UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PYRAMID LAKE PAIUTE TRIBE, Plaintiff, v. KATHLEEN SEBELIUS, in her official capacity as Secretary, U.S. Department of Health & Human Services, *et al*. Defendants.	)	Case No. 1:13-cv-01771-ESH

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, Kathleen Sebelius, et al. (hereinafter "Defendants"), by and through the undersigned counsel, respectfully moves, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in the Defendants' 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 Defendants' Statement of Material Facts Not In Genuine Dispute, are not in dispute. Therefore, as demonstrated in the accompanying Memorandum of Points and Authorities, the Defendants are entitled to judgment as a matter of law.

Respectfully Submitted,

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DEFENDANT'S MOTION TO DISMISS, CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Kathleen Sebelius, in her official capacity as Secretary, United States Department of Health and Human Services ("HHS"), Yvette Roubideaux, in her official capacity as Acting Director, Indian Health Service ("IHS" or the "Agency"), and Dorothy A. Dupree, in her official capacity as Area Director, Phoenix Area Indian Health Service ("PAIHS") (collectively, "Defendants"), oppose Plaintiff Pyramid Lake Paiute Tribe's ("Pyramid Lake" or the "Tribe") Motion for Summary Judgment. Defendants respectfully move to dismiss Plaintiff's Complaint in its entirety pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure for inability to join a party required under Rule 19.

In the alternative, Defendants move for summary judgment. At issue in this case is whether IHS was entitled to utilize its discretion to operate – or not operate – an agency program

in the manner it believed would best meet its statutory duty to provide health care to its beneficiaries. In terminating the financially unviable Emergency Medical Services program, IHS acted in accordance with its responsibilities under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 450, *et seq.*, and its implementing regulations, even when presented with a proposal by an Indian tribe to contract for that particular program. Because there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law, Defendants move for summary judgment and oppose Plaintiff's Motion for Summary Judgment.

STATUTORY BACKGROUND

IHS is an agency within HHS whose principal mission is to provide primary health care for American Indians and Alaska Natives throughout the United States. *See* S. Rep. No. 102-392, at 2-3 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 3943. It does so through three separate mechanisms: (1) by providing health care services directly through its own facilities; (2) by contracting with tribes and tribal organizations pursuant to the ISDEAA to allow those tribes to independently operate health care delivery programs previously provided by IHS; and (3) by funding contracts and grants to organizations operating health programs for urban Indians. *Id.* at 4. Through the first two of these mechanisms, IHS delivers health care services through local "Service Units" that are grouped within twelve regional IHS Areas, which in turn are overseen by a Headquarters ("HQ") Office located in Rockville, Maryland.

IHS' authority to provide health care services to American Indians and Alaska Natives derives primarily from two statutes. The first, the Snyder Act, is a general and broad statutory mandate authorizing IHS to "expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians," for the "relief of distress and

conservation of health." 25 U.S.C. § 13 (providing the authority to the Bureau of Indian Affairs (BIA)); 42 U.S.C. § 2001(a) (transferring the responsibility for Indian health care to IHS). The second, the Indian Health Care Improvement Act ("IHCIA"), establishes numerous programs specifically authorized by Congress to address particular Indian health initiatives, such as alcohol and substance abuse treatment, diabetes, medical training, and urban Indian health. 25 U.S.C. §§ 1601-1683.

In 1975, Congress enacted the ISDEAA, which allows tribes to contract with the HHS Secretary to operate many of the programs that IHS previously operated for the benefit of Indians. Tribes may do so either by entering into contracts under Title I of ISDEAA or into self-governance "compacts" under Title V. *See* 25 U.S.C. §§ 450*l*(a), (c), 458aaa-3(a). This process begins when a tribe requests control of one or more programs, functions, services, or activities and submits a contract proposal "to plan, conduct, and administer programs or portions thereof." 25 U.S.C. § 450f(a)(1).[1] A tribe's initial proposal to take over a new program must include certain items, including, but not limited to, the standards under which the tribe will operate the program. *See* 25 U.S.C. § 450f(a)(2); 25 C.F.R. § 900.8. Title I requires that the Secretary approve the proposal and award the contract within ninety days after receipt of the proposal unless she finds that the proposal implicates one or more of several grounds for declination:

> [T]he Secretary shall . . . 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;

[1] Tribes can, through a formal tribal resolution, authorize another tribe or tribal organization to contract on their behalf. *See* 25 § U.S.C. 450f(a)(1). Here, the Fort McDermitt Paiute and Shoshone Tribe has authorized Plaintiff to contract for the Emergency Medical Services program.

> (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 450j-1(a) of this title; 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 paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

25 U.S.C. § 450f(a)(2).

In addition to declining the full proposal, the Secretary can "approve any severable portion of a contract proposal that does not support a declination finding" if she determines that any other portion of the contract proposal:

> (A) proposes in part to plan, conduct, or administer a program, function, service, or activity that is beyond the scope of programs covered under paragraph (1), or
> (B) proposes a level of funding that is in excess of the applicable level determined under section 450j-1(a) of this title.

25 U.S.C § 450f(a)(4)(A)-(B). Implementing regulations jointly promulgated by the Department of the Interior (DOI) and HHS further state that "[a] proposal that is not declined within 90 days . . . is deemed approved and the Secretary shall award the contract or any amendment or renewal within that 90-day period and add to the contract the full amount of funds pursuant to section 106(a) of the Act." 25 C.F.R. § 900.18.

Once a proposal or portion of a proposal is approved, two general categories of funding are available for a program. *See* 25 U.S.C. §§ 450j-1(g), 450j-1(a); 25 C.F.R. § 900.19. First, the "Secretarial amount" or "106(a)(1) amount," "shall not be less than the appropriation Secretary would have otherwise provided for the operation of the programs . . . without regard to any organizational level within the . . . [HHS]." 25 U.S.C. § 450j-1(a)(1). Second, in addition to

the Secretarial amount, tribes and tribal organizations also receive a reasonable amount for contract support costs, known as "CSC" or the "106(a)(2) amount," which are costs that the tribe incurs for necessary activities to operate the program but that the Secretary did not incur or that are funded through resources other than those awarded under the contract. 25 U.S.C. § 450j-1(a)(2).

The ISDEAA prohibits the Secretarial amount funding and CSC funding from including duplicative costs, as these are two separate categories of funding for two different purposes. *See* 25 U.S.C. § 450j-1(a)(3)(A). Additionally, the ISDEAA requires that both of these amounts, collectively referred to as the "106(a) amount":

> shall not be reduced by the Secretary in subsequent years except pursuant to—
> (A) A reduction in appropriations from the previous fiscal year for the program or function to be contracted;
> (B) A directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;
> (C) A tribal authorization;
> (D) A change in the amount of pass-through funds needed under a contract; or
> (E) Completion of a contracted project, activity, or program.

25 U.S.C. § 450j-1(b). The 106(a) amount is colloquially referred to as a tribe's "base" funding, since it generally is not reduced. However, "[n]otwithstanding any other provision . . . the provision of funds . . . is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization . . . ." 25 U.S.C. § 450j-1(b). The dispute in this case arose during this contracting process.

Although IHS is primarily responsible for the health care of Indians, Congress has long recognized that Indians should not be denied health benefits afforded to non-Indians, and that IHS appropriations should not be the sole funding source for the provision of health care to

Indians. To further those goals, Congress has enacted cost-shifting measures to augment IHS resources to provide care to Indians. For example, Congress understood that "[a]lthough Indians are eligible for Medicare and Medicaid benefits in the same manner as any other citizens, they have experienced an inability to take advantage of those benefits." H.R. Rep. No. 94 1026(I), at 107 (1976), reprinted in 1976 U.S.C.C.A.N. 2652, 2745. This was so because, prior to the first enactment of the IHCIA, IHS was not permitted to receive payment from Medicare (or Medicaid). Specifically, two statutory restrictions prohibit Medicare from paying Federal providers for services like IHS. These "Medicare restrictions" are found at sections 1814 and 1835 of the Social Security Act [42 U.S.C. §§ 1395f(c) and 1395n(d)]. Through IHCIA, Congress amended the Social Security Act to authorize IHS and tribes to partially participate in Medicare and Medicaid programs. Specifically, section 1880 of the Social Security Act provides that a hospital or skilled nursing facility of IHS "shall be eligible for payments… if and for so long as it meets all of the conditions and requirements for such payments which are applicable generally to hospitals or skilled nursing facilities" under Medicare. *See* 42 U.S.C. 1395qq(a). Section 1395qq(e) also permits IHS freestanding clinics to bill and receive payment for all Medicare Part B covered services. Congress also gave IHS, tribes, and tribal organizations an independent statutory right to bill and receive payment from private insurers and other liable third parties. *See* 25 U.S.C. § 1621e.

Pursuant to 25 U.S.C. § 1621f, IHS may retain third-party reimbursements, including Medicare and Medicaid payments, rather than requiring such reimbursements to be credited as miscellaneous receipts. 25 U.S.C. § 1621f. Instead, section 1621f directs IHS to use recoveries in accordance with 25 U.S.C. § 1641. *Id.* Unless recoveries are expended to maintain compliance with conditions of participation for Medicare and Medicaid, section 1641(c)(1)(B)

provides that the funds shall be used by IHS for reducing health resource deficiencies, "subject to consultation with the Indian tribes being served by the Service unit…" 25 U.S.C. §1641(c)(1)(B). Tribes do not have to seek these recoveries, but if they do, they are not part of the Secretarial amount available for contracting as determined under 25 U.S.C. § 450j-1(a).[2] *See* 25 U.S.C. § 450j-1(a).

STATEMENT OF UNDISPUTED FACTS

IHS has operated the Fort McDermitt Clinic in McDermitt, Nevada ("NV") through the Schurz Service Unit in the Phoenix Area of the Indian Health Service ("PAIHS") since the 1970s. Plaintiff's Exhibit B to Motion for Summary Judgment ("Plaintiff's Exh. B") at 1; Plaintiff's Motion for Summary Judgment ("Plaintiff's MSJ") at 6. The Fort McDermitt Clinic is an ambulatory care clinic that provides a variety of outpatient services, including primary medical care, dental care, mental health care and alcohol and substance abuse counseling to IHS beneficiaries in the area. *Id.* These beneficiaries are primarily members of the Fort McDermitt Paiute and Shoshone Tribe ("Fort McDermitt Tribe"). Plaintiff's Exh. B at 1. As explained in regulations governing the availability of services, "[t]he Service does not provide the same health services in each area served." 42 C.F.R. § 136.11. In fact, IHS-operated EMS programs are atypical, with only a few currently operating out of inpatient hospitals in larger, more densely populated areas. Plaintiff's Exh. B. at 2. Since approximately 1993, the Schurz Service Unit has administered and operated the Fort McDermitt EMS program. Declaration of Andrew McAuliffe ("McAuliffe Decl.") at 2.

When tribes contract under ISDEAA to operate their own health care program they are entitled to their "tribal share" of the funding the Secretary used to administer the programs (or

[2] Tribal recoveries under the same authorities are considered supplemental to the Secretarial amount. See, e.g. 25 U.S.C. § 450j-1(m), 25 U.S.C. § 458aaa-7(j).

portions thereof) assumed under the contract, at all applicable administrative levels. Declaration of Cliff Wiggins ("Wiggins Decl.") at 3; Defendant's Exhibit 1, *Indian Health Service Headquarters Programs, Functions, Services, and Activities Manual.* The Fort McDermitt Tribe's share of the resources used by IHS to carry out all programs on its behalf in Fiscal Year (FY) 2013 at the Schurz Service Unit was $554,080. Declaration of Thomas Tahsuda ("Tahsuda Decl.") at 2. This represents the entire Secretarial amount for which the Fort McDermitt Tribe may contract from the Service Unit if it decided to operate all of its programs instead of allowing the IHS to operate some or all of its programs directly on its behalf. *Id.* The tribal shares available at the Service Unit for the Fort McDermitt Tribe, together with those available for the Winnemucca Indian Colony of Nevada ("Winnemucca Tribe") are the primary sources of funding for the operating budget of the Fort McDermitt Clinic. *Id.* Of the $554,080 contractible Service Unit tribal shares available to the Fort McDermitt Tribe, $38, 746 were budgeted for the EMS program in FY 2013.[3] *Id.*

In November 2012, Humboldt General Hospital in Winnemucca, NV (the county seat of Humboldt County) established an EMS station site in McDermitt, NV to provide EMS services for both the Indian and non-Indian population in the area. Plaintiff's Exh. B at 2; see also Humboldt General Hospital, EMS Rescue (2014),

[3] IHS Headquarters tribal shares for the Fort McDermitt Tribe in FY 2013 total $63, 764 ($41, 214 of which was H&C funding). Of this amount, $469 appears in line 115. The *IHS Headquarters Programs, Functions, Services, and Activities Manual* identifies line 115 as an amount for EMS training activities. Defendant's Exhibit 2, Table # 4 HQ PFSAs for FY 2013; Defendant's Exhibit 3 at 20. Phoenix Area shares for the Fort McDermitt Tribe in FY 2013 total $85,430 ($55, 900 of which was H&C funding). Of this amount, $92 was allocated for EMS. Defendant's Exhibit 3, FY 2013 Available Area Shares (unofficial).

http://www.hghospital.ws/Our_Services/EMS_Rescue.aspx. There are less than 500 tribal members living on the Fort McDermitt reservation and in McDermitt. McAuliffe Decl. at 2. Humboldt County is a sparsely populated area; per the 2010 Census--it has a population of approximately 16,528 in a 9,658 square mile area. United States Census Bureau, State & County QuickFacts: Humboldt County, Nevada (2010), http://quickfacts.census.gov/qfd/states/32/32013.html. Thus, as of November 2012, there were two EMS programs serving the small, sparsely-populated area around McDermitt, NV.

On January 14, 2013, PAIHS received a resolution from the Fort McDermitt Tribal Council authorizing Pyramid Lake "as the legal entity to provide EMS under the Tribe's ISDEAA contract for and on behalf of the Fort McDermitt tribe [sic] within the service delivery area of the Fort McDermitt Tribe." Plaintiff's Exh. B at 2; Plaintiff's Exh. C at 59, 61-62; see also Plaintiff's MSJ at 6. The Pyramid Lake Reservation is located primarily in Washoe County, Nevada, approximately 225 miles southwest of McDermitt. Plaintiff's Exh. B at 2.

On March 21, 2013, a Fort McDermitt Clinic's Governing Board meeting was held with representatives from the Fort McDermitt Tribe and Pyramid Lake Tribe present. Plaintiff's Exh. B at 2; Plaintiff's Exh. D. The meeting was held to discuss the operating costs and revenues of the EMS program and review an analysis and report of the program and options for the future that had been prepared at the request of the Governing Board. *Id*. The EMS program had been operating in excess of the funding available for Fort McDermitt Tribe's contractible shares for the program for some time. Tahsuda Decl. at 3. These excesses were offset with surpluses from other locations in the Schurz Service Unit. Declaration of Paulette Brewer ("Brewer Decl.") at 2.

Despite the January 2013 tribal resolution by the Fort McDermitt Tribe, as of the March 21, 2013 Governing Board meeting where the written report on the status of the EMS program was submitted, Pyramid Lake had not submitted a letter of intent or proposal to contract for the EMS program. As described in the report, IHS expressed concern as to whether the Agency could wait for Pyramid Lake to assume operation of the program while it continued to operate the program at a loss of approximately $33,324.98 per month despite collecting third-party revenues. Plaintiff's Exh. B at 3; Plaintiff's Exh. D at 5. Without collecting these revenues, the Agency would operate the program at a loss of approximately $41,884.28 per month. Plaintiff's Exh. D at 5. The report contemplated that the earliest Pyramid Lake could take over the McDermitt EMS program would be 120 days from submitting a proposal to contract for the program. *Id.* IHS would have ninety-days to approve or deny the request and then Pyramid would have to prepare and take over operations. 25 U.S.C. § 450f(a)(2).

With respect to ending the EMS program and relying on Humboldt General Hospital to provide EMS services in the area (and paying for runs out of the Contract Health Services ("CHS") budget), the report noted that this would reduce IHS' operating costs to zero upon the shutdown of the program and save the Fort McDermitt Clinic budget approximately $376,033.42 ($399,899.71 annual operating loss minus $23,866.29 in estimated increased CHS costs charged by Humboldt General Hospital to provide the ambulance services). Plaintiff's Exh. B at 3-4; Plaintiff's Exh. D at 5-7. The report urged that this option be seriously considered given the operating losses and the fact that Humboldt General Hospital is already operating an ambulance station in McDermitt. *Id.*

On July 8, 2013, PAIHS received Plaintiff's ISDEAA contract proposal to assume operation of the Fort McDermitt EMS program. Plaintiff's MSJ at 6. Plaintiff requested "all

service unit program shares and proportionate Area and Headquarters H&C...under 25 USC Section 106(a) 1" for the EMS program. Plaintiff's Exh. C. Plaintiff then requested funding in the amount of $502,611.30. Plaintiff's Exh. C at 3. This amount was taken directly from the total FY 2012 expenditures set forth in the report presented at the March 21, 2013 Governing Board meeting. Plaintiff's Exh. D at 1.

On or about August 15, 2013, Humboldt General Hospital notified PAIHS that it would not sign the annual base hospital agreement for the Fort McDermitt EMS program.[4] Defendant's Exhibit 5, Letter from Dorothy Dupree, Director, PAIHS to Elwood Lowery, Chairman, Pyramid Lake Paiute Tribe (Sept. 11, 2013). PAIHS tried to secure an agreement with several other Nevada hospitals without success. *Id.*

During consultation that occurred on August 21, 2013, PAIHS distributed the tribal shares allocation tables for FY 2013. Those tables indicated both that the total shares available for the Fort McDermitt Tribe were $554, 080 and that the tribal shares amount allocated for the EMS program was $38,746. *See* Administrative Record ("Admin. Rec.") at 0105 (FY 2013 Resource Allocation Table). PAIHS suspended operation of the Fort McDermitt EMS program on August 19, 2013. Ellery Decl. at 3. This decision was discussed with the Fort McDermitt Tribe on September 12, 2013. *Id*. The program was formally closed and IHS declined the Plaintiff's proposal on September 30, 2013. *Id.;* Plaintiff's Exh. B.

[4] This base hospital agreement is required by Nevada state law and although IHS is not required to comply with state law, PAIHS had had such an agreement in place for years. See Nev. Admin. Code §§ 450B.510, 450B.526 (2011).

I. STANDARD OF REVIEW

A. Dismissal Under Rule 19

Under Rule 19, a court must dismiss an action if: (1) an absent party is required, (2) it is not feasible to join the absent party and (3) it is determined "in equity and good conscience" that the action should not proceed among the existing parties. *Citizen Potawatomi Nation v. Norton,* 248 F.3d 993, 997 (10th Cir. 2001) (*quoting Philippines v. Pimentel,*—— U.S. ——, 128 S. Ct. 2180, 2185 (2008)).[5]

A party to a contract is the quintessential "indispensable party" and "no procedural principle is more deeply embedded in the common law than that, in an action to set aside a lease or contract, all parties who may be affected by the determination of the action are indispensable." *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 540 (10th Cir. 1987) (*quoting Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975)). In *Jicarilla*, a petroleum company sued the federal government over its oil and gas leases on the Jicarilla Apache Reservation. *Id.* at 538. The court affirmed the district court's dismissal of the company's action, finding the Jicarilla Apache Nation indispensable because the "Tribes's interest in the oil leases is at the heart of the controversy" and that it could not be joined because of its sovereign immunity. *Id*. at 540. *See also United States ex rel. Hall v. Tribal Dev. Corp.*,discussed *infra,* 100 F.3d 476, 479 (7th Cir. 1996) (*citing Travelers Indem. Co. v.Household Int'l, Inc.*, 775 F. Supp. 518, 527 (D. Conn. 1991) ("a

[5] Rule 19 was changed in 2007. The word "required" replaced the word "necessary" and the word "indispensable" was removed. The changes are stylistic only. *Pimentel*, 128 S. Ct. at 2184 (agreeing with the Rules Committee comment that the changes to Rule 19 are changes of style and not substance). References in this memorandum to decisions issued before the 2007 amendments may use the older language.

contracting party is the paradigm of an indispensable party")).

B. Summary Judgment

Plaintiff's summary judgment motion and Defendant's cross motion for summary judgment involve judicial review of an agency administrative action. "Although styled as Motions for Summary Judgment, the pleadings in this case more accurately seek the Court's review of an administrative decision." *Remmie v. Mabus*, 898 F.Supp.2d 108, 115 (D.D.C. 2012). The action in this case is the declination of Plaintiff's contract proposal. "The standard set forth in Rule 56(c), therefore, does not apply because of the limited role of a court in reviewing the administrative record." *Id.*[6]

The ISDEAA authorizes judicial review of IHS declinations under the ISDEAA without providing standards for that review.[7] "When a statute authorizes judicial review of agency action without providing standards for that review, we look to the [Administrative Procedure Act (APA)] for guidance." *Sierra Club v. Glickman*, 67 F.3d 90, 96 (5th Cir. 1995) (internal citation omitted) (citing *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir.

[6] Under Rule 56 of the Federal Rules of Civil Procedure, 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); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

[7] Congress considered and struck a de novo standard of review requirement from the Tribal Self-Government Amendments of 2000 P.L. 106-260. In legislative history accompanying P.L. 106-260, Congress still suggests that de novo review of declination actions under 450m-1 is appropriate based on 1994 amendments to the ISDEAA. *See* H.R. Rep. 106-477, at 35. This suggestion amounts to no more than subsequent legislative commentary on the meaning of a law passed during a previous session of Congress. Moreover, IHS testimony included report accompanying S.979, a companion bill, demonstrates that the removal of the de novo clause was at the insistence of the administration. S. Rep. 106-221, at 21 ("After negotiations with Tribal representatives, the House Committee on Resources and Administration Officials, the de novo provision was removed. We appreciate that this provision has remained out of the current House and Senate bills.") Ultimately, Congress acknowledged that the standard of review was left for courts to determine. H.R. Rep. 106-477, at 35.

1983); *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 685 (D.C. Cir. 1982).

SUMMARY OF ARGUMENT IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

The agency declination being challenged in the case *sub judice* involves at least one party not before this court, the Fort McDermitt Paiute and Shoshone Tribe ("Fort McDermitt Tribe"). The Fort McDermitt Tribe issued a tribal resolution to allow Plaintiff to operate the now defunded EMS program, however, Plaintiff now seeks a *de facto* redesign of the Fort McDermitt Tribe's tribal shares in ways not contemplated by the tribal resolution, implicating the Fort McDermitt Tribe's statutory rights to contract under the ISDEAA. This case should, therefore, be dismissed pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure because Federal Rule of Civil Procedure 19 ("Rule 19"), the mandatory joinder rule, and tribal sovereign immunity, prevent this action from proceeding in the absence of the Fort McDermitt Tribe, and potentially other tribes.

Dismissal under Rule 19 does not address the underlying merits of the Plaintiff's claims. Instead, Defendants request that this Court dismiss this case by ruling in conformity with the principles of tribal sovereign immunity and the important objectives advanced by Rule 19. Defendants further urge — for the reasons discussed below — that this Court hold that Fort McDermitt Tribe and, depending on the funds Plaintiff purports to obtain, other tribes, are required to be present in this action to assert their own interests regarding their own vested rights to contract with IHS under ISDEAA. Further, Defendants ask this Court to hold that joinder of the Fort McDermitt Tribe and other affected Indian tribes is not feasible because as Federally-recognized tribal governments,

such entities possess sovereign immunity. The ISDEAA itself states that "nothing" in the Act shall be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." 25 U.S.C. 450n. Pursuant to Rule 19, equity and good conscience require dismissal of this case.

In its Complaint challenging the declination decision issued by IHS regarding its proposed EMS program, Plaintiff has demanded that the Court grant mandamus and injunctive relief to compel IHS to approve its proposal and to pay $502,611.30 as the "Section 106(a)(1) amount" for the proposed program. Complaint ¶ 54(C). The demanded amount does not exist in a vacuum and cannot be sustained. As explained below, Plaintiff is only entitled to its portion of the funds associated with the operation of the Schurz Service Unit. *See* 25 U.S.C. § 450j-1(a)(1). The ISDEAA only imposes a duty on IHS to award a tribe with its portion or share of funding associated with the program to be transferred. *Id.* A "tribal share" is the sum of linked portions of resources from any level within IHS that support the programs to be transferred to the Tribe. Declaration of Cliff Wiggins ("Wiggins Decl.") at 2.

When a tribe contracts, the Tribe is contracting for the portion of funds or "tribal share" that supports the programs that are to be transferred to the Tribe. Wiggins Decl. at 2. Accordingly, IHS must sub-divide the funds used to perform IHS programs into tribal shares to transfer to the Tribe. *Id.* Tribal shares are calculated at three different levels: Service Unit, Area Office, and Headquarters. *Id.* First, Service Unit shares, or site shares, are the portion of site funds that are linked to tribal members to be served by the contract. These funds are often referred to as "program funding." *Id.* Second, the Tribe's Area Office shares are the portion of Area Office funds linked to the Service Unit program that

will be transferred through the Tribe's contract, plus any freestanding Area Office programs not connected to a Service Unit program. *Id.* Finally, a Tribe's Headquarters or IHS-wide shares are calculated as the portion of Headquarters funds linked to Area and Service Unit program that will be transferred to the Tribe. *Id.* The shares contracted by a Tribe at the Service Unit level, along with the portion of funds taken at the Area Office and Headquarters level, ultimately determine the amount of funding the Tribe is entitled to under its Contract and Funding Agreement. *Id.* This is the Secretarial amount awarded under 25 U.S.C. § 450j-1(a)(1). *Id.*

Although IHS consults with Tribes in establishing its allocable share at each administrative level of the Agency, the primary consideration in determining a Tribe's share is "the amount of funds . . . the Secretary would have otherwise provided for the operation of the programs or portion thereof . . . ." 25 U.S.C. § 450j-1(a)(1). Wiggins Decl. at 2. However, because IHS is organized in three tiers, tribal share amounts are determined separately at each tier. *Id.* This results in three different sets of distribution methodologies for determining a Tribe's available shares at the Service Unit, Area Office, and Headquarters levels. *Id.* Each of these methodologies is made available to Tribes proposing to contract under the ISDEAA. *Id.* Ultimately, the determination of the Secretarial amount under Section 450j-1 for an ISDEAA contract is not dependent on a tribal budget request, but instead is determined by IHS based on the amount the Agency previously spent to operate the program, which the Agency calculates through a methodology used to determine the applicable tribal share associated with the program. *Id.*

The duty to fund a tribe with its share implicitly recognizes that IHS programs

are not provided through a unique, mutually exclusive relationship with each of the 562 tribes IHS serves. Wiggins Decl. at 2. Rather, IHS programs benefit members of many tribes simultaneously. *Id.* Similarly, funds used to perform IHS programs are not tracked individually for each tribe, but rather by the services provided to a population that includes members of many tribes. *Id.* That is the case at the Schurz Service Unit where surpluses in one area of the budget may be used to offset losses in another. Declaration of Paulette Brewer ("Brewer Decl.") at. 1. The reallocation of surpluses to cover budgetary shortfalls is fundamentally an activity that falls within agency discretion under *Lincoln v. Vigil*, 508 U.S. 182 (1993). Such reallocations do not result in the redistribution of shares designated by IHS for another tribe. If Plaintiff prevails in this litigation, however, the funds to operate the EMS program will be withdrawn from the operating budget of the Schurz Service Unit, which for FY 2013 was slightly more than $3.5 million dollars. *See* Admin. Rec.at 0105

Of this $3.5 million in FY 2013, $554,080 was available for contracting by the Fort McDermitt Tribe as its share of the Service Unit's funding and resources. The remainder of the $3.5 million is associated with shares for twelve other Indian tribes, all of which have the same vested interest as the Fort McDermitt Tribe[8] in electing to contract (or not) with IHS to operate programs on their own behalf. The obvious and correct consequence of overturning IHS' declination and paying the Plaintiff its requested amount is that the majority of the Fort McDermitt Tribe's tribal shares, the only money for which the Fort McDermitt Tribe is entitled to contract, must be

[8] Plaintiff is one of the twelve other tribes with shares associated with the Schurz Service Unit, but was authorized to present a proposal as a tribal organization on behalf of the Fort McDermitt Tribe. *See* 25 § U.S.C. 450f(a)(1).

reallocated from the Fort McDermitt Clinic, which currently serves 479 of the Fort McDermitt Tribe's tribal members and 216 members of the Winnemucca Tribe. *See* Admin. Rec. 0105 (FY 2013 Resource Allocation Table). Withdrawing $502,611.30 from the Clinic's operating budget will cause irreparable harm to Clinic operations. Declaration of Loren Ellery ("Ellery Decl.") at 2. Essentially, Plaintiff will have redesigned the services that are provided to the Fort McDermitt Tribe.[9] While the resolution issued by the Fort McDermitt Tribe in support of Plaintiffs' proposal authorizes it to contract for the now defunded EMS program, nowhere does the proposal authorize Plaintiff to propose a virtual redesign of services provided to the Fort McDermitt Tribe. Accordingly, Defendant submits that this lawsuit cannot proceed without the joinder of the Fort McDermitt Tribe. Moreover, to the extent Plaintiff is seeking funding in addition to the Fort McDermitt Tribe's existing tribal shares allocation, it is essentially asking IHS to award it funds that have been designated as shares for other tribes at the Schurz Service Unit, from which it has received no resolution.[10]

A. The Funding Demanded by Plaintiff must be taken from Contractible Shares at the Schurz Service Unit therefore affecting the Legal Interests

[9] The disruption of Clinic operations caused by the reallocation of the Fort McDermitt Tribe's shares will likely cause collateral harm to Winnemucca Tribe too.

[10] The Plaintiff plainly lacks standing to assert a legal claim for tribal shares that do not belong to the Fort McDermitt Tribe, or more specifically, for the Fort McDermitt Tribe's shares that were not allocated for the EMS program.

of one or more Tribes, including the Fort McDermitt Tribe.

In the instant case, unlike in *Jicarilla*, the heart of the controversy does not involve an executed contract, either with the Plaintiff or any other tribe. However, this Circuit has recognized that joinder is required "of an absent party where the claims of a party and the absent party to a common fund or asset are conflicting and mutually exclusive." *Wach v. Byrne, Goldenberg & Hamilton, PLLC*, 910 F.Supp.2d 162 (D.D.C. 2012) (*citing Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986); *Fortuin v. Milhorat*, 683 F. Supp. 1 (D.C. Cir. 1988). This case involves a vested right to contract under ISDEAA, a statutory scheme that is unusually protective of each prospective contractor's legal rights. Each tribe has a statutory right to contract for its portion of the resources and funding that otherwise would be provided for the operation of programs administered by the Service Unit. 25 U.S.C. § 450f(a). Plaintiff's proposal implicates the overall operating budget of the Schurz Service Unit. Declaration of Thomas Tahsuda ("Tahsuda Decl.") at 2. Once contracted, funds awarded to Plaintiff will become permanently unavailable for IHS to award to any other tribe served by the Service Unit. Because Plaintiff's proposal would at least require IHS to reallocate most of the Fort McDermitt Tribe's designated tribal share, and potentially impact shares allocated to other tribes served by the Service Unit, dismissal under Rule 19 is necessary.[11]

Since at least the Fort McDermitt Tribe is a required absent sovereign, the Court

[11] Because this case will alter funds available for tribal shares, this case is unlike *Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), where this court rejected the contention that other non-party tribes had an interest in the remaining funds available from a one year appropriation.

should dismiss this action. The Fort McDermitt Tribe can claim a direct interest relating to the subject of this action since, if the Plaintiff is successful; the requested relief will immediately impact the amount of funding available for the provision of services at Fort McDermitt Clinic. Moreover, such a ruling would potentially disrupt health care services for hundreds of the Fort McDermitt Tribe's tribal members and members of other tribes who are served by the Fort McDermitt Clinic, and potentially affect the contract rights of other tribes served by the Schurz Service Unit. Joinder of at least one of the affected parties to the contract at issue herein, namely the Fort McDermitt Tribe, is not feasible because it possesses sovereign immunity. Therefore, for the reasons discussed below, this Court, in equity and good conscience, should dismiss the action.

A party is required if, in its absence: (1) complete relief is not possible among those already parties to the action or (2) the absent party claims a legally protected interest relating to the subject of the action and its interest will be impaired or impeded. Rule 19(a). *Citizen Potawatomi Nation*, 248 F.3d at 997.

In *Citizen Potawatomi Nation*, the 10th Circuit applied Rule 19 to a challenge to the Department of the Interior's method for calculating funding that five tribes received in ISDEAA contracts. *Id.* at 997-1001. The court readily found that the requirements for Rule 19(a) were met because the absent tribes (the Shawnee Tribe, the Kickapoo Tribe of Oklahoma, the Sac & Fox Nation, and the Iowa Tribe of Oklahoma) claimed an interest relating to the subject of the action — the Citizen Potawatomi action may have altered the funding that the four absent tribes would receive in their contracts. *Id.* at 999. In the present case, there is no contract, but 25 U.S.C. § 450j-1(a) establishes a legally protected interest in the portion of funds from the Service Unit that each tribe could contract for under ISDEAA. A decision in favor of the

Plaintiff in this case would alter the funding available to contract for the Fort McDermitt Tribe and potentially other tribes that receive services from the Service Unit.[12]

This case presents an unusual application of Rule 19 because Plaintiff is seeking a contract to provide EMS services on behalf of the Fort McDermitt Tribe. The fact that Plaintiff is authorized to act on behalf of the Fort McDermitt Tribe to contract for the operation of an EMS program, however, should not sway the Court's decision. In a recent case, the Federal Circuit affirmed a Rule 19 dismissal where the Plaintiff, the Klamath Tribe Claims Committee, was unable to obtain the support of the Tribe it historically represented in pursuing its case. *Klamath Claims Committee v. U.S.*, 541 Fed.Appx. 974, 977 (Fed. Cir. 2013). In that case, the government argued that the Plaintiff had failed to show that it was the proper entity to assert the claims. While the Defendant concedes here that Plaintiff is authorized to contest the declination on its own behalf, it has not shown or even argued that the Fort McDermitt Tribe gave it authority to litigate issues that could fundamentally alter the allocation of the Fort McDermitt Tribe's tribal shares. Moreover, even if the Fort McDermitt Tribe consents, as the Tribe declined to do in *Klamath Claims Committee*, the legally protected interests of other

[12] In contrast, in a recent case which did not involve a contract, the court found no linkage between the claim of the absent party (the Cherokee Nation) and the subject matter of the action (also filed by the United Keetoowah Band of Cherokee Indians of Oklahoma (UKB)). *United Keetoowah Band of Cherokee Indians of Okla. v. U.S.*, 480 F.3d 1318 (Fed. Cir. 2007). The court ruled that the case could proceed. The UKB brought a statutory claim under an independent section of the Cherokee, Choctaw, and Chickasaw Nations Claims Settlement Act ("Settlement Act"), 25 U.S.C. §§ 1779-1779g, that provides a right for the UKB and other specified Tribes to sue the United States over claims about the Arkansas Riverbed Lands of Oklahoma (but that "by its terms... does not apply to the Cherokee, Choctaw, and Chickasaw tribes" who are covered by other sections of the Act). *Id.* at 1321. The court held that the Cherokee Nation did not possess any interest relating to the UKB's statutory claims and that awarding monetary damages to the UKB under the Settlement Act would not affect the Cherokee Nation's property interest in the Riverbed Lands. *Id.* at 1325-1326. Therefore, the Tenth Circuit held that the absent Cherokee Nation could not claim an interest in the UKB action and was not a required party. *Id.*

Tribes served by the Schurz Service Unit remain at issue. *Id*. at 977.

B. Tribal Sovereign Immunity Renders Any Effort to Join the Fort McDermitt Tribe or any other affected Indian tribe, a Required Party, Unfeasible.

Under Rule 19(a), a required party must be joined "if feasible." Because Indian tribes possess sovereign immunity, joinder of a tribe is not feasible unless the tribe waives its immunity or the suit is authorized by Congress. *Citizen Potawatomi Nation,* 248 F.3d at 997 (citing to *Oklahoma Tax Commn. v. Citizen Band Potawatomi Indian Tribe of Okla.,* 498 U.S. 505, 509 (1991) ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories.... As an aspect of this sovereign immunity, suits against tribes are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress."). *See also Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997) and *Kiowa Tribe v. Mfg. Technologies, Inc.,* 523 U.S. 751 (1998). The ISDEAA itself affirms the principle of tribal sovereign immunity, stating that "*nothing* [in the ISDEAA] shall be construed as... affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe..." 25 U.S.C. 450n (emphasis added). *See Okla. Tax Commn.,* 498 U.S. at 510 (the ISDEAA is one of the statutes through which Congress "reiterated its approval of the doctrine of tribal sovereign immunity").

Because the other entities whose legally protected interests are implicated are Federally-recognized tribes and immune from suit — and because nothing in the ISDEAA abrogates this immunity — it is not feasible to join such necessary parties to

this lawsuit.

C. This Action Should Not Proceed Among the Existing Parties.

This Circuit has demonstrated that it will dismiss of a case when a tribe cannot be joined because of its sovereign immunity. *Wichita and Affiliated Tribes of Oklahoma,* at 774-776. The court also considered each of the Rule 19(b) factors in order to determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. *Id*.

The four factors to be considered in Rule 19(b) are: (1) the extent to which a judgment rendered in the party's absence might prejudice that party or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by protective provisions in the judgment, the shaping of the relief, or other measures; (3) whether a judgment rendered in the party's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder. The four factors of Rule 19(b) mandate dismissal in this case.

The first factor concerns whether a judgment rendered in the absence of the party would prejudice that party. As discussed in the analysis of Rule 19(a), *supra*, a judgment reallocating or increasing the Fort McDermitt Tribe's tribal share would surely prejudice either the Fort McDermitt Tribe or other non-party tribes with contractible shares at the Service Unit. The consideration of the first factor under Rule 19(b) "is essentially the same as the inquiry under [Rule 19(a)(1)(B)]" into whether the continuation of the action without the absent party will impair the ability of that party to protect its interest. *Enterprise Mgt. Consultants v. U.S.*, 883 F.2d 890, 894, n. 4 (10th Cir. 1989).

The second factor — whether measures could be taken to lessen or avoid the

prejudice — also weighs in favor of dismissal because the Court would be unable to lessen or avoid the prejudice to the other tribes by inserting protective provisions in the judgment or through other measures, unless the judgment is limited to the Fort McDermitt Tribe's recognized tribal shares and the Fort McDermitt Tribe consents to the litigation. In *Citizen Potawatomi Nation,* the court stated that the absent tribes would suffer substantial prejudice "*and there was no way to lessen that prejudice*." 248 F.3d at 1001 (emphasis added). In this case, there is simply no way to fashion a remedy that would not impact other tribes, because the EMS program must be funded from the overall Service Unit operating budget. In *Citizen Potawatomi Nation,* the court affirmed the District Court's dismissal based on these first two Rule 19(b) factors in combination with the strong policy favoring dismissal due to tribal sovereign immunity. *Id.*

The third factor — whether a judgment rendered in the party's absence would be adequate— concerns the public interest in settling disputes in their totality, thereby avoiding the inefficient administration of justice and multiple litigation. *Pimentel*, 128 S. Ct. at 2193. Since other tribes, would be a non-party to any judgment and not bound by the Court's judgment, they would be free to file separate lawsuits to assert their own interests and to challenge any action IHS may be required to take in order to comply with the Court's ruling on the contract involving the reallocation of tribal shares. Rulings stemming from this litigation could result in conflicting obligations for IHS and subject the United States to multiple lawsuits. The public interest is not favored by disrupting the provision of medical care to Native Americans, whether members of the Fort McDermitt Tribe or of any other tribe residing in the area served by the Schurz Service Unit. Nor is the public well-served when the United States is forced to expend resources defending

additional lawsuits which would follow any relief granted to the Plaintiff in this case.

The fourth factor concerns whether the Plaintiff will have an adequate remedy if the case is dismissed. Although the Plaintiff will not have an alternative forum in which to pursue its present claim if the case is dismissed for nonjoinder, this result is contemplated under the doctrine of tribal sovereign immunity. Dismissal based on tribal sovereign immunity, despite the lack of an available alternative forum "is less troublesome" than in other cases because "dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit." *Wichita & Affiliated Tribes of Okla.v. Hodel,* 788 F. 2d 765, 777 (D.C. Cir. 1986). Moreover, as discussed *infra*, the Fort McDermitt Tribe's shares of the Service Unit remain available for the tribe to contract, and pursuant to an appropriate resolution from the Fort McDermitt Tribe, Plaintiff is not estopped from submitting future proposals on the Fort McDermitt Tribe's behalf.

SUMMARY OF ARGUMENT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The parties agree that only one question is at issue in this case: whether IHS properly declined to enter into a contract with Plaintiff pursuant to the ISDEAA § 102(a)(2)(D), 25 U.S.C § 450f(a)(2). IHS submits that the declination in this case was proper. The EMS program at issue in this case became financially unsustainable and could not continue to be operated with available resources, whether by IHS directly or by a tribe or tribal organization contracted under the ISDEAA. Accordingly, IHS properly exercised its discretion to discontinue the EMS program and reallocate the resources that had been used by the Schurz Service Unit to administer the program, without regard to the proposal submitted by PlaintiffWhile the Fort McDermitt Tribe is still eligible to contract for its full Secretarial

amount, including the shares previously used to administer the EMS program, no funds remained allocated to the EMS program once the program was cancelled. Thus, when Plaintiff came to the table to contract with the IHS for the EMS program on behalf of the Fort McDermitt Tribe, IHS properly declined the contract.

In addition to these shares, Plaintiff also believes it is entitled to the third-party revenue generated by the Fort McDermitt Clinic and used, in the discretion of the IHS, to sustain the EMS program. However, these funds are not part of the "106(a)(1)" amount available to Tribes contracting with Secretary and the Indian Health Improvement Act (IHCIA) directs the funds to be returned to the Service Unit which generated them. 25 U.S.C. § 1621f. Thus, Plaintiff's proposal was also declined to the extent it proposed to contract for these non-contractible funds.

Assuming *arguendo* that the IHS could not cancel the EMS program after receiving a proposal from Plaintiff, IHS would have still declined Plaintiff's proposal pursuant to 25 U.S.C. § 450f(a)(2)(D). While the program was operational, the Fort McDermitt Tribe, and therefore Plaintiff on the Fort McDermitt Tribe's behalf, was only entitled to the tribal shares associated with the EMS program. At the Service Unit, that amount was $38,746. Plaintiff's proposal to contract for $502, 611.30 was far in excess of this amount and thus met the Section 450f(a)(2)(D) criteria of "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract." To award Plaintiff more than the tribal shares associated with the EMS program would be to engage in a *de facto* redesign of the Fort McDermitt Tribe's tribal shares without the Fort McDermitt Tribe's consent and outside of the process clearly delineated in the ISDEAA. In addition, awarding the Plaintiff $502, 611.30 of the Fort McDermitt Tribe's $554, 080 Service Unit tribal shares would

eviscerate the operating budget of the Fort McDermitt Clinic and cause it to close. This would effectively terminate direct services to the members of the Fort McDermitt Tribe. This result was clearly not contemplated by the Fort McDermitt Tribe when it gave Plaintiff a tribal resolution to operate an EMS program.

ARGUMENT

I. APPLICABLE STANDARD OF REVIEW

In *United States v. Carlo Bianchi & Co.*, the Supreme Court explained that "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, . . . consideration is to be confined to the administrative record and . . . no de novo proceeding may be held." 373 U.S. 709, 715 (1963). *See also Consolo v. FMC*, 383 U.S. 607, 619 n.17 (1966).

Despite the presumption that the APA standard applies, courts considering the standard of review under the ISDEAA have reached different conclusions about what standard of review applies.[13] *See Citizen Potawatomi Nation v. Salazar*, 624 F.Supp.2d at 108-109 n. 5 (applying the standard of review in § 706(2)(A) of the APA), *cf. Shoshone-Bannock Tribes of Fort Hall Reservation v. Shalala*, 988 F.Supp. 1306, (D.Or. 1997) (applying the *de novo* standard). In *Cherokee Nation of Oklahoma v. United States*, the district court noted that several unpublished decisions had considered the appropriate standard of review under the ISDEAA, including a decision from this court. 190 F.Supp.2d 1248, (E.D. Okla. 2001), rev'd on other grounds by

[13] A burden of proof, as opposed to a judicial standard of review, is mentioned in 25 U.S.C. § 450f(e). Under 450f(e), in defending a declination decision, the Secretary has "the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof." This burden is immaterial in this case, where there are no material facts in dispute.

Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631 (2005) (The three unreported cases cited by the court as adopting the APA standard were: *Suquamish Tribe v. Ada Deer*, Case No. C–96–5468 (RJB) (W.D. Wash. Sept. 2, 1997), *Cali. Rural Indian Health Bd., Inc., v. Shalala*, Case No. C–96–3526 (DLJ) (N.D. Cal. Apr. 24, 1997), *and Yukon– Kuskokwim Health Corp. v. Shalala*, Case No. A–96–155 (JWS) (D. Al. Apr. 15, 1997)). Ultimately, the *Cherokee* Court applied different law, finding that Cherokee's "lawsuit is properly brought under the Contract Disputes Act [(CDA)] and the *de novo* standard applies." In *Seneca Nations*, the Court applied the *de novo* standard of review to IDEAA claims in part because IHS agreed that the review was *de novo*. *Seneca Nation of Indians v. HHS*, 2013 WL 2255208, at *6 n5 (D.D.C. 2013) ("The parties agree that this Court's review is *de novo*"). But IHS only agreed to de novo review because it had determined that the Plaintiff had brought claims under the Contract Disputes Act (CDA), which requires *de novo* review under 42 U.S.C. § 7104(b)(4). Defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment at 9, 2013 WL 2255208 (D.D.C. 2013). Unlike in *Seneca Nations*, in this case, the IHS does not agree that the Court's review is de novo. Rather, the applicable standard is the APA's arbitrary and capricious standard of review. *See Citizen Potawatomi Nation v. Salazar*, 624 F. Supp.2d 103, 109. The CDA also provides that contracting officer's "specific findings of fact are not binding in any subsequent proceeding." 41 U.S.C. § 7103(e). The CDA, however, is not applicable to pre-award disputes or the dispute here, and so the neither the decision in *Seneca* nor *Cherokee* has any application to this proceeding. *See, e.g.*, 25 C.F.R. §§ 900.150, 900.215 (explaining that pre-award appeals are not subject to the CDA).

Applying the *de novo* standard to a pre-contractual dispute between IHS and its contractor invites the Court to substitute its judgment for that of the IHS in the matter at hand.

Essentially, it would allow the Court to act as if it were the contracting officer, the executive, in the matter. Instead, this Court should adopt the APA standard of review, not a *de novo* standard that "would entangle the court in assessing and balancing policies, programs, and principles of federal appropriations, the details of which no court is equipped to handle." *Shoshone-Bannock*, 988 F.Supp. at 1318, (*quoting Yukon–Kuskokwim Health Corp. v. Shalala*, Case No. A–96–155 (JWS) (D. Al. Apr. 15, 1997) (unpublished)). This is appropriate where, as here, the governing statute does not provide an internal standard of review. In *Tribal Village of Akutan v. Hodel*, the Court of Appeals for the Ninth Circuit held that the APA standard of review governs challenges to agency action under the Endangered Species Act (ESA). 869 F.2d 1185, 1193 (9th Cir. 1988) (determining the applicable standard for the ESA, 16 U.S.C. §§ 1531-1543). The ESA "permits judicial review of agency action but does not establish the standard to be applied in conducting such review." *Id.*; *see also Sierra Club*, 67 F.3d at 96, (citing 16 U.S.C. §§ 1536(n), 1540(g)). Consequently, "[b]ecause ESA contains no internal standard of review," cases challenging agency action under the ESA are governed by the APA. *Tribal Village of Akutan*, 869 F.2d at 1193. *See also Sierra Club*, 67 F.3d at 96; *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 981 (9th Cir. 1985); *Cabinet Mountains Wilderness*, 685 F.2d at 685 (same); *Ctr. for Marine Conservation v. Brown*, 917 F.Supp. 1128, 1143 (S.D. Tex. 1996) ("In the absence of a statutory review standard, the Court must look to the standard established by the [APA]."). The Court of Appeals for the District of Columbia Circuit explained the rationale behind this rule in *Doraiswamy v. Secretary of Labor*, a case under the Immigration and Nationality Act:

> This circumscription . . . stems from well ingrained characteristics of the administrative process. The administrative function is statutorily committed to the agency, not the judiciary. A reviewing court is not to supplant the agency on the administrative aspects of the litigation. Rather, the judicial function is

> fundamentally and exclusively an inquiry into the legality and reasonableness of the agency's action, matters to be determined solely on the basis upon which the action was administratively projected.

555 F.2d 832, 839-40 (D.C. Cir. 1976) (citations omitted).

When applying the APA standard in *Citizen Potawatomi Nation*, the district court relied on *Doraiswamy*, concluding that the arguments for adopting a *de novo* standard for reviewing agency actions under ISDEAA were not "sufficiently persuasive to overcome the strong presumption enunciated by both the Supreme Court and our Court of Appeals in favor of the APA standard." *Citizen Potawatomi Nation*, 624 F.Supp.2d at 108.

The APA standard of review for administrative decisions is the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard set forth in section 706(2)(A). Section 706(2)(A) provides that:

> [t]he reviewing court shall -
> * * *
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

5 U.S.C. § 706(2)(A).

According to this standard, the APA permits *de novo* review in only two narrow circumstances: (1) when the challenged agency "action is adjudicatory in nature and the agency's fact-finding procedures are inadequate," or (2) "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." *Friends of Endangered Species*, 760 F.2d at 982. Neither of these circumstances is present with regard to IHS' refusal to agree to the proposal for the EMS program. Under the APA, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in

the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). This limitation prevents the judiciary from substituting its judgment for that of the agencies entrusted by Congress to implement and administer various governmental programs. *See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-558 (1978).

Regardless of the standard adopted by this Court, the record before it is sufficient to review IHS' declination decision. Judicial review of agency actions under the APA "'is narrow and a court is not to substitute its judgment for that of the agency.'" *Peck v. Thomas*, 697 F.3d 767, 772 (9th Cir. 2012), cert. denied, —— U.S. ——, 133 S.Ct. 1289 (2013) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). As discussed below, IHS has met the standard with regard to the declination of the contract proposal and "show[n] that it had a reasonable basis for its decision; that is, . . . that 'the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made.'" *Id*. (*quoting Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir.2008)).

II. IHS IS AUTHORIZED TO USE ITS DISCRETION TO REPROGRAM ITS RESOURCES TO CREATE OR DEFUND PROGRAMS THAT BEST SERVE THE NEEDS OF ITS BENEFICIARY POPULATION.

Over twenty years ago, when the IHS decided that its beneficiaries could benefit from an EMS program, IHS reallocated funds to create such a program. Declaration of Andrew McAuliffe ("McAuliffe Decl.") at 2. Over the past few years, a number of external factors, including significant increases in cost, caused the IHS to reevaluate whether the EMS program continued to be financially viable. *Id.* Thus, closure of the EMS program and repurposing of its funding became an issue for consideration. *Id.* Plaintiff was present at one such meeting where closure of the EMS program was discussed. Plaintiff's Exh. B at 2; Plaintiff's Exh. D. Finally, IHS determined that too much of the funding for IHS beneficiaries was being diverted

to the EMS program. McAuliffe Decl. at 3. Therefore, the EMS program was suspended on August 19, 2013, and formally terminated on September 30, 2013. Ellery Decl. at 2.

Plaintiff argues that once IHS received the proposal from Plaintiff, the only two options available to IHS under the ISDEAA were to accept or reject the proposal. Plaintiff's MSJ at 13. IHS did respond with one of its two statutory options on September, 30, 2013, when it declined plaintiff's proposal. Plaintiff's ability under the ISDEAA to propose to contract for a failing program, however, does not terminate the Agency's discretion to allocate funds to best serve its beneficiaries. Nothing in the ISDEAA conveys such power to a proposal.

The Agency's termination of the EMS program is squarely governed by the rule set forth in *Lincoln v. Vigil*, 508 U.S. 182 (1993). In *Lincoln*, the IHS discontinued a local program for handicapped children because it felt those dollars would be better spent in a national treatment program. 508 U.S. 182. The Supreme Court held "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." *Lincoln v. Vigil*, 508 U.S. at 192 (citations and quotation marks omitted). Thus, the decision was committed to agency discretion and not subject to judicial review. *Id.* at 193-94. Plaintiff argues that *Lincoln v. Vigil* does not apply because the ISDEAA is directly applicable to IHS' decision. Plaintiff's MSJ at 16. However, nothing in the ISDEAA prohibits a discretionary decision of the Agency to cancel a low performing, high-cost program. The ISDEAA restricts the Secretary's ability to refuse to contract with a Tribe. It does not speak to her ability to operate her own programs. 25 U.S.C. § 450, *et seq*. As stated in *Lincoln v. Vigil*, such a decision requires

> a complicated balancing of a number of factors which are peculiarly within its expertise: whether its resources are best spent on one program or another; whether

> it is likely to succeed in fulfilling its statutory mandate; whether a particular program best fits the agency's overall policies; and, indeed, whether the agency has enough resources to fund a program at all.

Lincoln v. Vigil, 508 U.S. at 193.

Contrary to Plaintiff's contention, the Indian canon of constructions do not change this result.[14] Plaintiff's MSJ at 10. The canon applies only to ambiguous provisions of law. "When a statute's text is plain and unambiguous, the statute must be applied according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 380 (U.S. 2009) (internal citations omitted.) *See also Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1291 (10th Cir. Colo. 2010) ("It is not the province of this court to revise a statute when the express language of the statute is clear.") It does not require the courts to read new requirements into unambiguous statutes. The ISDEAA does not direct IHS to halt its programming decisions upon receiving a proposal from a tribe and no provision of the law can be read to reach that result.

In addition, IHS, as a Federal agency has a duty not only to serve its beneficiaries, but also to protect the public fisc. *See Brock v. Pierce County*, 476 U.S. 253, 259-60, 106 S. Ct. 1834, 90 L. Ed. 2d 248 (1986) (generally recognizing that public agencies by their very nature represent the public interest and, as such, have a duty to protect both the public fisc and the integrity of the government programs they represent). Thus, when IHS determines that spending has become errant, it has a responsibility to rectify the situation. However, under Plaintiff's view, even if the IHS determines that it has been using its Federal dollars on a

[14] Under the canon, "statutes 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, 1444–45 (D.C. Cir. 1988) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)); *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*, 851 F. 2d at 1445; alterations in original)).

duplicative and unstainable program, it must continue to do so if it has received a proposal from a tribe. Nothing in the ISDEAA supports this contention or places such weight on a proposal, particularly one that would consume nearly all of the funds associated with Fort McDermitt Tribe's shares of the entire Service Unit, not simply the EMS program.

III. IHS APPROPRIATELY DENIED PLAINTIFF'S PROPOSAL PURSUANT TO CONTRACT PURSUANT TO 25 U.S.C. § 450F(A)(2) I.E. THAT "THE AMOUNT OF FUNDS PROPOSED UNDER THE CONTRACT IS IN EXCESS OF THE APPLICABLE FUNDING LEVEL FOR THE CONTRACT."

IHS declined Plaintiff's proposal because there was no EMS program and no associated funding and resources were available for contracting as of September 30, 2013, when the program was canceled. Tahsuda Decl. at 2.

A. The Applicable Funding Level for the Fort McDermitt EMS Program as of September 30, 2013 was $0.00.

Pursuant to ISDEAA § 106(a)(1), 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…" 25 U.S.C. § 450j-1(a)(1). Accordingly, as stated above, IHS must sub-divide the funds used to perform IHS programs into tribal shares to transfer to the Tribe. *Id.* See supra, at 15-16.

Plaintiff's tribal resolution only entitled them to contract for the Fort McDermitt Tribe's EMS program tribal shares. When IHS ended the EMS program on September 30, 2013, the amount the Secretary provided for the operation of the program reverted to $0.00. Thus, any proposal with a funding amount above $0.00 would meet the declination criteria that the "amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a) of this title." 25 U.S.C. § 450f(a)(2)(D).

Should the Fort McDermitt Tribe give Pyramid Lake a resolution to contract for all of the Fort McDermitt Tribe's existing tribal shares, the IHS will consider the ISDEAA proposal.

The Ninth Circuit's recent decision in *Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell, et al.,* 729 F.3d 1025 (9th Cir. 2013), which was cited in the declination decision, supports IHS' decision to decline Plaintiff's contract proposal. In *Los Coyotes*, the Ninth Circuit upheld the Secretary of the Interior's decision to decline to enter into an ISDEAA contract with the Tribe to fund law enforcement on the reservation. The Bureau of Indian Affairs ("BIA") declined the Tribe's proposal to contract for $746,110 to increase law enforcement on the reservation pursuant to 25 U.S.C. § 450f(a)(2)(D) because the amount of funds proposed under the contract was in excess of the applicable funding level for the contract, as determined under Section 106(a) of the ISDEAA, as BIA spent no money for law enforcement services in California. *Id.* at 1034. The amount available for contracting was therefore zero, as there was no currently existing BIA program that the Tribe sought to take over. *Id.*

The court held that the Tribe's attempt to use the ISDEAA to create a program that does not exist is inconsistent with the ISDEAA, which only requires the Secretary "to fund the contract with the amount that the BIA would have otherwise spent on the program." *Id.* at 1036. The court described ISDEAA as a statute that "governs existing programs and does not create new ones." *Id*. at 1034. "In this case, the BIA would have provided no money for law enforcement on the reservation and the applicable funding level is therefore zero." *Id.* Further, in holding that the BIA's failure to fund law enforcement on the Tribe's reservation did not violate the Administrative Procedure Act, 5 U.S.C. § 551, et seq., the court relied heavily upon *Lincoln v. Vigil,* 508 U.S, 182 (1993), which involved a discontinued program that had been

operated by IHS. 729 F.3d at 1038 (quoting *Lincoln*'s holding regarding an agency's broad discretion to allocate funds from a lump-sum appropriation).

Contrary to Plaintiff's assertion that *Los Coyotes* does not apply, the case is directly applicable here where Plaintiff seeks to contract for a program that is not in existence. Plaintiff's MSJ at 15-16. Although the program in *Los Coyotes* had never existed, it does not change the fact that the court held that an agency could not be forced to fund a program not currently funded by the Secretary. *Id.* at 1036. The court stated: "The Tribe does not identify any specific appropriation it believes should have been allocated for law enforcement on the reservation, let alone specific language in an appropriation that deprives the Secretary the discretion to allocate the funds. The BIA's funding decisions are therefore unreviewable acts of agency discretion." *Id.* at 1038. Here, as in *Los Coyotes*, Plaintiff cannot identify any specific source of funding used by the IHS after September 30, 2013 to fund an EMS program. Nor can they cite to any language that requires IHS to fund an EMS program. Thus, as in the *Los Coyotes* case, the decision not to fund the program is within the Agency's discretion.

B. Third-Party Revenues Are Not Available to Include in a ISDEAA Contract

IHS provided an additional basis for declining Plaintiff's proposal in that the funding request included the third-party revenues generated by the Fort McDermitt Clinic and used by PAIHS, pursuant to its agency discretion, to fund the EMS program.[15] While the proposal did not specifically request the award of such funds, IHS declined the proposal, in part, because it

[15] IHS notes that although third-party reimbursements were not used in every year to the deficit of the EMS program, such reimbursements were included in the FY2012 budget which the Tribe used to develop its funding request. Plaintiff's Exhibit C; McAuliffe Decl. at 2.

appeared to require IHS to award third-party recoveries as part of the funding total for the proposed EMS program.[16] These revenues are not a program, function, service or activity available for contracting under the ISDEAA. *See* 25 U.S.C. § 450f(a). Additionally, third-party revenue is not part of the Secretarial amount awarded under § 450j-1(a). 25 U.S.C. § 450j-1(a).

When a tribe contracts with the Secretary, it is eligible to contract for its tribal shares at the Service Unit, Area, or Headquarters level. Wiggins Decl. at 2. These shares are identified on tables developed at the Area and HQ levels. *Id.* This is all a tribe is authorized to receive under Section 106(a)1. *Id.* When it contracts for only a particular program, function, service, activity or portion thereof, it receives only the shares associated with that program, function, service, activity, or portion thereof. *Id.* Third-party revenues are not part of this funding scheme. *Id.* When a tribe elects to assume operation of a program, it is generally empowered to bill directly for the services it has contracted to provide. *See* 25 U.S.C. §§ 1621e (authorizing tribes to recover from private insurers), 1641(d) (authorizing tribal health programs to bill Medicare and Medicaid directly). [17] But in this instance, Plaintiff is asking for revenues generated by programs operated by the Service Unit, for which Plaintiff is not proposing to contract or providing. IHS is under no duty, whether under ISDEAA or IHCIA, to award IHS recoveries to a tribe as part of its ongoing program award.

Pursuant to 25 U.S.C. § 1621f, the third-party revenues collected by a Service Unit, must be credited back to that Service Unit responsible for the provision of care. 25 U.S.C. § 1621f.

[16] The Complaint specifically demands the award of third-party resources. Plaintiff's Complaint ("Complaint") at ¶¶ 51-52.

[17] Tribal recoveries under the same authorities are considered supplemental to the Secretarial amount. *See, e.g.* 25 U.S.C. 450j-1(m), 25 U.S.C. 458aaa-7(j).

> [A]ll reimbursements received or recovered under [any provision of law] … by reason of the provision of health services by the Service … shall be credited to the Service. …. In the case of such a service provided by or through a Service Unit, such amounts shall be credited to such unit.

25 U.S.C. § 1621f.

IHS may retain third-party reimbursements, including Medicare and Medicaid payments, rather than requiring such reimbursements to be credited as miscellaneous receipts. Section 1621f directs IHS to use recoveries in accordance with 25 U.S.C. § 1641. Unless recoveries are expended to maintain compliance with conditions of participation for Medicare and Medicaid, section 1641(c)(1)(B) provides that the use of such funds shall be used by IHS for reducing "health resource deficiencies." As a matter of law, the funds remain available to IHS to be used for addressing other health resource deficiencies that exist within IHS direct operated programs at the Service Unit.

Accordingly, any third-party revenues included as part of Plaintiff's proposal were funds "in excess of the applicable funding level for the contract, as determined under section 450j-1(a) of this title" and properly declined pursuant to ISDEAA section 102(a)(2). 25 U.S.C. 450f(a)(2)(D).

C. Assuming *arguendo* that IHS could not have canceled the EMS program after receiving a proposal to contract from Plaintiff, the proposal was still properly declined pursuant to 25 U.S.C. § 450f (a)(2)(D).

Had the program not been cancelled on September 30, 2013, the Fort McDermitt Tribe's contractible shares available for the EMS program at the Service Unit would only equal $38, 746. Therefore, Plaintiff, on the Fort McDermitt Tribe's behalf, could only contract for that

amount. Instead, Plaintiff submitted a proposal in the amount of $502.611.30. Even if the program had still been in operation, IHS would have declined the plaintiff's proposal pursuant to the same 25 U.S.C. § 450f (a)(2)(D) criteria that "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract." 25 U.S.C. § 450f (a)(2)(D). The $38, 746 for the EMS program is not segregable under 25 U.S.C. § 450f (a)(4) because Plaintiff has requested $502, 611.30 for one program.

In addition, even if Plaintiff had submitted a proposal in the amount of $38, 746, there is no evidence that the program could be properly carried out on such a small base budget, with experience showing that third-party revenue attributable to the EMS program does not cover the remaining costs. *See* 25 U.S.C. 450f(a)(2)(A) (The Secretary may decline if "the service to be rendered to the Indian beneficiaries of the particular program… to be contracted will not be satisfactory") or 25 U.S.C. 450f(a)(2)(C) ("the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract"). [18]

To award Plaintiff more than $38, 746 in Service Unit tribal shares would be to engage

[18] Further, Plaintiff's proposal has not shown how it will overcome the absence of a base hospital agreement. A base hospital agreement is required by Nevada state law. *See* Nev. Admin. Code §§ 450B.510, 450B.526 (2011). The base agreement requires the hospital to provide a physician to communicate with the emergency service provider twenty-four hours a day and places requirements on hospital physicians communicating medical instructions to providers of emergency care. Nev. Admin. Code § 450B.526 (2011). The EMS' program's base agreement with Humboldt General Hospital expired on June 30, 2013, and the hospital refused to sign another agreement on or about August 15, 2013. The hospital is currently operating its own EMS program in the area which would be competing with Plaintiff's program and would be unlikely to sign a base agreement with a competitor. IHS and its employees are not subject to state law, but Plaintiff is. *Johnson v. Maryland*, 254 U.S. 51 (1920). Plaintiff would have to seek out a base agreement with another hospital before being able to operate under state law. *See* Nev. Admin. Code §§ 450B.510, 450B.526 (2011). Plaintiff's proposal does not state that it has found a hospital to serve as its base. Plaintiff's Exh. C.

in a *de facto* redesign of the Fort McDermitt Tribe's tribal shares without a formal tribal resolution from the Fort McDermitt Tribe authorizing such and outside of the normal ISDEAA process. 25 U.S.C. § 450j(j). The entirety of the Fort McDermitt Tribe's tribal shares remain available to the Fort McDermitt Tribe for contracting. Plaintiff, with another resolution from the Fort McDermitt Tribe, or the Fort McDermitt Tribe, in its own interest, could propose to contract for all of the tribal shares available to the Fort McDermitt Tribe. Either Tribe could then submit a proposal to redesign those funds into an EMS program. 25 U.S.C. § 450j(j). However, proposals for redesign under Title I of the ISDEAA require IHS approval and the Tribe must demonstrate that it would successfully administer an EMS program with the funding identified and meet all other requirements, including a base hospital agreement. *Id.* Instead, Plaintiff seeks to bypass the ISDEAA process and gain access to $502, 611.30 of the Fort McDermitt Tribe's $554, 080 in Service Unit tribal shares which are primarily used to support services at the Fort McDermitt Clinic. This would leave the Fort McDermitt Tribe with less than $52, 000 in Service Unit tribal shares for all of their direct services at the Fort McDermitt Clinic. The Clinic could not continue to operate on this budget. McAuliffe Decl. at 3. Plaintiff's tribal resolution from the Fort McDermitt Tribe certainly did not intend this result.

This unintended reallocation of resources would cause irreparable harm to the beneficiaries of the Fort McDermitt Clinic. While IHS does not presume to speak for the Fort McDermitt Tribe, it can assume that the elimination of all of its direct services was not the result the Fort McDermitt Tribe desired when it gave Plaintiff a limited resolution to provide emergency services. Although a Tribe's decision to contract under the ISDEAA is an exercise in self-determination, it was also an exercise of the Tribe's right to self-determination when it

chose not to contract for other clinical services at the Schurz Service Unit and entrusted the IHS to provide services directly for its members. Wiggins Decl. at 2. As such, the IHS must zealously advocate for the health and safety of the Fort McDermitt Tribe's patients for whom the IHS provides care. Allowing Plaintiff to contract for either third-party revenue generated by the clinic or for additional tribal shares not covered by Fort McDermitt's tribal resolution is inconsistent with the intent of the ISDEAA and would result in Plaintiff receiving funding in excess of the 106(a)(1) amount associated with the EMS program. Plaintiff has no authority pursuant to the ISDEAA or the Fort McDermitt Tribe's tribal resolution to enter into such a contract.

D. Plaintiff is Not Entitled to Mandamus or Injunctive Relief

Plaintiff has requested mandamus and injunctive relief in its Complaint, but has not argued the elements of either form of relief in its brief. Complaint at ¶ 54. IHS has briefed the case on its merits, regardless. However, Plaintiff would not meet the standards for either mandamus or injunctive relief.

Although Plaintiff has not stated what type of injunctive relief it is seeking, it appears to be seeking a permanent injunction. A party seeking an injunction must establish the existence of four elements: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and

(4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006).[19]

Mandamus relief is subject to a higher standard. *See, e.g.*, *In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1120 (9th Cir. 2001) ("The writ of mandamus is, however, an extraordinary remedy justified only in 'exceptional circumstances.'") (citing *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988)). Generally, mandamus relief is available "only if (1) the individual's claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available." *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1997).

Plaintiff has failed to show or argue how its situation meets any of the requirements for injunctive relief or the higher mandamus standard and so the Court should not address these demands. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (the court refused to consider arguments not specifically and distinctly argued in the party's opening brief). IHS has briefed above how Plaintiff's case should not succeed on its merits. In addition, no irreparable harm will result if a grant of injunctive relief or mandamus is not granted because the proposed services are redundant and more expensive than services that IHS can obtain, on an as needed basis, from Humboldt General Hospital. Moreover, Plaintiff can seek another tribal resolution from the Fort McDermitt Tribe and contract for other tribal shares available to the Fort McDermitt Tribe.

CONCLUSION

IHS does not have the resources to fund a half-a-million dollar EMS program from the Schurz Service Unit budget, much less contract for such a program and continue to operate a

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

Clinic to provide direct services to the Fort McDermitt Tribe. Based on the budget proposed by Plaintiff, the EMS program cannot be maintained if the Clinic is to remain open and the Clinic cannot continue to operate if $502, 611.30 of funding, available in tribal shares for the Fort McDermitt Tribe, is reallocated for an EMS program. This cannot be the intent of the Fort McDermitt Tribe when it gave Plaintiff a limited resolution to operate an EMS program. While Plaintiff's decision to contract under the ISDEAA is an exercise in self-determination, it is also an exercise of the Fort McDermitt Tribe's right to self-determination when it chose not to contract for other clinical services at the Schurz Service Unit and entrusted the IHS to provide services directly for its members. Allowing Plaintiff to contract for either third-party revenue generated by the Fort McDermitt Clinic or for additional Service Unit funds not available to the Fort McDermitt Tribe for this purpose, or intended under the tribal resolution is inconsistent with the intent of the ISDEAA and would result in Plaintiff receiving funding in excess of the 106(a)(1) amount associated with the EMS program. For the reasons set forth above, Defendants respectfully request that this Court grant its motion for summary judgment and deny the Plaintiff's motion for summary judgment.

Respectfully submitted,

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