UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PYRAMID LAKE PAIUTE TRIBE,	
PLAINTIFF,	CASE 1:13-CV-01771-RLW
v.	
KATHLEEN SEBELIUS, et al.,	**MOTION FOR SUMMARY JUDGMENT**
DEFENDANTS.	ORAL HEARING REQUESTED

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Pyramid Lake Paiute Tribe (hereinafter "Tribe"), by and through the undersigned counsel, respectfully moves, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in the Tribe's favor on the ground that there is no genuine issue of material fact. The essential facts of this case, as set forth in the accompanying Plaintiff's Statement of Material Facts Not In Genuine Dispute, are not in dispute. Therefore, as demonstrated in the accompanying Memorandum of Points and Authorities, the Tribe is entitled to judgment as a matter of law.

Specifically, the Tribe asks that this Court enter judgment as follows:

1. Declaring that Defendants violated the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 450, *et seq*, by terminating the EMS program after receiving the Tribe's proposal to contract that program;
2. Declaring that the Tribe's EMS proposal, as proposed, is approved by operation of law;

3. Granting mandamus and injunctive relief pursuant to this Court's authority under 25 U.S.C. § 450m-1(a) to compel Defendants to approve the Tribe's EMS proposal and to enter into and fund a self-determination contract with the Tribe to carry out the EMS program as proposed;
4. Awarding interest pursuant to this Court's authority under 25 U.S.C. § 450m-1(a) on the amounts requested in the proposal from the date of the deemed approval of the final offer under the Prompt Payment Act or other applicable law;
5. Awarding reasonable attorney fees and expenses pursuant to this Court's authority under 25 U.S.C. § 450m-1(a) in favor of the Plaintiff under the Equal Access to Justice Act, 28 U.S.C. § 2412, and any other applicable law; and
6. Granting such other relief as the Court deems just.

In support of its Motion for Summary Judgment, the Tribe relies on the pleading and file in this action, Plaintiff's Statement of Material Facts Not In Genuine Dispute, Plaintiff's Memorandum of Points and Authorities, and all exhibits associated therewith. In addition, the Tribe requests an oral hearing on this motion pursuant to LCvR 7(f).

Respectfully submitted,

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DATED: January 27, 2014.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PYRAMID LAKE PAIUTE TRIBE,	)	
	)	CASE 1:13-CV-01771-RLW
PLAINTIFF,	)	
	)	
v.	)	**MEMORANDUM OF POINTS**
	)	**AND AUTHORITIES**
KATHLEEN SEBELIUS, et al.,	)	**IN SUPPORT OF PLAINTIFF'S**
	)	**MOTION FOR SUMMARY**
DEFENDANTS.	)	**JUDGMENT**
	)	
	)	ORAL HEARING REQUESTED
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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY

Plaintiff, the Pyramid Lake Paiute Tribe (hereinafter "Tribe"), is a federally-recognized Indian Tribe that operates its own health services delivery program for its members and other eligible Indians and Alaska Natives in the State of Nevada. The Tribe does so pursuant to a self-determination contract with the Indian Health Service (IHS) under the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 450, *et seq*.[2] The Tribe brings this action to appeal IHS's declination of the Tribe's proposal to contract for an Emergency Medical Service/Ambulance program (hereinafter "EMS program") under the ISDEAA.

The EMS program at issue has been operated by IHS for approximately 20 years at Fort McDermitt, Nevada. IHS has operated the EMS program as part of IHS's outpatient clinic facility at Fort McDermitt, which provides health services to the Fort McDermitt Paiute and Shoshone Tribes of the Fort McDermitt Indian Reservation (hereinafter "FMT"), and its reservation community. By resolution of its governing body, the FMT sanctioned the Tribe as its "tribal organization" to contract the EMS program at Fort McDermitt and provide EMS services to the FMT. The Tribe thereafter submitted its proposal to IHS seeking to contract the EMS program.

The ISDEAA directs the Secretary, "upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts," and requires the Secretary to either (1) approve the proposal and award the contract or (2) decline the

[2] Hereafter, when referring to particular sections and subsections of the ISDEAA in the text of this Memorandum, we use the commonly used Public Law sections, followed by the citations in Title 25, United States Code.

proposal under one or more of the five listed declination criteria. 25 U.S.C. §§ 450f(a)(1), (2). However, in this case, the IHS terminated the EMS program *after* receiving the FMT's Resolution and the Tribe's contract proposal, noting that a non-tribal third party—the Humboldt General Hospital (hereafter "Humboldt")—is an available, alternate provider of EMS services from whom IHS could instead purchase EMS services for the FMT. IHS then declined the Tribe's contract proposal, reasoning that purchasing EMS services from Humboldt, rather than entering an ISDEAA contract for such services with the Tribe, was in the best interests of the FMT. IHS had no legal authority to do so and violated the ISDEAA.

The IHS's declination of the Tribe's contract proposal was not properly based on any of the five declination criteria, as required by Section 102(a)(1)–(2) of the ISDEAA, 25 U.S.C. §§ 450f(a)(1)–(2), and the ISDEAA does not afford IHS the discretion to terminate an ongoing program after receipt of a tribe's contract proposal. 25 U.S.C. § 450j-1(a)(1).

STATUTORY AND REGULATORY BACKGROUND

The purpose of the ISDEAA is to reduce Federal domination of Indian programs and promote tribal self-determination and self-reliance. *See* 25 U.S.C. § 450a(b); *Cherokee Nation v. Leavitt*, 543 U.S. 631, 639 (2005). To this end, Congress established a mandatory contracting process in the ISDEAA, Section 102(a), which directs the Secretary, on the request of an Indian tribe by resolution, to enter into a self-determination contract with a "tribal organization to plan, conduct, and administer programs or portions thereof." 25 U.S.C. § 450f(a)(1). A "tribal organization" is defined in Section 4 in pertinent part as: (1) the governing body of a Federally recognized Indian tribe; or (2) any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body.

25 U.S.C. § 450b(*l*).

Section 106(a)(1) requires the Secretary to fund an ISDEAA contract in an amount "not less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract." 25 U.S.C. § 450j-1(a)(1). This is known as the "Section 106(a)(1) amount." Additionally, Sections 106(a)(2)–(3) require IHS to also provide contract support costs, 25 U.S.C. §§ 450j-1(a)(2)–(3), and Section 106(a)(5) requires that IHS provide startup costs. 25 U.S.C. § 450j-1(a)(5).

Section 102 governs self-determination contracts, including submission and review of contract proposals, and it provides as follows, in pertinent part:

> If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4),[3] the Secretary *shall,* within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that–
>
> (A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;
>
> (B) adequate protection of trust resources is not assured;
>
> (C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;
>
> (D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a) [of the ISDEAA]; or
>
> (E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under

[3] The exception in paragraph (4) allows the Secretary to approve a severable portion of the proposal, or a funding amount different than what was proposed, at a level authorized under Section 102(a). *See* 25 U.S.C. § 450f(a)(4). When a tribal organization requests more than IHS would otherwise provide for operating the ongoing program directly, then Section 102(a)(4) requires the Secretary to approve the contract proposal at the amount IHS would have provided and decline the rest under Section 102(a)(2)(D). 25 U.S.C. §§ 450f(a)(4); 450f(a)(2)(D).

> [Section 106(a)(1) of the ISDEAA] because the proposal includes activities that cannot lawfully be carried out by the contractor.

25 U.S.C. § 450f(a)(2) (emphasis added).

For every ISDEAA contract proposal, Section 102(a)(2) restricts the Secretary's discretion to either: (1) approve the proposal and award the contract; or (2) decline the proposal based on a finding that clearly demonstrates or is supported by controlling legal authority that at least one of the five listed declination criteria applies, unless the exception in Section 106(a)(4) applies. 25 U.S.C. § 450f(a)(2). *See also* n.3.

In each declination letter, Section 102(b) requires that the Secretary shall: (1) state any objections in writing to the tribal organization; (2) provide assistance to the tribal organization to overcome the stated objections; and (3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter, and the opportunity to appeal on the objections raised, *except* that the tribe or tribal organization may, in lieu of filing an administrative appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to Section 110(a). 25 U.S.C. § 450f(b).

Section 110(a) provides:

> The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under

> section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

25 U.S.C. § 450m-1(a).

The regulations governing self-determination contracting under Title I of the ISDEAA are set forth at 25 C.F.R. Part 900. The regulations contain declarations of Secretarial policy governing agency conduct with respect to contracting with Indian tribes and tribal organizations under the ISDEAA. For example, 25 C.F.R. § 900.3(b)(1) provides:

> (b) *Secretarial policy*. (1) It is the policy of the Secretary to facilitate the efforts of Indian tribes and tribal organizations to plan, conduct and administer programs, functions, services and activities, or portions thereof, which the Departments are authorized to administer for the benefit of Indians because of their status as Indians. The Secretary shall make best efforts to remove any obstacles which might hinder Indian tribes and tribal organizations including obstacles that hinder tribal autonomy and flexibility in the administration of such programs.

Subpart E of the regulations, §§ 900.20–33, governs declination procedures. While 25 C.F.R. § 900.24 provides that the Secretary may only decline a contract proposal based on one or more of the five declination criteria, 25 C.F.R. § 900.23 provides that the Secretary may not decline to enter into a contract with an Indian tribe or tribal organization based on any objection that can be overcome by the contract.

STATEMENT OF UNDISPUTED MATERIAL FACTS

The Tribe is a federally recognized Indian tribe. 78 FED. REG. 26384 (May 6, 2013). As such, the Tribe provides a range of health care services within the State of Nevada to its members and other eligible Indians and Alaska Natives, pursuant to a self-determination contract and Annual Funding Agreement (AFA) with the IHS under the ISDEAA, 25 U.S.C. § 450, *et seq*. *See* Exhibit A (CY 2013 Annual Funding Agreement by and between Pyramid Lake Paiute

Tribe and the United States of America, Department of Health and Human Services, Indian Health Service).

The FMT is a federally recognized Indian tribe located on the Fort McDermitt Indian Reservation in the State of Nevada. 78 FED. REG. 26384 (May 6, 2013); Exhibit B (Letter from Dorothy A. Dupree, Director, Phoenix Area Indian Health Service (PAIHS) to the Tribe's Chairman, Elwood Lowery, dated September 30, 2013, declining the Tribe's EMS contract proposal) at 1. IHS provides health services at the IHS's Fort McDermitt Clinic facility, which is operated by the IHS Schurz Service Unit, to members of the FMT and other eligible Indians living on the Fort McDermitt Indian Reservation and in the surrounding service area. Exhibit B at 1. For approximately 20 years, IHS has directly operated the EMS program through its clinic facility at Fort McDermitt. Exhibit B at 1.

On January 13, 2013, the FMT's Tribal Council adopted Resolution No. FM13-001-002 sanctioning the Tribe as the FMT's tribal organization for purposes of contracting the EMS program at Fort McDermitt under the ISDEAA. Exhibit C (Tribe's Contract Proposal from Chairman Lowery to Area Director Dupree dated June 21, 2013) at 61-62; Exhibit D (IHS Report presented at March 21, 2013 meeting of the Fort McDermitt Clinic Governing Board) at 4. The Director, Phoenix Area Office, IHS (PAIHS) acknowledged receipt of that Resolution by letter to the FMT dated March 13, 2013. Exhibit C at 59. The Tribe thereafter submitted its proposal, dated June 21, 2013, to the PAIHS to contract the EMS program at Fort McDermitt on behalf of the FMT. *See* Exhibit C. The PAIHS received the Tribe's contract proposal on July 8, 2013. Exhibit B at 1.

In its proposal, the Tribe asked to assume operation of the Fort McDermitt EMS program,

on behalf of the FMT, under the Tribe's existing self-determination contract and AFA with IHS. Exhibit C at 3-11. The Tribe proposed that the EMS program and associated funding be incorporated into the Tribe's AFA in 2013. Exhibit C at 4.

The Tribe proposed $502,611.30 for operating costs, $136,139 for contract support costs, and $196,739 for startup costs. Exhibit C at 3; Exhibit B at 5. The proposed $502,611.30 amount for operating costs is the same amount that IHS expended to operate the EMS program for fiscal year 2012. Exhibit B at 5; Exhibit D at 1-2.

On August 19, 2013, approximately six weeks after PAIHS's receipt of the Tribe's contract proposal and over five months after receipt of the FMT's Resolution, IHS terminated the Fort McDermitt EMS program. Exhibit B at 4. IHS determined that Humboldt is an available, alternative provider of EMS services for FMT, Exhibit B at 2, and that IHS can purchase such services under the IHS's contract health services (CHS) program[4] using CHS funds. Exhibit D at 7.

Several weeks after IHS terminated its EMS program at Ft. McDermitt, the IHS declined the Tribe's contract proposal (hereafter "Declination Letter"). Exhibit B at 1.

STANDARDS OF REVIEW

A. Summary Judgment

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *Arrington v. United States*, 473 F.3d 329, 333 (D.C. Cir. 2006) (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986)). The movant bears the initial

[4] "Contract health services" means those health services "provided at the expense of the Indian Health Service from public or private medical or hospital facilities other than those of the Service." 42 C.F.R. § 136.21(e).

burden of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Fed.R.Civ.P. 56(c); *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1179 (D.C. Cir. 2011) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

However, "'[t]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.'" *Theodus v. McLaughlin*, 852 F.2d 1380, 1382 (D.C. Cir. 1988) (citing *Anderson*, 477 U.S. at 247–248) (emphasis in original). A material fact is one that "might affect the outcome of the suit under governing law." *Hendricks v. Geithner*, 568 F.3d 1008, 1012 (D.C. Cir. 2009) (citing *Anderson*, 477 U.S. at 248–251). In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than "[t]he mere existence of a scintilla of evidence" in support of its position. *Id*. at 252. Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. If the evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249–250 (citations omitted).

B. ISDEAA

This Court has applied the *de novo* standard of review to an appeal of an agency declination under the ISDEAA. *Seneca Nation of Indians v. U.S. Dep't of Health and Human Services*, 945 F. Supp. 2d 135, 141–142 (D.D.C. 2013). Other courts have also applied a *de*

novo standard of review to claims brought under the ISDEAA. *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F. Supp. 2d 1059, 1066–67 (D.S.D. 2007); *Cherokee Nation of Okla. v. U.S.*, 190 F. Supp. 2d 1248, 1258 (E.D. Okla. 2001), *rev'd on other grounds by Cherokee Nation*, 543 U.S. 631; *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306, 1318 (D. Or. 1997)).

BURDEN OF PROOF

Under Section 102(e) of the ISDEAA, the burden is on the Secretary to establish, by clearly demonstrating, the validity of the grounds for declining the Tribe's contract proposal. 25 U.S.C. § 450f(e).

RULES OF CONSTRUCTION

When courts consider laws governing relations between the United States and Indian tribes, the Indian law canons of statutory construction apply: "'[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.' . . . [S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444–1445 (D.C. Cir. 1988) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (citations omitted)). *See also Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 421 (D.D.C. 2008) ("The result, then, is that if the [statutory text] can reasonably be construed as the [t]ribe [or tribal organization] would have it construed, it *must* be construed that way." (quoting *Muscogee (Creek) Nation*, 851 F.2d at 1445 (emphasis in original) (alterations in *Tunica-Biloxi Tribe of La.*)).

This canon of statutory construction is explicitly included in the model agreement (self-

determination contract) set forth in Section 108 of the ISDEAA. 25 U.S.C. § 450(*l*)(c). Section 1(a)(2) of the model agreement provides that: "[e]ach provision of the [ISDEAA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractible under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor." 25 U.S.C. § 450(*l*)(c).

The Indian law canons of statutory construction, combined with language in the model agreement, leave no question as to the absence of deference to an agency interpretation of ISDEAA provisions under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Instead, *Chevron*-type deference is not applied in this Circuit where "[t]he governing canon of construction requires that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (quoting *Montana*, 471 U.S. at 766 (1985)). Because this is the rule even when a competing canon might otherwise require deference to an agency interpretation, *see Albuquerque Indian Rights v. Lujan*, 930 F.2d. 49, 59 (D.C. Cir. 1991), IHS is given no deference to interpret ISDEAA provisions under *Chevron*.

SUMMARY OF ARGUMENT

IHS unlawfully declined the Tribe's EMS contract proposal in violation of the ISDEAA. None of the grounds on which IHS relied to decline the proposal are valid or applicable and thus the IHS was required by the ISDEAA to award and fully fund the Tribe's contract proposal.

First, Congress was clear that ISDEAA contracting is mandatory and not a matter of

discretion for IHS. In this case, instead of following the ISDEAA as required, IHS—after receipt of the FMT's Resolution and the Tribe's proposal—terminated the EMS program in favor of purchasing EMS services for FMT from a third party. Exhibit B at 4; Exhibit D at 7. IHS had neither the authority nor the legal discretion to take such actions.

Second, case law cited by the IHS in its Declination Letter to suggest that IHS has discretion, namely *Lincoln v. Vigil*, 508 U.S. 182 (1993), does not apply to the facts at hand. *See* Exhibit B at 4. *Lincoln* is an APA case, yet the Tribe has not raised a claim under the APA and the ISDEAA is intervening law to apply to IHS's action. After receipt of the Tribe's contract proposal, Section 102(a)(2) restricts IHS's discretion and requires the Secretary to either: (1) approve the Tribe's contract proposal and award the contract; or (2) decline the proposal in accordance with the Section 102(b) declination requirements. 25 U.S.C. §§ 450f(a)(2), (b). Terminating the EMS program after receipt of the FMT's Resolution and the Tribe's contract proposal is not an option available to IHS.

Third, IHS's declination of the Tribe's proposal improperly relies on Section 102(a)(2)(D) of the ISDEAA, 25 U.S.C. § 450(a)(2)(D), and inapplicable case law, *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell*, 729 F.3d 1025 (9th Cir. 2013), to claim that the amount of funding available for contracting the EMS program is zero dollars ($0). Exhibit B at 5. In *Los Coyotes*, the Ninth Circuit determined that the ISDEAA does not require the Bureau of Indian Affairs to create and fund a wholly *new* law enforcement program that never existed before. *Los Coyotes*, 729 F.3d at 1035. The Tribe's contract proposal did not ask the IHS to create a *new* EMS program, because IHS had an *existing* EMS program at Fort McDermitt for approximately 20 years, and that program existed at the time IHS received the FMT's Resolution

and the Tribe's contract proposal. Exhibit B at 1, 5. *Los Coyotes*, thus, does not support IHS's improper actions. Furthermore, the object and purpose of the ISDEAA, as well as Section 102(a)(2) and Section 106, 25 U.S.C. §§ 450f(a)(2) and 450j-1 respectively, prevent IHS from reducing the amount of funding for the EMS program to zero dollars ($0) in order to keep the Tribe from contracting the program.

Finally, there is no basis in the ISDEAA for IHS's assertion that funds supporting a contractible program, or portion of a program, be themselves programs, functions, services, and activities (PFSAs) subject to contracting separately from the PFSAs they support. Nothing in the ISDEAA makes third-party revenues legally unavailable for contracting. Any of IHS's objections to using third-party revenue to fund a portion of the Tribe's contract, such as the non-recurring nature of such funds, can be overcome through the contract and thus cannot form the basis for declination. 25 C.F.R. § 900.23.

ARGUMENT

I. IHS did not have the legal discretion to terminate the EMS program after receiving FMT's Resolution and the Tribe's proposal.

As a matter of law, after IHS received the Tribe's proposal, IHS had only two choices: (1) either approve the proposal and award the contract; or (2) decline it under the terms of Section 102(a)(2), 25 U.S.C. § 450f(a)(2). The ISDEAA does not allow IHS to treat the Tribe's contract proposal as optional and instead choose to purchase EMS services from a third party.

The Declination Letter states the following as one basis for IHS's decision to end the Fort McDermitt EMS program and decline the Tribe's contract proposal:

> The EMS program's operating losses, which were borne by the Fort McDermitt Clinic, force the Agency to conclude that the EMS program was financially untenable and that the funds used to support the program could be

> better utilized at the Clinic. Indeed, because the EMS program was actually taking money away from the Fort McDermitt Clinic, continuing to operate the EMS program at such a severe deficit would not be in the interest of IHS beneficiaries. Accordingly, PAIHS ceased operation of the Fort McDermitt EMS program on August 19, 2013. This decision was discussed with the Fort McDermitt Tribe on September 12, 2013. In making this decision, PAIHS exercised its lawful discretion to allocate its limited funds from its lump sum appropriation in the manner it believes would best meet its duty to provide health care to IHS beneficiaries. *See, Lincoln v. Vigil*, 508 U.S. 182 (1993).

Exhibit B at 4.

IHS's reasoning undermines and violates the ISDEAA. After receipt of the Tribe's proposal to contract the EMS program under the ISDEAA on behalf of the FMT, IHS did not have the discretion under the ISDEAA to terminate the EMS program and refuse to contract it to the Tribe in favor of purchasing services from a third party. Section 102(a)(1) provides that "the Secretary *is directed*, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof . . . ." 25 U.S.C. § 450f(a)(1) (emphasis added). Under Section 102(a)(2), once a tribal organization submits a contract proposal, the "Secretary shall," within 90 days of receipt, approve the proposal and award the contract, unless the Secretary declines the proposal under one or more of the five declination criteria listed in Section 102(a)(2). 25 U.S.C. § 450f(a)(2). This is mandatory language and leaves no discretion to IHS.

IHS's reliance on the Supreme Court's decision in *Lincoln v. Vigil*, as a basis for the Agency to exercise discretion not authorized under the ISDEAA, is misplaced. First, in *Lincoln*, IHS decided to discontinue a directly operated program that provided diagnostic and other health services to handicapped Indian children in the Southwest and reallocate the program's resources. The plaintiffs brought an action against the Secretary challenging IHS's decision under the APA.

The Court determined that in the absence of a specific law or regulation applicable to IHS's decision, IHS had the discretion to allocate its lump-sum appropriation in this manner. Thus, the Court held that IHS's decision was not judicially reviewable under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), because it was "committed to agency discretion by law." *Lincoln*, 508 U.S. at 193.

In *Lincoln*, there was no law or regulation applicable to the handicapped Indian children's program under which the Court could review IHS's decision to terminate the program. The ISDEAA was not involved. Here, IHS made its decision to terminate its operation of the EMS program *after* receiving the FMT's Resolution and the Tribe's ISDEAA contract proposal. Receipt of the Tribe's contract proposal made the ISDEAA intervening law to apply. *See* 25 U.S.C. § 450f(a)(1). The ISDEAA restricts IHS's discretion. *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996) (Congress "clearly expressed . . . its intent to circumscribe as tightly as possible the discretion of the Secretary" in the ISDEAA.). After receipt of the FMT's Resolution and the Tribe's contract proposal, IHS did not have the legal option of terminating the EMS program in favor of purchasing EMS services from a third party. *See* 25 U.S.C. § 450f(a)(1).

The *Seneca* Court also noted that "[i]n seeking to give effect to the provisions of the ISDEAA, as with any statute, the Court must treat the 'object and policy' of that statute as its polestar." *Seneca*, 945 F. Supp. 2d at 142 (citation omitted). It is clear from Congress' declaration of policy in Section 3 of the ISDEAA that the "object and policy" of the ISDEAA is to "permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct,

and administration of those programs and services."[5] 25 U.S.C. § 450a(b). IHS's action here illustrates the "Federal domination" that Congress sought to eliminate through the ISDEAA contracting process. By substituting its own judgment for FMT's decision that the Tribe should provide EMS services on FMT's behalf, IHS violated this key congressional policy contained in the ISDEAA and its implementing regulations.

Applicable regulations state that it is Secretarial policy "to facilitate" the efforts of tribes and tribal organizations to contract under the ISDEAA and that the Secretary "shall make best efforts to remove any obstacles" that might hinder tribal contracting. 25 C.F.R. § 900.3(b)(1). Rather than remove obstacles, IHS here has created them by terminating the EMS program, choosing instead to purchase EMS from a third party using CHS funds, and re-allocating any "savings" to other services at the Clinic. No matter how IHS seeks to rationalize its conduct in the Declination Letter, IHS's assertion that, under *Lincoln*, it has the discretion to create these obstacles to the Tribe's contracting the EMS program, runs contrary to the ISDEAA and the Act's implementing regulations.

II. IHS improperly declined the Tribe's contract proposal under Section 102(a)(2)(D).

The Declination Letter states the following as an additional basis for IHS's declination of the Tribe's contract proposal:

> Under the ISDEAA, a tribal contractor's funding is based on the amount the "Secretary would have otherwise provided for the operation of the programs or portions thereof . . ." ISDEAA § 106(a)(1); 25 U.S.C. § 450j-1(a)(1). Because PAIHS ended the EMS program effective August 19, 2013, the amount available for contracting in FY 2014 pursuant to 25 U.S.C. § 450j-1(a)(1) is zero. PAIHS is therefore declining the Tribe's funding request of $502,611.30

[5] *Accord, Cherokee Nation*, 543 U.S. at 639 (The ISDEAA "seeks greater tribal self-reliance brought about through more 'effective and meaningful participation by the Indian people' in, and less 'Federal domination' of, 'programs for, and services to, Indians." (quoting 25 U.S.C. § 450a(b)).

> based on ISDEAA Section 102(a)(2)(D), 25 U.S.C. § 450f(a)(2)(D). See, e.g., Los Coyotes Band of Cahuilla and Cupeno Indians v. Jewell, et al., 2013 WL 4734037 (Sept. 4, 2013) (upholding BIA declination pursuant to 25 U.S.C. § 450(a)(2)(D), as the Secretary is only required to fund the contract with the amount the BIA would have otherwise spent on the program; in this case, BIA would have provided no money for the program and the applicable funding level is therefore zero).

Exhibit B at 5. The Declination Letter thus relies on the Ninth Circuit's decision in *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell* as controlling legal authority. Exhibit B at 5. In fact, the *Los Coyotes* decision has no application to this case.

The issue in *Los Coyotes* was whether the plaintiff tribe could use the ISDEAA to force the BIA to re-allocate its appropriations to fund a brand new law enforcement program on the tribe's reservation that the tribe could then contract to operate. The BIA had not previously funded a law enforcement program on the reservation. The plaintiff tribe was thus challenging the BIA's allocation of its law enforcement funds through an ISDEAA proposal. The Court held that the BIA properly declined the proposal under Section 102(a)(2)(D) because the BIA had never before provided funding for a law enforcement program on the Tribe's reservation. *Los Coyotes*, 729 F.3d at 1028. Thus, under Section 106(a)(1) of the ISDEAA, 25 U.S.C. § 450j-1(a)(1), there were no funds available for contracting such a program and the BIA did not have to allocate resources to do so.

The facts in the *Los Coyotes* case are distinguishable from the facts of the present case. In this case, the Tribe submitted a proposal to contract a long-standing IHS EMS program at Fort McDermitt. *See* Exhibit C; Exhibit B at 1. The Tribe did not propose that IHS allocate funding to create and fund a new EMS program at Fort McDermitt, which had never existed before.

Rather, IHS terminated the existing EMS program, after receiving the FMT's Resolution and the Tribe's proposal to contract that program, so that there would no longer be a program to contract. Exhibit B at 1, 5. IHS then relied on Section 102(a)(2)(D), 25 U.S.C.§ 450f(a)(2)(D), as the basis to decline the Tribe's proposed funding amount in the contract proposal on the ground that the Section 106(a)(1) amount available was zero. *Id*. at 6. The *Los Coyotes* decision does not support IHS's reliance on Section 102(a)(2)(D) in this situation.

Under Section 102(a)(2), after receipt of the Tribe's contract proposal, IHS had 90 days to either approve the proposal and award the contract or decline the proposal.[6] 25 U.S.C. § 450f(a)(2). No provision of the ISDEAA allows the IHS to trigger application of the declination criterion at Section 102(a)(2)(D) by terminating an ongoing program to be contracted and thereby reducing the Section 106(a)(1) amount available for the proposed contract to zero.

The Supreme Court has observed that "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (internal quotation marks omitted). The *Seneca* Court recognized that "[i]n seeking to give effect to the provisions of the ISDEAA, as with any statute, the Court must treat the 'object and policy' of that statute as its polestar." *Seneca*, 945 F. Supp. 2d at 142 (citation omitted). The language in Section 106(a)(1) must therefore be interpreted in the context of other ISDEAA provisions and the ISDEAA's object and purpose of transitioning away from Federal domination

[6] *But see* footnote 3 above regarding the statutory exception that authorizes the Secretary to approve a severable portion of a proposal under certain circumstances. That exception does not apply to the facts of this case, however, as the amount the Tribe requested is the same amount that IHS, by its own figures, provided for the EMS program in 2012. Exhibit B at 5; Exhibit D at 1. Also, the IHS did not decide here to provide less than what the Tribe requested, and thus did not trigger this exception, but instead choose to terminate the EMS program so that the funding would be zero dollars ($0).

toward greater tribal self-reliance and meaningful participation by Indians in the provision of services to Indian people. *See* 25 U.S.C. § 450a(b); *Cherokee Nation*, 543 U.S. at 639. IHS actions in this case, by terminating its operation of the existing EMS program, and then declining the Tribe's requested funding amount under Section 102(a)(2)(D) on the grounds that the Section 106(a)(1) amount is consequently zero, runs afoul of the ISDEAA and its object and purpose.

Thus, IHS is legally precluded by the ISDEAA from reducing to zero dollars ($0) the $502,611.30 that IHS provided to operate the EMS program, and which was requested by the Tribe in its contract proposal, in order to prevent the Tribe from contracting the EMS program.

III. IHS improperly declined the Tribe's contract proposal on the ground that IHS used third-party revenues to fund the EMS program.

The Declination Letter states the following additional basis for IHS's declination of the Tribe's contract proposal:

> PAIHS is also declining the Tribe's funding request based on ISDEAA Section 102(a)(2)(D), 25 U.S.C. § 450f(a)(2)(D) to the extent that the Tribe['s] funding request includes the third-party revenues generated by the Fort McDermitt Clinic used by PAIHS pursuant to its agency discretion to fund the EMS program. Not only were these third-party revenues generated by the Clinic (as opposed to the EMS program), third-party revenues are speculative and not in themselves a program, function, service or activity available for contracting under the ISDEAA. See ISDEAA Section 102(a)(1), 25 U.S.C. §450f(a).

Exhibit B at 5.

There is no requirement in the ISDEAA or its implementing regulations that the funds supporting a contractible program (or portion of a program) be themselves PFSAs subject to contracting—separately from the PFSAs—in order to be included in the Section 106(a)(1) amount. The terms "programs, functions, services, or activities" include associated funding, but those terms cannot reasonably be interpreted to make the actual funds supporting the PFSAs

separately contractible from the PFSAs they support.

There is a difference between appropriated funds and third-party revenues. Third-party revenues are collected throughout the year from billing third parties (*e.g.*, Medicare, Medicaid, health insurance) for services provided to covered patients. Thus, while IHS may not be able to add third-party revenues to an AFA in a lump sum at the beginning of the fiscal year, Section 1(b)(6) of the model agreement provides for quarterly, semiannual, lump sum, or other methods of payment at the Tribe's option. 25 U.S.C. § 450(*l*)(c), Sec. (1)(b)(6). The parties can agree in contract negotiations that third-party revenues are non-recurring and subject to the actual amounts collected. As a result, these are matters which can be dealt with in contract negotiations each year.

For many years, IHS made the policy decision to use Clinic-generated third-party revenues to supplement appropriated funds to fund the EMS program. Exhibit B at 1; Exhibit D at 2–4. Although the proportion of third-party revenues used by IHS to fund the EMS program has varied from year to year, this has always been a major source of funding for the EMS program and has thus become a part of the Section 106(a)(1) amount expended by IHS for its operation of that program. Exhibit B at 1; Exhibit D at 2–4. The Tribe is aware that the amount of funds from this source may vary from year to year, just as it varied when IHS operated the EMS program directly, and believes that accounting for these changing amounts can be addressed during the parties' contract negotiations each year and provided for in the terms of the AFA. The ISDEAA's implementing regulations provide that the Secretary may not decline to enter into a contract with an Indian tribe or tribal organization based on any objection that can be overcome through the contract. 25 C.F.R. § 900.23.

The Declination Letter cites to no provision in the ISDEAA or its implementing regulations to support the assertion that third-party revenues supporting a proposed contract must themselves be separately contractible as PFSAs in order to be part of the Section 106(a)(1) amount available for contracting. There is no language in Section 106(a)(1) to support this assertion. *See* 25 U.S.C. § 450j-1(a)(1). Nor is this a requirement in Section 102(a)(2)(D). *See* 25 U.S.C. § 450f(a)(2)(D).

CONCLUSION

IHS does not have legal discretion to terminate the EMS program. Once IHS received the FMT's Resolution and the Tribe's contract proposal, IHS did not have the option of ending its EMS program to instead purchase EMS services from an alternate provider, as IHS unlawfully did in this case. Instead, the ISDEAA requires that the Secretary approve and award the contract requested by the Tribe. Case law cited by IHS to support its declination of the Tribe's contract proposal is factually distinguishable and does not support IHS's actions, which violate the ISDEAA, its object and purpose, and Secretarial policy. IHS has failed to meet its burden of proof to substantiate its declination. Because the material facts are not in dispute, the Tribe requests that this Court grant the accompanying Motion for Summary Judgment.

Respectfully submitted,

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DATED: January 27, 2014.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PYRAMID LAKE PAIUTE TRIBE,	)	
	)	CASE 1:13-CV-01771-RLW
PLAINTIFF,	)	
	)	
v.	)	**PLAINTIFF'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
	)	
KATHLEEN SEBELIUS, et al.,	)	
	)	
DEFENDANTS.	)	
	)	
	)	
	)	

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

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure and LCvR 7(h)(1), Plaintiff Pyramid Lake Paiute Tribe (hereinafter "Tribe") sets forth the following material facts that are not in genuine dispute:

1. The Pyramid Lake Paiute Tribe (hereinafter "Tribe") is a federally recognized Indian tribe. 78 FED. REG. 26384 (May 6, 2013).

2. The Tribe provides a range of health care services within the State of Nevada to its members and other eligible Indians and Alaska Natives, pursuant to a self-determination contract and Annual Funding Agreement (AFA) with the IHS under the ISDEAA, 25 U.S.C. § 450, *et seq*. *See* Exhibit A (CY 2013 Annual Funding Agreement by and between Pyramid Lake Paiute Tribe and the United States of America, Department of Health and Human Services, Indian Health Service).

3. The Fort McDermitt Paiute and Shoshone Tribes of the Fort McDermitt

Reservation (FMT) is a federally recognized Indian tribe located on the Fort McDermitt Indian Reservation in Nevada. 78 FED. REG. 26384 (May 6, 2013); Exhibit B (Letter from Dorothy A. Dupree, Director, Phoenix Area Indian Health Service (PAIHS) to the Tribe's Chairman, Elwood Lowery, dated September 30, 2013, declining the Tribe's EMS contract proposal) at 1.

4. IHS provides health services at its Fort McDermitt Clinic facility, which is operated by the IHS Schurz Service Unit, to members of the FMT and other eligible Indians living on the Fort McDermitt Indian Reservation and in the surrounding service area. Exhibit B at 1.

5. For approximately 20 years, IHS has directly operated the EMS program through its clinic facility at Fort McDermitt. Exhibit B at 1.

6. On January 13, 2013, the FMT's Tribal Council adopted Resolution No. FM13-001-002 sanctioning the Tribe as the FMT's "tribal organization" for purposes of contracting the EMS program at Fort McDermitt under the ISDEAA. Exhibit C (Tribe's Contract Proposal from Chairman Lowery to Area Director Dupree dated June 21, 2013) at 61-62; Exhibit D (IHS Report presented at March 21, 2013 meeting of the Fort McDermitt Clinic Governing Board) at 4.

7. Area Director Dupree acknowledged receipt of that Resolution by letter to the FMT dated March 13, 2013. Exhibit C at 59.

8. The Tribe thereafter submitted its proposal, dated June 21, 2013, to the PAIHS to contract the EMS program at Fort McDermitt on behalf of the FMT. *See* Exhibit C.

9. The PAIHS received the Tribe's contract proposal on July 8, 2013. Exhibit B at 1.

10. In its proposal, the Tribe asked to assume operation of the Fort McDermitt EMS program, on behalf of the FMT, under the Tribe's existing self-determination contract and AFA with IHS. Exhibit C at 3-11.

11. The Tribe proposed that the EMS program and associated funding be incorporated into the Tribe's AFA for fiscal year 2013. Exhibit C at 4.

12. The Tribe proposed $502,611.30 for operating costs, $136,139 for contract support costs, and $196,739 for startup costs. Exhibit B at 5; Exhibit C at 3.

13. The proposed $502,611.30 amount for operating costs was the same amount that IHS expended to carry out the EMS program in fiscal year 2012. Exhibit B at 5; Exhibit D at 1-2.

14. IHS has historically made the policy decision to use Clinic generated revenues to fund a portion of the EMS program. Exhibit B at 1; Exhibit D at 2-4.

15. While the amount of Clinic generated revenues used by IHS to fund the EMS program may vary from year to year, this has always been a major source of funding for the EMS program and thus part of the Section 106(a)(1) amount provided by IHS for its operation of that program. Exhibit B at 1; Exhibit D at 2-4.

16. IHS has determined that Humboldt General Hospital is an available, alternate provider of EMS services to the FMT, Exhibit B at 2, and that IHS can purchase such services under the IHS's contract health service (CHS) program using IHS's CHS funds. Exhibit D at 7.

17. On or about August 19, 2013, approximately six weeks after PAIHS's receipt of the Tribe's contract proposal and over five months after receipt of the FMT's Resolution, IHS terminated the Fort McDermitt EMS program. Exhibit B at 4.

18. Several weeks after IHS terminated its EMS program, Area Director Dupree, by letter dated September 30, 2013, to the Tribe's Chairman Elwood Lowery, declined the Tribe's contract proposal. Exhibit B.

19. On or about November 8, 2013, the Tribe filed this action to challenge the IHS's declination, as authorized by Section 110(a) of the ISDEAA, 25 U.S.C. § 450m-1(a). Compl. (Dkt. No. 1), ¶ 8.

Respectfully submitted,

s/ Caroline Mayhew

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DATED: January 27, 2014.