UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PYRAMID LAKE PAIUTE TRIBE,	)	
	)	
PLAINTIFF,	)	
	)	Case No. 1:13-CV-01771-CRC
v.	)	
	)	
KATHLEEN SEBELIUS, et al.,	)	
	)	
DEFENDANTS.	)	
	)	
	)	
	)	

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

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I. Introduction

The Pyramid Lake Paiute Tribe (Tribe) asks the Court to review and reverse a decision by the Phoenix Area Office of the Indian Health Service (PAIHS or IHS) to decline a contract proposal under the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 450 *et seq*. Compl. ¶ 53. Last July, the Tribe submitted a proposal to the PAIHS under the ISDEAA to contract the Fort McDermitt Emergency Medical Services (EMS) program on behalf of the Fort McDermitt Paiute and Shoshone Tribes (FMT). The Tribe contends that the PAIHS unlawfully terminated the EMS program after receiving the Tribe's proposal and then relied on that unlawful termination to deny the proposal on the grounds that funding is no longer provided for that program. Compl. ¶ 48-49.

Section 102(a)(2) of the ISDEAA requires that IHS decline a contract proposal by "written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that" one or more of the five listed declination criteria applies.[1] 25 U.S.C. § 450f(a)(2). PAIHS declined the Tribe's proposal on the grounds that the PAIHS had ended the Fort McDermitt EMS program on August 19, 2013, and thus *no* funding ($0) was available for contracting the terminated program. Pl.'s Exh. B, Dkt. No.12-2, at 5.[2] Additionally, the Declination Letter found that third-party revenues are "not in themselves programs, functions, services or activities available for contracting." *Id.*

As framed by the PAIHS's letter declining the Tribe's proposal, two legal questions are at the core of this appeal: (1) whether the PAIHS had discretion under the ISDEAA to terminate

[1] The implementing regulation requires that "a detailed explanation of the reason for the decision to decline the proposal" be in the declination letter, not provided later for litigation purposes. 25 C.F.R. § 900.29.

[2] Letter from Dorothy A. Dupree, Director, PAIHS, to Chairman Elwood Lowery, dated September 30, 2013, denying the Tribe's proposal.

the EMS program after receiving the Tribe's proposal to contract that program; and (2) whether the ISDEAA requires that funds supporting a contractible program (*e.g.*, third-party revenues) be themselves programs, functions, services or activities that are subject to contracting separate from the program they support in order to be included in the amount awarded under Section 106(a) of the ISDEAA, 25 U.S.C. § 450j-1(a).

Defendants filed a Motion to Dismiss and a Cross-Motion for Summary Judgment that seeks, in significant part, to justify the declination of the Tribe's proposal on new grounds very different from those included in the Declination Letter.

Defendants now claim that this action is an attempt by the Tribe to "redesign" the FMT's "tribal shares" funding as determined by the IHS in a Schurz Service Unit funding allocation table distributed by PAIHS to the tribes on August 21, 2013.[3]

Relying on the amounts in that table, Defendants assert that PAIHS could have declined the Tribe's contract proposal because: (1) the $38,746 shown in the tribal shares table as available for the EMS program was much less than the $502,611.11 that the Tribe requested; or (2) the Tribe could not operate a satisfactory EMS program with the $38,746 plus whatever third-party revenues the EMS program would generate. Defendants advance these arguments only now, in the context of this litigation. These arguments were not included in the Declination Letter, and the Declination Letter did not reference a "contractible tribal share analysis."

Defendants also argue that a new alternative basis to decline the Tribe's proposal is that the proposal has not shown how it will overcome the absence of a base hospital agreement.[4]

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[3] *See* memorandum accompanying Defendants' Motion to Dismiss, Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment (Defs.' Mem.), at 11, 18 (citing Administrative Record (Admin. Rec.) at 0105 (FY 2013 Resource Allocation Table)).

[4] *See* Defs.' Mem. at 11 n.4, 39 n.18, and 40.

This is also a new argument that was not included in the Declination Letter. Even if the PAIHS had raised this alternative argument in a timely fashion in the Declination Letter, such a concern would not provide a valid declination basis under the ISDEAA.

Defendants' burden of proof in this declination appeal is to clearly demonstrate the validity of the specific findings contained in the Declination Letter. Pl.'s Exh. B at 4-5. As discussed more fully in the Tribe's Motion for Summary Judgment and below, the grounds for declining the proposal included in the Declination Letter do not satisfy any of the declination criteria in the statute and do not meet this burden of proof. In addition, as also discussed below, all of the new, post-hoc rationalization arguments that were not included in the Declination Letter and were first raised by the Defendants in this litigation should be disregarded by the Court. Accordingly, the Tribe's Motion for Summary Judgment should be granted. Because the Defendants' Cross-Motion for Summary Judgment relies on false characterization and post-hoc rationalization of the declination, it should also be denied.

Defendants' Motion to Dismiss should also be denied. In the Motion, Defendants assert that both the FMT and other tribes in the Schurz Service Unit are indispensable parties to any "redesign" of the FMT's tribal shares, but the Tribe's proposal sought only the funds that the IHS said in the "McDermitt EMS/Ambulance Program Options Analysis" (Options Analysis), Pl.'s Exh. D, Dkt. No. 12-4, that it spent on the EMS program and did seek nor implicate the tribal shares of other Schurz Service Unit tribes. Further, to the extent the FMT's interests are implicated, it has designated the Tribe as the proper entity to represent it, including in the context of this litigation. Defendants action to dismiss pursuant to Rule 12(b)(7) is therefore unfounded and should be denied.

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

The standard of review in this case is *de novo*; Defendants are not entitled to the Administrative Procedures Act (APA) standard of review for a declination appeal brought under § 450m-1(a) of the ISDEAA. As discussed in our Memorandum supporting the Plaintiff's Motion for Summary Judgment at pages 8-9, the question of the standard of review is governed by this Court's decision in *Seneca Nation of Indians v. U.S. Department of Health and Human Services*, 945 F. Supp. 2d 135 (D.D.C. 2013). The *Seneca* Court noted the following:

> The Secretary has "the burden of proof to establish by clearly demonstrating the validity of the grounds for declining [a] contract proposal (or portion thereof)." 25 U.S.C. § 450f(e)(1). The parties agree . . . that this Court's review is *de novo*.

Id. at 141-142 (alteration in original).

The Court cited several decisions holding that *de novo* review applies to declination appeals under § 450m-1(a) of the ISDEAA.[5] In a footnote, the Court observed:

> Another Court in this District applied the "arbitrary and capricious" standard of the APA to an ISDEAA claim. *See Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103, 107-09 (D.D.C. 2009). That court, observing that district courts "have disagreed on the appropriate standard to be applied," rejected the reasoning of *Cheyenne River* and followed the older, unpublished cases in applying the APA standard. *Id*. at 108 n.5. However, *Citizen Potawatomi Nation* is distinguishable from the instant matter on at least two bases. First, the Nation brings claims under only the ISDEAA, as opposed to both the ISDEAA and APA as in *Citizen Potawatomi Nation*. *Id*. at 109. Second, the Secretary concedes that *de novo* review is appropriate. *See* Defs. MSJ at 9.

945 F. Supp. 2d at 142 n.5.

[5] *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F. Supp. 2d 1059, 1066-67 (D.S.D. 2007) (citing, *inter alia*, *Cherokee Nation of Okla. v. United States*, 190 F. Supp. 2d 1248, 1258 (E.D. Okla. 2001), *rev'd on other grounds by Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005)); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306, 1318 (D. Or. 1997).

Here, like in *Seneca*, the Tribe brings claims under only the ISDEAA, as opposed to both the ISDEAA and the APA. Therefore, *Seneca* controls, and *de novo* review is appropriate in this case.[6]

Defendants cite to legislative history of the Tribal Self-Governance Amendments of 2000, P.L. 106-260, noting that while the House Report suggested that *de novo* review of declination actions under § 450m-1 is appropriate, the Senate Report indicated that a *de novo* provision was removed from the final Bill after negotiations with Administration officials.[7] Defs.' Mem., Dkt. 14, at 13 n.7. The Court need not look to legislative history of the Tribal Self-Governance Amendments of 2000 for Congressional intent with respect to § 450m-1, however. The Senate Report to the Indian Self-Determination and Education Assistance Act Amendments of 1988, P.L. 100-472, which added § 450m-1 to the ISDEAA,[8] makes clear that adopting the deferential APA standard of review will not implement Congressional intent. S. Rep. No. 100-274 (1988), *reprinted in* 1988 U.S.C.A.A.N 2620. Congress was motivated by "bureaucratic recalcitrance" when it created the federal district court remedy. *See id.* at 7-8; *Shoshone-*

[6] Defendants argue that *Seneca* should not be followed because in that case the IHS agreed that the proper standard of review was *de novo*, but only because the plaintiffs in that case brought claims under the Contract Disputes Act (CDA). Defs.' Mem. at 28. But neither one of the cases cited by the *Seneca* Court in adopting a *de novo* standard involved any claims under the CDA, and nothing in the *Seneca* opinion itself suggests such a limitation. *See Seneca Nation*, 945 F. Supp. 2d at 141-42 (citing *Shoshone-Bannock*, 988 F. Supp. 1306, a case that did not involve the CDA, for the conclusion that "the ISDEAA's text and legislative history and the presumption favoring Indian rights favor *de novo* review"). In fact, the *Seneca* Court held that the CDA did not apply because the dispute was over a pre-award declination decision and not breach of contract claims as the Government urged. *Id*. at 148-149. Accordingly, whether or not the CDA played any role in the Government's "agreement" on the standard of review in that case, the CDA was not the basis for the Court's decision to apply a *de novo* standard. Moreover, the correct standard of review to apply is a question of law that is not subject to the Defendants' consent. Notably, the Government in *Seneca*, which likewise involved the IHS, tried to avoid the consequences of violating the ISDEAA declination requirements, by characterizing the Plaintiff's proposal to amend Plaintiff's ISDEAA contract as a CDA claim. Defendants use the same tactic here to try to avoid the consequences of violating ISDEAA requirements by characterizing this declination appeal as an action to redesign the Schurz Service Unit funding.

[7] The Tribal Self-Governance Amendments of 2000, P.L. 106-260, added Title V to the ISDEAA, 25 U.S.C. § 458aaa, *et seq*.

[8] P.L. 100-472, Title II, § 206(a), 102 Stat. 2294-95.

Bannock, 988 F. Supp. at 1315. The Senate Report goes on to note that "[t]he strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated." S. Rep. No. 100-247 at 37.

Applying the deferential APA standard of review in this case would undermine this legislative intent and conflict with Section 102(e)(1) of the ISDEAA, which, as also noted by the Court in *Seneca*, provides as follows:

> With respect to any hearing or appeal conducted pursuant to subsection (b)(3) or any civil action conducted pursuant to section 110(a) [25 U.S.C. § 450m-1(a)] of this title, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

25 U.S.C. § 450f(e)(1); *see also Seneca*, 945 F. Supp. 2d at 141. The Secretary's burden of proof required by Section 102(e)(1) would be erased if this Court applied the APA standard of review to this declination appeal, because applying the APA standard of review would shift the burden of proof to the Plaintiff to show that the IHS's declination decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).[9]

The scope of judicial review under the APA "arbitrary and capricious" standard is narrow and a court cannot substitute its judgment for that of the agency. *See Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). In *Motor Vehicle Manufacturers*, the Supreme Court noted that the agency decision will be upheld unless "the

[9] Defendants argue that the Secretary's burden of proof in § 450f(e) "is immaterial . . ., where there are no material facts in dispute." Defs.' Mem. at 27, n. 13. But Rule 56 of the Federal Rules of Civil Procedure does not trump applicable ISDEAA provisions.

agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*. The "arbitrary and capricious" APA standard articulated by the Supreme Court in *Motor Vehicle Manufacturers* thus imposes a heavy burden of proof on the party challenging an agency decision. In contrast, Section 102(e)(1) of the ISDEAA imposes a heavy burden of proof on the IHS to justify its declination decisions.[10]

While the Defendants conceded that *de novo* review applied in *Seneca*, they now reverse their litigation position in this case. When the Defendants change their litigation position, the new litigation position is not entitled to any deference. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

Further, no deference is owed by this Court to Defendants' statutory interpretations. In this Circuit, *Chevron*-type deference is not applied where "[t]he governing cannon of construction requires that 'statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit.'" *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)).

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[10] The opinions cited by the *Seneca* Court determined that the APA arbitrary and capricious standard of review is inconsistent with several statutory provisions of the ISDEAA, not just the burden of proof set forth in § 450(f)(e)(1). As explained by one court:

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

Shoshone-Bannock, 988 F. Supp. at 1313. *See also*, *Cheyenne River Sioux*, 496 F. Supp. at 1067; *Cherokee Nation*, 190 F. Supp. 2d at 1256-58.

This canon of statutory construction is explicitly included in the model agreement (self-determination contract) set forth in Section 108(c) of the ISDEAA, which provides as follows:

> Each 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).

Thus, "[i]f the ISD[EA]A can reasonably be construed as the Tribe would have it construed, it must be construed that way. This canon of construction controls over more general rules of deference to an agency's interpretation of an ambiguous statute." *S. Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1078 (10th Cir. 2011) (quotation and citation omitted). *See also*, *Seneca Nation*, 945 F. Supp. 2d at 142.

III. The IHS's Discretion Under *Lincoln v. Vigil* Does Not Trump the ISDEAA and Third-Party Revenues are Included in the Section 106(a) Amount.

A key question in this case is whether the PAIHS had discretion under the ISDEAA to terminate the EMS program after receiving the Tribe's proposal to contract that program. As discussed in the Tribe's memorandum in support of its Motion for Summary Judgment (MSJ), the Secretary is *directed* by the ISDEAA to enter into a self-determination contract on request of a tribe or tribal organization unless at least one of five specific, listed declination grounds is satisfied. 25 U.S.C. § 450f(a); Pl.'s MSJ, Dkt. 12, at 12-13. The ISDEAA severely restricts the IHS's discretion and does not allow the IHS to avoid a proposed contract by terminating or reducing funding to a program after a proposal has been submitted and the declination provisions and implementing regulations have been triggered.

Defendants claim that the PAIHS had legal discretion under *Lincoln v. Vigil*, 508 U.S. 182 (1993), to terminate the EMS program after the Tribe submitted its contract proposal. Defs.' Mem. at 17, 32-33. But as the Tribe has already noted, Pl.'s MSJ at 14, the D.C. Circuit in *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338, 1333-1344 (D.C. Cir. 1996), rejected this argument when it held that *Lincoln* did not give the Bureau of Indian Affairs (BIA) the legal discretion to impose a funding penalty on contracting tribes for late filing of requests for contract support costs. The Court held that where the ISDEAA was intervening law to apply, the agency did not have the legal discretion to contravene the ISDEAA's requirements. *Id.* This is the law in this Circuit.

Defendants also argue that the ISDEAA "does not speak to [the Secretary's] ability to operate her own programs," Defs.' Mem. at 32, but this case does not involve the Secretary's ability to operate her own programs in the absence of ISDEAA requirements, as was the situation in *Lincoln*. This case involves an Indian tribe's ability to contract the operation of those programs under the ISDEAA. The requirements of Section 102(a) of the ISDEAA govern the submission of a contract proposal by a tribal organization and the IHS's options to decline a contract proposal. The ISDEAA is therefore intervening law to apply, once a tribal organization submits a proposal to contract an IHS operated program, and the Secretary no longer has the discretion to terminate a program without complying with ISDEAA's terms. *Lincoln* is distinguishable on this ground.

Defendants recognize that Section 106(a)(1) of the ISDEAA governs contract funding. This is also law to apply. Defendants also concede that "the amount previously spent to operate the program" determines the Section 106(a)(1) funding amount. Defs.' Mem. at 16. The Declination Letter and the Options Analysis reflect that amount as being $502,611.30 and that is

the amount the Tribe requested. Pl.'s Exh. B at 2; Pl.'s Exh. D at 1. Though the Declination Letter suggests some of this amount was funded with third-party revenues generated by the Fort McDermitt Clinic, there is nothing in the text of Section 106(a)(1) that limits the required amount to IHS appropriated funds.[11] The IHS can continue to fund the contracted program through a combination of IHS appropriated funds and third-party revenues, just as it did before it terminated the program. As we discussed in our Memorandum supporting the Tribe's Motion for Summary Judgment, third-party revenues are not themselves programs, functions, services or activities which must be separately contracted as programs, functions, services or activities to be included in the Section 106(a)(1) amount. Pl.'s MSJ at 18-20.

The Tribe's proposal requested the amount the Tribe was entitled to under Section 106(a)(1) of the ISDEAA, which is the amount the Secretary spent to operate the program, regardless of the source. PAIHS did not have discretion under the ISDEAA to terminate the EMS program after receiving the Tribe's proposal as a means to prevent the Tribe from contracting it, and none of the five listed declination criteria in 25 U.S.C. § 450f(a)(2) were validly applicable. Accordingly, the Tribe's Motion for Summary Judgment should be granted, and the Defendants' Cross-Motion for Summary Judgment should be denied.

IV. Defendants May Not Rely On Post-Hoc Rationalization To Offer New, Alternative Grounds for Supporting the Declination of the Tribe's Proposal.

The burden on defendants at this stage of the proceedings is to clearly demonstrate the validity of the specific findings contained in the Declination Letter, Pl.'s Exh. B. *National Oilseed Processors Ass'n v. Browner*, 924 F. Supp. 1193, 1204 (D.D.C. 1996) (citing *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983)) (stating that an

[11] Defendants misstate the statutory text to say: "shall not be less than the appropriation Secretary would have otherwise provided." The word used in the text is "appropriate" not "appropriation." Defs.' Mem. at 4.

agency is required to defend its actions on the basis that such actions were originally taken, and it cannot rely on "some new basis that is developed in litigation to justify the decision."). Accordingly, Defendants may not now attempt to justify the declination on grounds different than those set out in the Declination Letter. *See, e.g.*, *SEC v. Chenery*, 318 U.S. 80, 87-88 (1943) (agency counsel may not rely in court on ground the agency did not articulate in its decision); *Ass'n of Civilian Technicians v. Fed. Labor Rels. Auth.*, 269 F.3d 1112, 1117 (D.C. Cir. 2001) ("Agency decisions must generally be affirmed on the grounds stated in them" and "[p]ost-hoc rationalizations, developed for litigation are insufficient."); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962) (rejecting government's post hoc rationalization that issuance of cease-and-desist order would have been ineffective, because "the [Interstate Commerce] Commission did not so find").

This rule applies with even greater force where, as here, the statute requires that the decision be grounded in a "specific finding." 25 U.S.C. § 450f(a)(2). Section 102(a)(2) of the ISDEAA requires that the written notification declining a contract proposal contain a "specific finding that clearly demonstrates that, or that is supported by a controlling legal authority," that one or more of the listed declination criteria apply. 25 U.S.C. § 450f(a)(2). Section 900.29 of the regulation requires that the written notification contain "a detailed explanation of the reason for the decision to decline the proposal" and that "any documents relied on in making the decision" be furnished to the tribal applicant within 20 days of the decision. 25 C.F.R. § 900.29.

(a) The PAIHS's Declination Letter Declines the Tribes Proposal on the Ground that No Funding is Available.

The Declination Letter is clear with regard to the reasons for the PAIHS's declination of the Tribe's proposal:

> 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 based on ISDEAA Section 102(a)(2)(D), 25 U.S.C. § 450f(a)(2)(D). . . .
>
> 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 third-party revenues generated by the Fort McDermitt Clinic were 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)(1).

Pl.'s Exh. B at 5.

The Declination Letter states that "[t]he Fort McDermitt EMS program was created by IHS using Fort McDermitt Clinic third-party revenues with the intention that the program would become self-sustaining through the generation of its own third-party revenues." *Id.* at 1. However, the Declination Letter notes that according to the Options Analysis, the Fort McDermitt EMS program has not generated sufficient third-party revenues to be self-sustaining and has operated at a significant deficit. *Id.* at 2. According to the Declination Letter and the Options Analysis, operating costs of the EMS program for FY 2012 totaled $502,611.30. *Id.* at 2; Pl.'s Exh. D at 1. The Letter also states that "this amount was paid for by Fort McDermitt Clinic hospital and clinic ('H & C') funds and third-party revenues generated by the Clinic," Pl.'s Exh. B at 5, and that "[i]n supporting the EMS program with Fort McDermitt clinic funding and revenues, PAIHS has been unable to grow and expand the Clinic operations to better serve the eligible Indian population," *id.* at 3.

The Declination Letter explains that the EMS program's operating losses "forced 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." *Id.* at 4. The Declination Letter

reasons that in making the decision to end the Fort McDermitt EMS program, "PAIHS exercised its lawful discretion to allocate its limited funds from its lump-sum Congressional 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)." *Id.* The IHS is bound by this reasoning and the grounds for declination as stated in the Declination Letter and now has the burden of proving the validity of those grounds.

(b) Defendants' Tribal Share Analysis Is Post-Hoc Rationalization for the PAIHS Declination That Was Developed After This Litigation Was Filed And Should Not Be Considered.

In its briefs, Defendants seek to justify the declination based on new and different reasons not included in the Declination Letter. For example, Defendants assert that the declination should be affirmed on the basis that the Tribe was only entitled to request funding in the amount of the Fort McDermitt EMS "tribal shares" as determined by the IHS in the "tribal shares table" distributed at a meeting with Schurz Service Unit tribes on August 21, 2013. Defs.' Mem. at 11, 14, 26-27, 38-40. According to the August 21 tribal shares table cited by Defendants, the total "tribal shares" for the FMT from the Schurz Service Unit was $554,080 for FY 2013, including $38,746 for the EMS program. *Id.* at 26-27, 38-40. Therefore, Defendants claim, the Tribe seeks a "*de facto* redesign" of the FMT's tribal shares for FY 2013, which the Defendants also characterize as being contrary to what the FMT authorized.[12] *Id.* at 14, 26-27, 38-40.

[12] Defendants further argue that, based on the tribal shares available to the FMT in the August 21 table, "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." Defs.' Mem. at 26-27. Notably, threatening to close the Fort McDermitt Clinic if the Tribe wins this case implicates § 301(b) of the Indian Health Care Improvement Act, 25 U.S.C. § 1631(b), which provides in pertinent part: "[n]otwithstanding any provision of law other than this subsection, no [IHS] hospital or outpatient health care facility of the Service, or any portion of such a hospital or facility, may be closed if the Secretary has not submitted to the Congress at least 1 year prior to the date such hospital or facility (or portion thereof) is proposed to be closed an evaluation of the impact of such proposed closure . . . ." Defendants' threat to close the Fort McDermitt Clinic conflicts with this statute.

With this new "tribal shares" argument, Defendants ignore both the Declination Letter and the actual timeline of events in an effort to transform this action into one they would rather now defend. On August 21, 2013, when the tribal shares table was distributed, the Tribe's proposal had already been submitted and the EMS program had already been suspended (and the funding presumably re-allocated elsewhere). The August 21 tribal shares table can thus have nothing to do with the Tribe's proposal, which the Tribe submitted over six weeks earlier when the EMS program was still in operation, or with this action, which is an appeal of the declination of the Tribe's proposal as submitted. Indeed, the Declination Letter never mentioned the tribal shares tables or the amounts reflected in it.

Defendants now advance the following post-hoc argument in the context of this litigation:

> 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.

Defs.' Mem. at 16. Despite their concession that the amount the PAIHS previously spent to operate the program determines the amount available under Section 106(a)(1), Defendants contend that, in order to determine the amount spent, they do not look at what they actually spent but instead rely on the PAIHS's tribal shares "methodology."

Defendants offer no other statutory or regulatory basis for their tribal shares "methodology," but only declarations describing what is apparently IHS's current practice. Dkt. No. 14-10 (Declaration of Thomas R. Tahsuda); Dkt. No. 14-11 (Declaration of Cliff N. Wiggins). The IHS is free to develop practices to lawfully implement its statutory obligations, but the IHS's use of its tribal shares methodology is only valid so long as it complies with the requirements of Section 106(a).

Imposing a "tribal shares" methodology on the Tribe conflicts with Section 107(a)(1) of the ISDEAA, which states clearly that the Secretary, except as specifically authorized in that subsection or other provision of the ISDEAA, "may not promulgate any regulation, nor impose any nonregulatory requirement, relating to self-determination contracts or the approval, award, or declination of such contracts," except with respect to certain specific topics listed in that subsection. 25 U.S.C. § 450k(a)(1). Determining contract funding amounts under Section 106(a)(1) is not one of the topics listed. Section 107(a)(1) not only restricts the Secretary's rulemaking authority to the specifically listed topics, it also precludes the Secretary from imposing any "nonregulatory policy" outside the specific topics listed. *See*, *Ramah Navajo Sch. Bd., Inc.*, 87 F.3d at 1348 ("The situation here is in marked contrast to that in *Lincoln*; there is overwhelming evidence that Congress intended the ISD[EA]A to limit the Secretary's discretion in funding matters and to provide for judicial review of all of the Secretary's actions.").

Because contract funding is not one of the topics listed in Section 107(a)(1), the Secretary has no delegated authority to impose the "tribal share" policy on tribes for purposes of determining the Section 106(a)(1) amount.[13] Nor is *Chevron*-type deference applicable to IHS determinations of the Section 106(a)(1) amount under the "tribal share" policy in this case because Congress has not delegated the Secretary any rulemaking authority on this topic.[14]

Accordingly, it is Section 106(a) itself, and not Defendants' tribal shares methodology, that governs the amount of funding available for the Tribe to request in its contract proposal.

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[13] Section 1(b)(11) of the model agreement (self-determination contract) provides: "[e]xcept as specifically provided in the [ISDEAA], the Contractor is not required to abide by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law." 25 U.S.C. § 450(*l*)(c).

[14] *See, e.g.*, *U.S. v. Mead Corp*., 533 U.S. 218, 226-27 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.").

The best measure of that funding amount is the amount the IHS previously spent to operate the program—particularly in this case, where the IHS has improperly terminated the program in an attempt to escape its statutory responsibility. The Options Analysis and the Declaration Letter concluded that the amount the Secretary spent on the EMS program was $502,611.30 for FY 2012. Pl.'s Exh. B at 2; Pl's Exh. D at 1. Defendants' "tribal shares" argument to the contrary is a post-hoc rationalization that would conflict with Sections 106(a)(1) and 107(a)(1) of the ISDEAA and should be disregarded.[15]

(c) Defendants May Not Use The Absence Of A Base Hospital Agreement As An Alternative Bases To Decline The Tribe's Proposal.

In its most recent filings in this case, the Defendants invoke another new declination ground not considered or discussed in the Declination Letter as an alternative basis to decline the Tribe's proposal: "the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract." 25 U.S.C. § 450f(a)(2)(C). Defendants contend that this declination criterion applies because "Plaintiff's proposal has not shown how it will overcome the absence of a base hospital agreement." Defs.' Mem. at 39 n.18. This post-hoc rationalization cannot now be offered as an alternative basis for declination. Moreover, even if the PAIHS had raised its concern about the base hospital agreement timely in the Declination Letter, such a concern would not provide a valid declination basis under the ISDEAA.

[15] As an additional but related basis on which the Defendants' argue the PAIHS might have hypothetically declined the proposal, Defendants cite 25 U.S.C. § 450f(a)(2)(A), which provides that the Secretary may decline a contract proposal where "the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory." 25 U.S.C. § 450f(a)(2)(A). Defendants contend that this declination criterion applies because "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." Defs.' Mem. at 39. This argument should be disregarded. Defendants may not now rely on an argument that the Agency could have declined a hypothetical proposal for $38,760 on a basis never raised in the Declination Letter.

The Defendants' objection about a base hospital agreement apparently stems from Ms. Dupree's September 11, 2013 letter to Elwood Lowery, the Tribe's Chairman, explaining why the PAIHS had to shut down the IHS operated EMS program on August 19, 2013:

> The reason that the Fort McDermitt EMS program is currently not in service is due to the fact that Humboldt General Hospital (HGH) refused to sign the annual base hospital agreement for Fort McDermitt's EMS program, which has previously been in place for many years. In accordance with Nevada State Statutes [NAC 450B.510] and [NAC 450B.526], EMS programs must have a designated base hospital, otherwise the EMS operating permit is invalidated, and unable to lawfully transport patients on state highways.[16]

Defs.' Exh., Dkt. 14-6 at 1 (brackets in original).

The Declination Letter does not mention Ms. Dupree's letter or its conclusion that IHS must have a base hospital agreement and state permit to transport patients on state highways. Defendants now admit that the letter was incorrect on this point: "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 many years." Defs.' Mem. at 11 n.4. Nonetheless, Defendants assert the following:

> 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).

Defs.' Mem. at 39 n.18.

The IHS cannot decline a tribe's contract proposal "based on any objection that will be overcome through the contract," 25 C.F.R. § 900.23, and the Tribe can obtain a base hospital agreement from another hospital once it has contracted the program. Also, the Tribe does not have to include a base hospital agreement as part of its contract proposal. The ISDEAA

[16] Ms. Dupree failed to mention that NRS 450B.830 (9) specifically exempts "[a]mbulances or air ambulances owned and operated by an agency of the United States Government."

regulations list what an initial contract proposal must contain. 25 C.F.R. § 900.8. A statement as to how the Tribe will comply with state law, such as a base hospital agreement, is not required by the regulation. There is a reason for this: Tribes "step into the shoes of certain United States government agencies in providing certain services to their members." *Seneca Nation*, 954 F. Supp. 2d at 143. A self-determination contract is defined in pertinent part as "a contract . . . between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law . . . ." 25 U.S.C. § 450b(j). The ISDEAA treats contracting tribes carrying out self-determination contracts as federal instrumentalities. For example, the ISDEAA extends coverage under the Federal Tort Claims Act to tribal organizations and their employees by deeming the tribal organization to be the part of the Public Health Service and its employees to be employees of the Service while acting within the scope of their employment in carrying out the contract. 25 U.S.C. § 450f(d). This includes "the operation of an emergency motor vehicle." *Id.* Also, a tribal organization carrying out a self-determination contract is deemed a federal agency and part of the IHS for purposes of accessing federal sources of supply. 25 U.S.C. § 450j(k).

Defendants cite *Johnson v. Maryland*, 254 U.S. 51 (1920) as authority for contending that the Tribe is subject to Nevada permit laws, including the base hospital requirement. *Johnson* involved the issue of whether a Maryland law penalizing those who operate motor trucks on highways without having obtained licenses based on examinations of competency and payment of a fee can constitutionally apply to a federal Post Office employee driving a mail truck on state roads. *Id.* The Court held that the Maryland law could not be applied to the federal employee, explaining:

> It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient.

Id. at 57.

A later decision, *Hancock v. Train*, 426 U.S. 167 (1976), reaffirmed that federal instrumentalities are not subject to state permitting requirements. That rule has been extended to federal contractors performing federal functions. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988).

Although we believe that the Tribe would be considered a federal instrumentality immune from state permitting requirements, this Court need not decide this issue raised post-hoc by Defendants to support their Cross-Motion for Summary Judgment. The PAIHS's basis for declining the Tribe's proposal is set out in the Declination Letter and defines the legal issues raised in this appeal. The PAIHS relied on its improper termination of the EMS program to state that no funding was available for the program. This appeal has nothing to do with a "redesign" of "tribal shares" or with whether or not the Tribe was required to demonstrate a base hospital agreement under state law. Since Defendants' Cross-Motion for Summary Judgment hinges on these inapplicable, post-hoc arguments, it should be denied.

V. Rule 19 Does Not Require Dismissal of This Action.

Defendants' likewise fail to substantiate their Motion to Dismiss this case. Defendants assert that the interests of other tribes are at stake and that Rule 19 of the Federal Rules of Civil Procedure ("Rule 19") is implicated. The Defendants therefore move to dismiss the Complaint pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure.

In ruling on a motion to dismiss for failure to join a party under Rule 19, the court must determine: (1) if an absent party is "required" under Rule 19(a); (2) whether joinder of any required party is feasible; and (3) if there is a required party with respect to whom joinder is not feasible, "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. Rule Civ. Proc. 19(b) ("Rule 19"); *Ramah Navajo Sch. Bd.*, 87 F. 3d at 1350-51. In determining whether the action should proceed in the absence of a required party that cannot be joined, the court must use its discretion and judgment to balance the factors listed in Rule 19(b) along with other case-specific considerations to reach an equitable conclusion. *Philippines v. Pimentel*, 553 U.S. 851, 862-63 (2008); *Cloverleaf Standardbred Owners Ass'n v. Nat'l Bank of Wash.*, 699 F.2d 1274, 1276-77 (D.C. Cir. 1983). In this case, contrary to Defendants' assertions, there is no non-party tribe that is a required party under Rule 19(a), and even if there were, "in equity and good conscience, the action should proceed" pursuant to Rule 19(b).

(a) There is No Non-Party Tribe that is a Required Party to This Action Under Rule 19(a).

The first inquiry under Rule 19 is whether a non-party is a "required" party under Rule 19(a). *See Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 (10th Cir. 2001). Rule 19(a) provides, in relevant part:

> **(1)** ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
> **(A)** in that person's absence, the court cannot accord complete relief among existing parties; or
> **(B)** that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> **(i)** as a practical matter impair or impede the person's ability to protect the interest; or

> **(ii)** leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Defendants do not allege that the court cannot accord complete relief among the existing parties as provided in Rule 19(a)(1)(A). However, Defendants contend that the FMT (and possibly other tribes served by the Schurz Service Unit) claims an interest that could be impaired or impeded by the resolution of this case, as provided under Rule 19(a)(1)(B)(i).[17] That contention is wrong for at least three reasons:

(i) The FMT has specifically designated the Tribe as the entity to represent its interests in this matter and disclaimed the need to participate in this litigation;

(ii) No other tribe has any legally protected interest in the subject matter of this action because the Tribe's proposal and the PAIHS's Declination Letter implicate only Fort McDermitt Clinic funds and third-party revenues that were, at the time of the proposal, spent by the Secretary for operation of the EMS program and that were therefore not contractible by any other tribe; and

(iii) Even if resolution of this action were to implicate other funds within the Schurz Service Unit budget that could at some point be contracted by other tribes, and to the extent that a currently non-contracting tribe has any legally protected interest in funds

[17] It is unclear whether the Defendants also argues that Rule 19(a) applies because the interests of non-party tribes are such that disposing of this case as between the current parties could leave the Defendants subject to a substantial risk of multiple or inconsistent obligations, pursuant to Rule 19(a)(1)(B)(ii). Defendants do not raise that issue as part of their discussion of Rule 19(a), but they do claim in their analysis of the Rule 19(b) factors that the case should not go forward because judgment rendered in the absence of other Schurz Service Unit tribes "could result in conflicting obligations for IHS" because those other tribes "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." Defs.' Mem. at 24. In any event, for the reasons discussed in this section—namely that neither the Tribe's contract proposal nor the Secretary's Declination Letter, which are the subjects of this action, implicate funds contractible by any tribe other than FMT and the Tribe as the FMT's designated tribal organization—subsection (a)(1)(B)(ii) is not applicable to this case.

it may wish to contract for in the future, the Defendants can adequately represent those interests in this case.

(i) The FMT is Not a Required Party Because it has Designated the Tribe to Represent its Interests in This Matter and has Consented to this Litigation.

Defendants acknowledge that the FMT authorized the Tribe to contract to operate the EMS program on its behalf, but argue that the Tribe "now seeks a *de facto* redesign of the FMT's tribal shares in ways not contemplated by the tribal resolution, implicating the FMT's statutory rights to contract under the ISDEAA." Defs.' Mem. at 14. Defendants claim, therefore, that the FMT is a necessary party under Rule 19(a). Defs.' Mem. at 19. In fact, as noted, this action contemplates no "redesign" of FMT's tribal shares but is an appeal of a declination decision on the very proposal that the FMT authorized the Tribe to submit on its behalf.

In support their necessary party argument, Defendants cite to *Klamath Claims Committee v. United States*, 541 Fed. Appx. 974, 977 (Fed. Cir. 2013), in which the Federal Circuit affirmed a dismissal for failure to join a required party under Rule 19. Defs.' Mem. at 21. In that case, the Court of Federal Claims requested that the plaintiff (the Klamath Claims Committee) obtain confirmation from the Tribe whose interests were implicated (the Klamath Tribes) that the Committee was authorized by the Tribe to pursue the litigation. *Klamath Tribe Claims Comm. v. United States*, 97 Fed. Cl. 203, 212 (Ct. Cl. 2011). The Committee was unable to obtain confirmation of authorization, and the Klamath Tribes stated in a letter to the court that it did not support the litigation but claimed an interest in the subject matter. *Id.* Based on these facts, the court found that the Klamath Tribes was a required party under Rule 19(a). *Id.*

Where a tribe has expressly stated that it claims an interest in the subject of a pending action and does not support the action going forward without its involvement, it is clearly proper for the court to find that the tribe is a required party under Rule 19(a), as the court did in

Klamath Claims Committee. In fact, though, precisely the opposite has occurred here. Defendants presume that this litigation is "not contemplated" by the FMT resolution, but the Tribe disagrees. In a second resolution, adopted on April 8, 2014, the FMT acknowledged this pending action and declared that "the Fort McDermitt Tribal Council interprets Resolution FM13-001-002 as authorizing the Pyramid Lake Paiute Tribe's Chairman or designee to take necessary actions to contract the EMS program on behalf of the Fort McDermitt Tribe, including the Pyramid Lake Paiute Tribe's litigation, which the Fort McDermitt Tribal Council fully supports, to appeal the Indian Health Service's declination." Pl.'s Exh. E at 4. The resolution further states:

> [T]the Fort McDermitt Tribal Council believes that the Fort McDermitt Tribe is not a necessary party to the litigation between the Pyramid Lake Paiute Tribe and the federal government, and does not need to be involved in the lawsuit, having transferred full authority to the Pyramid Lake Paiute Tribe to contract the EMS program "in the best interests and on behalf of the Fort McDermitt Tribe," which includes litigation of the Indian Health Service's declination and other necessary actions.

Id. (quoting Resolution FM13-001-002, Pl.'s Exh. C, Dkt. 12-3, at 59).

Defendants appear to concede that the case does not implicate Rule 19 concerns with respect to the FMT if the FMT itself "consents."[18] That determination is consistent with cases that hold "[w]here, as here, the party instead *disclaims* an interest, Rule 19(a)(1)—which might otherwise provide a basis for joining an unwilling party—does not apply." *Little v. King*, 768 F. Supp. 2d 56, 63 (D.D.C. 2011) (emphasis in original) (citing *Tell v. Trs. of Dartmouth Coll.*, 145 F.3d 417, 419 (1st Cir. 1998) ("The situation would be different if the allegedly necessary party

[18] Defendants state: "Moreover, even if the Fort McDermitt Tribe consents, as the Tribe declined to do in *Klamath Claims Committee*, the legally protected interests of other Tribes served by the Schurz Service Unit remain at issue." Defs.' Mem. at 21-22.

disclaimed an interest.")); *ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., Inc.*, 102 F.3d 677, 682-83 (2d Cir. 1996); *see also Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043-44 (9th Cir. 1983). In *Northrop*, the Ninth Circuit declined to affirm that the Government was a required party under Rule 19(a) to an action relating to "teaming agreements" entered into between defense contractors at the Government's request, even though the Government remained involved in the operation of the contracts. 705 F.2d at 1044. The court found: "The Government is not a party to any of the teaming agreements, and has never asserted a formal interest in either the subject matter of this action or the action itself. On the contrary, the record reflects that the Government has meticulously observed a neutral and disinterested posture. . . . [The defendant] offers no cogent reason why we should second-guess the Government's assessment of its own interests." *Id.* at 1043-44.

Because the FMT has itself determined that it does not need to be involved in this litigation, but has designated the Tribe to act on its behalf in this matter, the FMT is not a required party under Rule 19(a). Moreover, the Defendants' "self-serving attempts to assert interests on behalf of [an absent party] fall outside the language of Rule 19(a)(2), and thus cannot be used as the basis" for the Defendants' required party arguments. *ConnTech Dev. Co.*, 102 F.3d at 683.[19]

(ii) No Other Tribe has a Legally Protected Interest in the Subject of this Action.

In addition to the FMT, Defendants state that "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." Defs.' Mem. at 14. However, the Tribe's proposal only requests funds that—according to the IHS's own records at

[19] It is the absent party itself who must claim the interest. *ConnTech Dev. Co.*, 102 F.3d at 683.

the time of the proposal—were allocated from Fort McDermitt Clinic funds and revenues to the Fort McDermitt EMS Program, and were therefore not contractible by other tribes. Pl.'s Exh. C at 4; Pl.'s Exh. D at 2. Indeed, the PAIHS's own Declination Letter, being appealed in this action, states that the EMS program the Tribe seeks to contract "was paid for by Fort McDermitt Clinic hospital and clinic ('H & C') funds and third-party revenues generated by the Clinic." Pl.'s Exh. B at 5. The Tribe, therefore, does not seek any "reallocation" of funding to which any other tribe could claim a legally protected interest. *See Ramah Navajo Sch. Bd.*, 87 F. 3d at 1351 ("Our Rule 19 analysis must begin with an assessment of whether the nonparty Tribes have a legally protected interest in the enjoined CSF funds.").

Defendants cite to a Tenth Circuit case, *Citizen Potawatomi Nation*, suggesting that the reasoning employed in that case is applicable here and that the Tenth Circuit in that case found the requirements of Rule 19(a) were met because "the Citizen Potawatomi action may have altered the funding that the four absent tribes would receive in their [ISDEAA] contracts." Defs.' Mem. at 20. But the facts in *Citizen Potawatomi* were entirely different, and the court's reasoning was tied closely to those facts. In that case, "five tribes within the Shawnee Agency of the Bureau of Indian Affairs *negotiated a formula among themselves* for dividing future federal appropriations. . . . The United States used this formula to determine the amount of funding awarded to the tribes in their Annual Funding Agreements." *Citizen Potawatomi*, 248 F.3d at 995-96 (emphasis added). The Tenth Circuit held that because the Plaintiff's action could alter future funding for the absent tribes under the formula, those tribes could claim an interest under Rule 19—but only because "[h]ere, however, the tribes have already agreed to the use of the formulas in question. . . . We feel this transforms the funding decisions from a mere expectation, which is unprotected, into an interest which is protected." *Id.* at 997-998. Ordinarily, the Tenth

Circuit noted, a "mere expectation" of funding is not a protected interest that would make a party "required" under Rule 19. *Id.*

In the present case, there is no such agreement among the tribes with regard to funding allocation that might create a legally protected interest in the EMS program funds sought by the Tribe in this action. Further, the IHS's Declination Letter states that the EMS program was paid for with Fort McDermitt Clinic hospital and clinic funds and revenues. Other tribes served by the Schurz Service Unit could have no protected interest in those funds.

(iii) The Defendants Adequately Represent Any Potential Interest on the Part of Other Tribes in the Subject of this Action.

Even if resolution of this action were to implicate funds within the Schurz Service Unit budget that could be contracted by other tribes if the EMS program were lawfully discontinued and those funds reallocated, and even if a non-party's entitlement to those funds were certain enough to create a legally protected interest, those non-party tribes are still not necessary parties within the meaning of Rule 19(a) because the Defendants can adequately represent those interests in this case. In *Ramah Navajo School Board*, the D.C. Circuit held that non-party tribes and tribal organizations that contracted with the Bureau of Indian Affairs under the ISDEAA, and that were slated to receive certain payments of contract support costs under a Notice policy challenged by the Ramah Navajo School Board in that action, were not required parties under Rule 19. 87 F.3d at 1352. One ground for the holding was as follows:

> Although the allocation of a fixed fund may create a protectable interest in the beneficiaries of that fund, the United States may adequately represent that interest as long as no conflict exists between the United States and the nonparty beneficiaries. If the nonparties' interests are adequately represented by a party, the suit will not impede or impair the nonparties' interests, and therefore the nonparties will not be considered "necessary."

Id. at 1351 (citations omitted). The interests of the tribes served by the Schurz Service Unit that the Defendants claim are at stake in this action—protection of those tribes' contractible shares—align with the Defendants' interests in this case and present no conflict as between each other. Therefore, under *Ramah*, the Defendants' presence as a party in this case adequately protects those interests and the non-party tribes are not required under Rule 19(a).[20]

(b) Pursuant to Rule 19(b), "In Equity and Good Conscience" This Action Should Proceed Among the Existing Parties.

The Rule 19 analysis does not end even if an absent party is found to be required under subsection (a). Rather:

> District judges are plainly instructed to continue on to the Rule 19(b) determination "whether in equity and good conscience the action should proceed among the parties before [the court], or should be dismissed, the absent person being regarded as indispensable." This Rule 19(b) language "leaves the district judge with substantial discretion in considering which factors to weigh and how heavily to emphasize certain considerations in deciding whether the action should go forward in the absence of someone needed for a complete adjudication of the dispute." 7 C. Wright & A. Miller, Federal Practice and Procedure, § 1604 at 45-46 (1972). As the Ninth Circuit observed, the ultimate question Rule 19(b) poses is not "a purely legal issue"; it calls for the exercise of "judgmental discretion."

Cloverleaf, 699 F.2d at 1277 (alteration in original) (footnote and citations omitted).[21] Rule 19(b) sets out several factors for the court to consider—including (1) "the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;"

[20] In *Three Affiliated Tribes of the Fort Berthold Indian Reservation v. United States*, this Court affirmed that *Ramah* applies despite the fact that each non-party tribe may have individual contracts resulting in "highly individualized and divergent interests" so long as the broader, shared interest is sufficient to ensure adequate representation. *Three Affiliated Tribes of the Fort Berthold Indian Reservation v. United States*, 637 F. Supp. 2d 25, 31-32 (D.D.C. 2009) (citation omitted). In this case, the Defendants adequately represent each individual tribe's contracting interests because the Defendants share the broad interest in protecting non-Fort McDermitt Tribal funds from being diverted to the EMS program as a result of the resolution of this case.

[21] This case quotes an earlier version of Rule 19, but as Defendants note, Defs.' Mem. at 12 n.5, recent revisions removing the word "indispensable" were stylistic and not substantive. *Pimentel*, 553 U.S. at 854.

(2) "the extent to which any prejudice could be lessened or avoided" by "protective provisions in the judgment," the "shaping" of relief, or "other measures"; (3) "whether a judgment rendered in the person's absence would be adequate"; and (4) "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Rule 19(b). However:

> The considerations set forth in subdivision (b) are nonexclusive, as made clear by the introductory statement that "[t]he factors for the court to consider include." Fed. Rule Civ. Proc. 19(b). The general direction is whether "in equity or good conscience, the action should proceed among the existing parties or should be dismissed." *Ibid.* The design of the Rule, then, indicates that the determination whether to proceed will turn upon factors that are case specific, which is consistent with a Rule based on equitable considerations.

Pimentel, 553 U.S. at 862-63.

In this case, the Rule 19(b) factors and other pertinent considerations require, in equity and good conscience, that this case proceed among the existing parties. With regard to the listed factors in Rule 19(b), there is no prejudice to the FMT or to any other tribe in allowing the case to proceed, since the FMT has designated the Tribe as the entity to act on its behalf in this matter and since the funding interests of other tribes are not implicated in this case or are otherwise adequately represented by the Defendants. Relief can be shaped to avoid prejudice to absent parties, since the court need not award amounts contractible by other parties in order to provide the Tribe with the relief it seeks. Further, there is no reason why a judgment rendered in the absence of the FMT or any other tribe could not be adequate; however, the Tribe would have no adequate remedy (no other forum in which to seek review of the Secretary's actions) were this case to be dismissed.

In fact, to dismiss this case on Rule 19 grounds would be to make the Secretary's declination of the contract proposal unreviewable, contrary to the express right of appeal under § 450f(b)(3) of the ISDEAA. As the D.C. Circuit has noted, "Congress . . . clearly expressed in

the [ISDEAA] both its intent to circumscribe as tightly as possible the discretion of the Secretary, *see* [ISDEAA] § 450k(a) (prohibiting the Secretary from promulgating any regulation or imposing any nonregulatory requirement, except for regulations pertaining to sixteen carefully delineated topics not relevant here), and its intent to make available judicial review of all agency action, *see id.* § 450m-1(a)." *Ramah Navajo Sch. Bd*, 87 F. 3d at 1344. Yet, if the court accepts the Defendants' Rule 19 argument in the present case, it would allow the Secretary to avoid both the requirement to enter into ISDEAA contracts on a mandatory basis and the consequence of judicial review for failure to do so—in this case and perhaps others—simply by discontinuing a program after receipt of an unwelcome contract proposal and arguing that tribes who may wish to contract for the subsequently reallocated funds have an interest in any challenge. That result is plainly inconsistent with the ISDEAA statutory scheme and the Court should reject the Defendants' request for an escape hatch from their statutory obligations.

Finally, the fact that the FMT itself has passed two resolutions designating the Tribe as the appropriate entity to represent its interests in the subject matter of this action – with the second resolution specifically referencing this litigation and stating that the FMT supports the litigation and does not believe it needs to be involved—is an overwhelming factor in this case for allowing the action to proceed. Equitable considerations should preclude the Defendants from using a tribe's own sovereign immunity and purported interests as a pretext, against that tribe's will, to preclude review of agency action contrary to what that tribe believes to be in its own best interests.

VI. The Tribe Is Entitled To Statutorily Authorized Relief.

The Tribe is entitled to its requested relief and was not required to argue the specific elements of injunctive or mandamus relief for such relief to apply in this action. The traditional

requirements for obtaining injunctive relief do not apply when it is clear that Congress intended a different standard. *FTC v. H.J. Heinz Co.*, 246 F. 3d 708, 714 (D.C. Cir. 2001). Section 110(a) of the ISDEAA provides:

> [T]he 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 Act 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 Act or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 102(a)(2) or to compel the Secretary to award and fund an approved self-determination contract).

25 U.S.C. § 450m-1(a).

The Tribe's Complaint at Paragraph 54 requests exactly this relief to protect its rights under the ISDEAA, and Congress made clear its intention that such relief should be available in an action, such as this one, challenging an unlawful declination of an ISDEAA proposal.

(a) Congress Clearly Intended to Provide Injunctive Relief to Enforce the ISDEAA's Strict Declination Provisions Without Regard to the Traditional Equity Standard.

Where Congress clearly indicates that injunctive relief is available without regard to the traditional four-part test, or under a different standard, the party seeking the injunctive relief need not make any showing under the traditional test, but need only show that the statutory criteria for relief is met. *H.J. Heinz Co.*, 246 F.3d at 714 (Congress provided a different standard for injunctive relief in 15 U.S.C. § 53(b) that did not require federal agency to show all elements of the traditional equity standard); *Alston v. District of Columbia*, 439 F. Supp. 2d 86, 91 (D.D.C. 2006) (traditional four-part standard not applicable when statute is interpreted as imposing an automatic statutory injunction). Congressional intent must be clearly indicated, *FMC v. City of Los Angeles*, 607 F. Supp. 2d 192, 197 (D.D.C. 2009), such as when Congress states the circumstances under which an injunction may be issued. *Id.* at 198 (statutory language altered

standard for permanent injunction, but not preliminary injunction, to enjoin an agreement under Section 6(h) of the Shipping Act, where "the agreement is likely to have the effect described" in Section 6(g) of the Act).

Mandatory language in a statute can also constitute clear evidence of Congressional intent to make injunctive relief available without regard to the otherwise-applicable equitable showing. In *Alston*, this Court noted that the traditional four-part standard for injunctive relief is inapplicable in actions for an injunction to enforce the "stay put" provision of the Individuals with Disabilities Education Act (IDEA) because the IDEA explicitly states that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child *shall* remain in the then-current educational placement of such child." 439 F. Supp. 2d at 91-92 (emphasis in original).

The ISDEAA specifically states that district courts may order injunctive relief "against any action . . . contrary to this Act or regulations promulgated thereunder." 25 U.S.C. § 450m-1(a). This broad language clearly indicates Congress' intent to set a standard for injunctive relief that departs from the traditional four-part standard, which does not allow an injunction against "any action" contrary to law but requires the party seeking relief to demonstrate likelihood of irreparable harm, that the balance of equities is in that party's favor, and that an injunction is in the public interest. This multi-pronged equitable showing is inconsistent with the plain and broad language of Section 450m-1(a) and clearly was not intended by Congress to be required under that provision.

The mandatory nature of the ISDEAA provisions that govern this appeal are also clear evidence of Congressional intent to depart from the equitable showing requirement for injunctive relief. By statutory command, 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). The Secretary "shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides a written notification to the applicant that contains a specific finding that clearly demonstrates" that at least one of five listed declination criteria applies. 25 U.S.C. § 450f(a)(2). Further, the Secretary "shall approve any severable portion of a contract proposal that does not support a declination finding" listed in the statute. 25 U.S.C. § 450f(a)(4). The provision making injunctive and mandamus relief available to ISDEAA contractors in Section 110 of the ISDEAA is specifically designed to enforce these and other mandatory provisions of the ISDEAA that themselves compel the conclusion that an injunction or writ of mandamus may issue. *See Alston*, 439 F. Supp. 2d at 91-92. Accordingly, the Tribe need only show that the PAIHS's actions are contrary to the ISDEAA, as provided in Section 110, for this Court to award such relief.

Other courts have in fact found that Section 110 of the ISDEAA, 25 U.S.C. § 450m-1(a), does not require an ISDEAA contractor to make any showing under the traditional equitable test for injunctive and mandamus relief in order to avail itself of the remedy provided for in that Section. *See, e.g.*, *Susanville Indian Rancheria v. Leavitt*, U.S. Dist. LEXIS 365 at *34–36 (E.D. Cal. 2008) (enjoining IHS from rejecting tribe's offer and requiring the IHS to fund an ISDEAA agreement without restrictions); *Crownpoint Inst. of Tech. v. Norton*, 2005 U.S. Dist. LEXIS 48399 at *37 (D.N.M. 2005) ("The specific mandamus relief authorized by ISD[EA]A relieves [the plaintiff tribal organization] of proving the usual equitable elements including irreparable injury and absence of an adequate remedy at law.").

Thus, the statutory relief provided by Section 110 of the ISDEAA renders moot the traditional elements required for equitable relief, and the Tribe is entitled to a permanent injunction, or in the alternative, in the Court's discretion, mandamus or other relief on showing that the PAIHS's actions are contrary to the ISDEAA.

(b) While Not Required To Do So, The Tribe Also Satisfies The Elements Required For Equitable Relief.

1. The Tribe Is Entitled To Injunctive Relief.

Even though the Tribe is not required in this action to argue the elements of injunctive relief, the Tribe satisfies the test otherwise applied to requests for permanent injunctive relief. In seeking a permanent injunction, a plaintiff must meet the following four factor test:

> A plaintiff must demonstrate: (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.

Loving v. IRS, 917 F. Supp. 2d 67, 80-81(D.D.C. 2013) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

a. The Tribe has suffered an irreparable injury.

The Tribe has suffered an irreparable injury because Defendants' actions in this case have impaired the Tribe from directly exercising its rights under the ISDEAA. The Tribe is not carrying out an EMS program for the FMT and does not have the $502,611.30 in funding requested to provide EMS services to the FMT's Indian beneficiaries, as the ISDEAA has contemplated the Tribe to provide.

b. Money damages are inadequate.

Monetary damages alone would not adequately compensate the Tribe for the Defendants' violation of the ISDEAA. For example, if the court were to award the Tribe only the

$502,611.30 the Tribe requested in its Title I proposal, such funding would only be for one year's worth of the funding the Tribe was seeking—not for multiple years of payment needed to provide continuing EMS services on behalf of the FMT. The ISDEAA provides that the Section 106(a)(1) amount of funding paid to a Title I contractor recurs in subsequent years and may not be reduced except in limited circumstances (*e.g.*, reduction in appropriations, by tribal authorization). 25 U.S.C. § 450j-1(b)(2). Relief that would give the Tribe only one year's worth of funding for the EMS program would not allow the Tribe to provide ongoing EMS services on behalf of the FMT for multiple years, as intended by the Tribe and supported by the FMT in its resolutions.

Moreover, the provision of monetary damages alone would not result in a reversal of the IHS's declination and subsequent award of an ISDEAA contract to the Tribe, so that the Tribe could carry out the EMS services under the ISDEAA, exercise its rights of self-determination, and take advantage of the benefits that apply to ISDEAA contractors (*e.g.*, Federal Tort Claims Act coverage per 25 U.S.C. § 450f(d)).

Only injunctive relief preventing Defendants from declining the Tribe's proposal to contract the EMS program would result in the Tribe's being able to fully exercise its rights as intended by the ISDEAA. Monetary relief alone would not make the Tribe whole from the Defendants' violation of the ISDEAA.

c. The balance of hardships favors the Tribe.

In contrast to the substantial and irreparable injury the Tribe would suffer in the absence of injunctive relief, Defendants' injury from such relief is minimal. The Defendants would merely be required to pay the Tribe to provide EMS services to the FMT, and at most the

Defendants would be required to reprogram funding from the IHS's multi-billion dollar appropriation to fund the contract.

Congress does not specify, in the appropriations acts, how much the IHS may or must spend for EMS. The IHS receives two large appropriations, one for Indian Health Services and one for Indian Health Facilities. *See* Consolidated Appropriations Act, 2014, Pub. L. No. 113-76. The Services appropriation, with which IHS carries out the ISDEAA and other statutory responsibilities, totaled $3,982,842,000 for FY 2014. *Id.* Most of the funding is unrestricted and there is no restriction on the amount the IHS could allocate to the EMS program that the Tribe has proposed to contract.

Thus, while the Tribe has had its rights violated under the ISDEAA, the Defendants' would at the most face an accounting issue. It would also be a hardship to the Tribe (and on the public as a whole) if Defendants were not enjoined from declining the Tribe's proposed Title I contract using the strategy employed in this case: terminating a program after receiving a contract proposal to conveniently make $0 in funds available for contracting. Failure to enjoin the Defendants from declining the Tribe's proposal would allow a terrific harm to occur—Defendants would have found a way to defeat the purposes of the ISDEAA, which are to promote tribal self-determination, assure maximum Indian participation in the direction of Federal services provided in Indian communities, and to "permit an orderly transition from the Federal domination of programs for, and services to, Indians." 25 U.S.C. § 450a(a), (b).

The balance of harms is thus in the Tribe's favor.

d. A permanent injunction is in the public interest.

The public interest would be served if the Court were to issue a permanent injunction against the Defendants, enjoining them from declining the Tribe's contract as proposed. Such an

injunction would help ensure that the ISDEAA is properly implemented by the Defendants and that the ISDEAA's purposes are realized rather than defeated.

Additionally, the public mainly impacted by the issues raised in this action are the Indian beneficiaries of the programs, functions, services and activities provided to them by their tribes and tribal organizations through the ISDEAA. Such beneficiaries include the members of the FMT, on whose behalf the Tribe would be providing the EMS services proposed. Those beneficiaries' interests in having an active and robust EMS program on the FMT's reservation, to be provided by the Tribe rather than the PAIHS—as expressed in the FMT's resolutions—would be served only if an injunction ensued to allow the Tribe to exercise the rights Congress provided to it under the ISDEAA.

The Tribe is thus entitled to permanent injunctive relief statutorily authorized by the ISDEAA and under the traditional elements considered by the courts.

2. The Tribe Is Entitled To Mandamus Relief.

In the alternative, or in addition to injunctive relief, in the Court's discretion, the Tribe also satisfies the tests applied to requests for mandamus relief: "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff.'" *Turner v. Beers*, 2013 U.S. Dist. LEXIS 176637 at *5 (D.D.C. 2013) (quoting *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002)).

The Tribe has a clear and certain right under the ISDEAA to a Title I contract for the EMS program and associated funding, as the Tribe has argued in its Motion for Summary Judgment and this brief. The Tribe has also asserted that the Defendants' duties under the ISDEAA are non-discretionary and that Defendants are plainly required to award the contract proposal: Section 102(a)(1) of the ISDEAA states that the "Secretary is directed, upon the

request of any Indian tribe by tribal resolution, to enter into a self-determination contract . . . ." 25 U.S.C. § 450f(a)(1). As noted above, any remedies other than preventing the Defendants from declining the Tribe's proposed contract and requiring Defendants to award and fund the contract would be inadequate.

The Tribe is thus entitled to the mandamus relief statutorily authorized by the ISDEAA and under the traditional elements considered by the courts.

VII. Conclusion

For the reasons stated, the Tribe respectfully requests that the Court grant the Plaintiff's Motion for Summary Judgment and deny the Defendants' Motion to Dismiss and Cross-Motion for Summary Judgment.

Respectfully submitted,

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

Geoffrey D. Strommer *pro hac vice*
Starla K. Roels *pro hac vice*
Hobbs, Straus, Dean & Walker, LLP
806 SW Broadway, Suite 900
Portland, OR 97205
503-242-1745 (Tel.)
503-242-1072 (Fax)

Attorneys for the Pyramid Lake Paiute Tribe

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