cost mandate is not based upon “controlling legal authority” and cannot be sustained by “clear and convincing evidence.”<sup>163</sup>

*B. These Costs are Not Duplicative of Sums Already Awarded*

The Director’s second contention—that SCF already included amounts for contract support costs in the budgets that SCF prepared—again begs the question and it is also incorrect. It is incorrect because the final budgets corresponding to the numbers in SCF’s final offer were crystal clear: no contract support cost requirements were included in the program budgets of the MSPI or DVPI funds.<sup>164</sup> Indeed, in the case of the MSPI budget, an extra column was added depicting those fixed costs as funded from “other sources”—ideally, from a contract support cost payment.<sup>165</sup> Moreover, the Director recognized that contract support costs were not being covered by program funds because IHS agreed to include the contract support cost need for these

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<sup>162</sup> The IHS Manual labels “direct” contract support costs as “recurring” costs because they are expected to be at the same level each year that the underlying program is contracted. In contrast, the Manual treats “indirect” costs as non-recurring because they must be recalculated each year depending upon the contractor’s new indirect cost rate. IHS Manual 6.3.2.D–E. These labels are beside the point: if the underlying program ends, whether it is the MSPI initiative or the closing of the entire Alaska Native Medical Center complex, “direct” contract support cost funding will cease too, despite their “recurring” label. See §450j-1(b)(2)(E) (cutting off payment rights when appropriations cease). The Manual’s classification of some contract support costs as “recurring” and others as “non-recurring” is done for IHS’s convenience and has nothing to do with a tribal contractor’s right to contract support costs for the underlying program. See *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996) (the ISDA withholds from the agency any delegated authority from Congress to limit tribal contractor rights to contract support costs).

<sup>163</sup> 25 U.S.C. §458aaa-6(c)(1)(A), (d).

<sup>164</sup> Docket 28 at 4-5 ¶¶ 13, 15-16 (Supp. Olson Decl.).

<sup>165</sup> Docket 28-1 at 2 (April 2013 Proposed MSPI Budget).

programs in the shortfall reports it submitted to Congress.<sup>166</sup> Even if a contractor's budget, prepared at the agency's direction, could somehow alter the Director's statutory duty under the ISDA to "add" in "full" contract support costs to the MSPI and DVPI program funds—and a statutory duty cannot be so nullified—the budgets at issue here were clear that program funds were not expected to cover the additional fixed contract support cost requirements associated with these two programs. (Nor did SCF waive any right to these costs by signing the amendments in earlier years: those amendments made clear that, while IHS was not paying contract support cost funding at the time of its award, these costs would be included in the shortfall report and thus could be the subject of a future damages claim.<sup>167</sup> Thus, SCF is entitled to contract support costs for these initiatives.

The Director's position is also a Catch 22, for even if SCF had shown a budget absorbing CSC costs inside the program, that situation would only arise because the Director had failed to pay the costs to SCF in the first place. The agency cannot fail to pay the costs, force a contractor to absorb the costs inside the program, and then claim it is free of the ISDA's mandate to add full contract support costs to the contract amount.

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<sup>166</sup> See, e.g. Docket 17-3 at 11 (4/28/09 Area Guidance) (Model Amendment to add MSPI funds).

<sup>167</sup> See Docket 5-1 at 11 (Letter dated Jan. 13, 2010 from Director Roubideaux) ("The language required for the MSPI awards is the same language IHS requires for other new and expanded programs. However, in the case of the MSPI, additional contract support cost (CSC) funds were not available because the IHS had allocated all available CSC funds to existing Tribal contracts and compacts."); see also *Southern Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1083 (10th Cir. 2011), *cert. denied* 133 S. Ct. 24 (2012) ("A tribe cannot be forced to enter into a self-determination contract waiving its entitlement to full CSC funding.").



#### **IV. SCF is Entitled to the Specific Amounts for CSCs Requested in its Final Offer.**

The Director rejected the specific amounts that SCF requested for contract support costs for several reasons. The Director carries a heavy burden when rejecting a funding proposal: she must make “a specific finding that clearly demonstrates or that is supported by a controlling legal authority, that . . . the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian Tribe is entitled under this [Act] . . . .”<sup>168</sup> In any ensuing “civil action,” “the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer . . . .”<sup>169</sup> The Director’s decision letter does not meet these high standards.

##### *A. The June 2013 Letters Constituted a Final Offer*

First, the Director argues she rejected the proposals in SCF’s June 25, 2013 letter because they were not a valid “final offer.”<sup>170</sup> Title V provides that when the parties cannot agree on the terms of a compact or a funding agreement, including funding levels, the Tribe may present a “final offer” to the agency.<sup>171</sup> The Director asserts that there was no disagreement between the parties here because SCF had not submitted an estimate of its contract support costs prior to those letters and there was no prior negotiation between the parties.<sup>172</sup>

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<sup>168</sup> 25 U.S.C. § 458aaa-6(c)(1)(A)(i).

<sup>169</sup> 25 U.S.C. § 458aaa-6(d).

<sup>170</sup> Docket 5-7 at 4 (IHS Decision Letter).

<sup>171</sup> 25 U.S.C. § 458aaa-6(b).

<sup>172</sup> Docket 5-7 at 4.

First, the statute does not specify any mandatory formal negotiation period, nor does it require the submission of prior estimates.<sup>173</sup> Second, this assertion is contrary to the facts: SCF and IHS negotiated the content of this funding agreement for almost a full year before this suit was filed.<sup>174</sup> Third, SCF also submitted revised budgets to IHS on April 23, 2013, showing estimates for contract support costs for both the MSPI and DVPI. Although SCF and IHS never agreed on these estimates, that does not mean they were never submitted; in fact, this disagreement is what prompted SCF to submit a “final offer” in the first place.

*B. The Amounts Requested for CSCs are Easily Verifiable So the Director Cannot Evade Her Burden to Justify Her Rejection of this Final Offer*

Second, the Director rejects SCF’s estimations of its contract support costs, arguing that “IHS cannot verify that these amounts meet the definition of CSC.”<sup>175</sup> However, these amounts are easily verifiable and were calculated in accordance with longstanding IHS policy. SCF proposed direct contract support cost funding levels of \$48,209 associated with the MSPI funds, and \$42,734 associated with the DVPI funds.<sup>176</sup> “Direct” contract support costs are comprised mostly of tribal fringe benefits that exceed the portion of federal fringe benefits that are often transferred to a tribe within a program budget.<sup>177</sup> SCF derived the direct contract support cost

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<sup>173</sup> 25 U.S.C. § 458aaa-6 (“In 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 a funding agreement (including funding levels), the Indian tribe may submit a final offer to the Secretary.”). The parties were clearly “unable to agree” as IHS maintained the amount awarded for direct contract support costs must be 0.

<sup>174</sup> See Docket 38 at 7 ¶ 24 (Answer) (admitting that “negotiations commenced in August 2012 and continued through June 2013”).

<sup>175</sup> Docket 5-7 at 5 (IHS Decision Letter).

<sup>176</sup> Docket 5-5 at 9-10 (Ex. 20: 6/25/13 Final Offer Letter to Director Roubideaux).

<sup>177</sup> Docket 6 at 13 ¶ 29 (Olson Decl.); IHS Manual 6-3.2.D.

requirement for these programs by applying the difference in fringe benefit rates to the “salaries” portion of its approved MSPI and DVPI program budgets.<sup>178</sup> SCF proposed indirect contract support cost funding levels of \$223,493 associated with the MSPI funds, and \$134,999 associated with the DVPI funds.<sup>179</sup> SCF derived these sums by applying its agency-approved indirect cost rate, which is issued by the DHHS Division of Cost Allocation, to the program amounts.<sup>180</sup> This is the precise same method that SCF and IHS applied to all of SCF’s other compact funds, and it is the method prescribed in the IHS Manual for determining indirect contract support cost requirements.<sup>181</sup> Thus, the Director could easily determine if these amounts met “the definition of CSC” or are “in excess of the applicable funding level.”<sup>182</sup> Her apparent choice to do nothing on this issue during the three months she developed her decision only demonstrates the Director’s failure to even attempt to meet her burden under the statute.

The Director’s assertions fall far below the high threshold Congress established for a “rejection” of a final offer. The rejection of SCF’s computations is not supported by a “specific finding” that “clearly demonstrates” that SCF’s requested sums for indirect costs are higher than

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<sup>178</sup> Docket 6 at 13-14 ¶¶ 29–31 (Olson Decl.). Thus, contrary to IHS’s assertions, these sums are not duplicative because the amounts requested are for fringe benefits that exceed the federal portion already included in the program award.

<sup>179</sup> The MSPI indirect contract support cost amount of \$223,493 is comprised of \$206,861 associated with the MSPI program plus \$16,632 of indirect associated with the direct contract support cost amount. Docket 5-5 at 10 (6/25/13 Final Offer Letter to Director Roubideaux); *see also* IHS Manual 6.3.4E(1) & 6.3.2E(1) (computing indirect on a base which includes direct contract support costs). The DVPI indirect amount of \$134,999 is similarly comprised of \$124,016 plus \$10,983. Docket 5-5 at 11.

<sup>180</sup> Docket 6 at 12-13 ¶ 27 (Olson Decl.).

<sup>181</sup> IHS Manual 6-3.2.E(1).

<sup>182</sup> Docket 5-7 at 5 (IHS Decision Letter).

the statutory standard for the award of “administrative” contract support costs.<sup>183</sup> IHS’s position is particularly weak given that SCF and IHS have been contracting for years, SCF used the same methods to calculate indirect costs that it always uses, and IHS has access to all of SCF’s audits and related indirect cost materials necessary to verify these calculations.<sup>184</sup> In effect, the Director’s decision places the burden on SCF to justify the amounts requested, contrary to the ISDA’s mandate. As in *Seneca*, “the Secretary fundamentally misunderstands the burden placed on her by the statute. The Secretary bears the burden of ‘clearly demonstrating the validity of the grounds for declining [a] contract proposal (or portion thereof),’ 25 U.S.C. § 450f(e)(1); it is not [SCF]’s burden to justify the validity of its position.”<sup>185</sup>

*C. The Director’s Incurred Cost Approach is Wrong*

Third, the Director maintains that an award of contract support costs is limited to the costs actually incurred by SCF from operating these initiatives, which the agency would then reimburse.<sup>186</sup> This assertion is wrong for multiple reasons. The Director’s position is contrary to the ISDA’s contract support cost provisions, which mandates an up-front payment of these costs, as the amount a contractor “actually incur[s]” cannot be known until the contract year is over and audits are completed.<sup>187</sup> It also goes against the Act’s mandate that “the Secretary shall transfer

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<sup>183</sup> 25 U.S.C. § 458aaa-6(c)(1)(A); 25 U.S.C. § 450j-1(a)(3)(A)(ii) (explaining allowable costs).

<sup>184</sup> Docket 6 at 12-14 ¶¶ 27-28, 32 (Olson Decl.).

<sup>185</sup> *Seneca Nation of Indians v. U.S. Dep’t of Health & Human Servs.*, 2013 WL 2255208, at \*16 (D.D.C. 2013).

<sup>186</sup> Docket 5-7 at 7 (IHS Decision Letter).

<sup>187</sup> *See Id.* (“This type of theoretical application of an indirect rate agreement percentage fails to appreciate that CSC is applicable only for costs that SCF will actually incur rather than for costs it may have incurred on the basis of additional direct CSC funds.”); 25 U.S.C. §§ 450j-1(a)(2), 450j-1(g).

to the Indian tribe all funds provided for in the funding agreement . . . not later than 10 days after the apportionment of such funds by the Office of Management and Budget . . . ,”<sup>188</sup> an amount that necessarily would include contract support costs.

The notion that the sums awarded for contract support costs are payable only as reimbursement for costs after they are incurred is also contrary to the ISDA’s provision that, once funds are paid, a contractor may “reallocate or redirect funds for such [contracted] programs, services, functions, and activities (or portions thereof) in any manner which the Indian tribe deems to be in the best interest of the health and welfare of the Indian community being served,” such as redirecting any remaining contract support funds to MSPI drug treatment services.<sup>189</sup> Along similar lines, the Director’s position is contrary to the ISDA’s direction that unspent funds can be carried over to the next year, rather than paid back to the agency.<sup>190</sup> And, it is also contrary to Congress’s decision to authorize money damages when funds are not paid, and when, because of that non-payment, costs were actually not incurred.<sup>191</sup>

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<sup>188</sup> 25 U.S.C. § 458aaa-7(a).

<sup>189</sup> 25 U.S.C. § 458aaa-5(e). *See also* Docket 5-1 at 11 (Letter dated Jan. 13, 2010 from Director Roubideaux) (“Tribes are also authorized to rebudget within their approved budgets to address all allowable contract costs.”).

<sup>190</sup> 25 U.S.C. § 458aaa-7(i).

<sup>191</sup> *See* 25 U.S.C. § 450m-1(a) (provision authorizing district court to order “appropriate relief” for contract claims, including money damages). *See also* S. REP. NO. 100-274, at \*37-38 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2656-57 (see n.2) (explaining at length Congress’s conclusion that a limitation of remedies to “incurred” costs “is an unacceptable argument”); *compare with* 25 U.S.C. § 450j-1(a)(5) *and* § 450j-1(a)(6) (two specific subcategories of contract support costs not at issue here where Congress did limit recovery to “incurred” costs).

Finally, the Director's contention that either the ISDA or the *Ramah* decision limits contract support costs to "incurred costs" is simply wrong. The ISDA in § 450j-1(a)(2) contains no such limitation; indeed, Congress actually rejected such a limitation.<sup>192</sup> Subsection 450j-1(a)(3) states that contract support costs must "include" certain incurred costs, but "[t]he word 'includes' is usually a term of enlargement, and not of limitation."<sup>193</sup> Thus, Congress ensured that the Secretary's contract support cost payments must include certain "incurred" costs, but it did not limit the contract price to such costs. The Director also mistakes a general description of the issue presented in the *Ramah* decision as a holding in that case.<sup>194</sup> Accurately, the *Ramah* case never litigated, much less addressed, what does and does not qualify as contract support costs, as the case concerned only the government's liability for agreed-upon costs.<sup>195</sup>

As IHS improperly rejected SCF's final offer, IHS must now award the remainder of the contract amendments SCF requested in its final offer.

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<sup>192</sup> Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, §205, 102 Stat. 2285, 2292 (1988).

<sup>193</sup> *Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008) (quoting 2A Singer § 47:7, p. 305).

<sup>194</sup> Docket 5-7 at 7 (IHS Decision Letter) (discussing statement in *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2186 (2012) that "ISDA mandates that the Secretary shall pay the full amount of 'contract support costs' incurred by tribes in performing their contracts").

<sup>195</sup> *Ramah*, 132 S. Ct. at 2186 ("At issue in this case is whether the Government must pay [contract support] costs when Congress appropriates sufficient funds to pay in full any individual contractor's contract support costs, but not enough funds to cover the aggregate amount due every contractor.")

*D. SCF is Entitled to a Declaration that IHS Wrongly Withheld the MSPI and DVPI Program Funds*

The Government has argued that SCF's claims regarding the program funds are moot because IHS has now paid these sums.<sup>196</sup> While IHS did issue a contract amendment paying SCF the FY 2012 MSPI and DVPI program funds, it only did so after this suit was filed, and it is obvious that the suit—and not IHS's legal obligation—was the catalyst for payment. In the interim, SCF was required to draw on its reserves in order to continue running the programs.<sup>197</sup>

The ISDA provides that “[i]f the Secretary rejects an offer . . . the Secretary shall provide the Indian tribe with the option of entering into the severable portions of a final proposed . . . funding agreement, or provision thereof . . . that the Secretary did not reject . . . .”<sup>198</sup> This the Director failed to do. The Director agreed that SCF was owed these sums, and the parties only disputed the award of contract support costs.<sup>199</sup> Despite that fact, IHS delayed 13 months until a lawsuit was filed to finally issue the funds with the required severable contract amendment. This was contrary to the ISDA. As the Director's actions were unlawful, SCF is entitled to declaratory relief to prevent such harms from recurring in the future.

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<sup>196</sup> Docket 17 at 23 (PI Opp.).

<sup>197</sup> Docket 6 at 11 ¶ 24 (Olson Decl.). IHS must have anticipated such as a result as the Supreme Court recognized that “Tribes respond[] to these shortfalls by reducing ISDA services to tribal members, diverting tribal resources from non-ISDA programs, and foregoing opportunities to contract in furtherance of Congress' self-determination objective.” *Ramah*, 132 S. Ct. at 2187 (internal citations omitted).

<sup>198</sup> 25 U.S.C. § 458aaa-6(c)(1)(D).

<sup>199</sup> Docket 38 at 8 ¶ 29 (Answer) (admitting that “IHS and SCF agree that SCF is entitled to \$599,596 in MSPI program funds and \$482,554 in DVPI program funds.”); Docket 5-2 at 7 (Ex. 8: Proposed Project Year 3 DVPI Amendment) (noting award of \$482,554 in DVPI program funds); Docket 5-2 at 10 (Ex. 10: Email re MSPI award) (noting award of \$599,596 for program funds).

## CONCLUSION

For the foregoing reasons, the Director's August 7, 2013 decision constitutes an illegal rejection of SCF's final offer and must be overturned. Under the ISDA, the remedy is not a remand but (1) an order directing IHS to award to SCF direct and indirect contract support costs in the amounts stated in SCF's final offer; and (2) declaratory relief holding that the Director's actions in withholding the program funds to have been unlawful.

Respectfully submitted this 20th day of December 2013.

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### Certificate of Service

I hereby certify that on the 20th day of September 2013 a true and correct copy of the foregoing **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** was served electronically via the Court's CM/ECF system upon:

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