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

INTRODUCTION

The Pyramid Lake Paiute Tribe ("Plaintiff") submitted a proposal to contract for the Emergency Medical Services ("EMS") program on behalf of the Fort McDermitt Paiute and Shoshone Tribe ("Fort McDermitt Tribe") pursuant to the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 450 *et seq.* Plaintiff's Exhibit ("Pl.'s Exh.") C, ECF No. 12-3. The proposal requested funding in the amount of $502,611.30. *Id.* at 7. The Indian Health Service ("IHS" or "Agency") declined the proposal pursuant to 25 U.S.C. § 450f(a)(2)(D) ("the amount of funds proposed under the contract is in excess of the applicable funding level for the contract") because the EMS program had been suspended on August 19, 2013 and formally terminated on September 30, 2013. Pl.'s Exh. B, ECF No. 12-2, at 5; Declaration of Loren Ellery,

ECF No. 14-7, at 2. Thus, the funding available for the EMS program was $0.00.[1] Pl.'s Exh. B, ECF No. 12-2, at 6.

Plaintiff appealed the declination and filed a Complaint and a Motion for Summary Judgment in this Court. Defendants filed a Cross-Motion for Summary Judgment and a Motion to Dismiss. In Defendants' Motion to Dismiss, Defendants argued that the Fort McDermitt Tribe and the other tribes of the Schurz Service Unit ("other tribes") were indispensable parties to the litigation. Defendants' Motion to Dismiss and Cross-Motion for Summary Judgment ("Defs' Mem."), ECF No. 14, at 14. Plaintiff filed a Reply to Defendants' Opposition to Plaintiff's Motion for Summary Judgment and an Opposition to Defendants' Motion to Dismiss and Defendants' Cross-Motion for Summary Judgment. 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 ("Pl.'s Mem." or "Plaintiff's Memorandum"), ECF Nos. 18 and 19. This Memorandum is in response to Plaintiff's Opposition.

[1] When IHS received Plaintiff's proposal to contract, it was in the process of determining that the Fort McDermitt EMS program would need to be canceled. The Fort McDermitt Tribe's tribal shares available for the EMS program prior to its cancelation were $38,746. Administrative Record ("Admin. Rec.") 0105 (Fiscal Year ("FY") 2013 Resource Allocation Table). During the 90-day time frame in which IHS had to decide whether to accept Plaintiff's proposal, the EMS program was canceled, making the tribal shares available for the program $0.00. Pl.'s Exh. B, Dkt. No. 12-2, at 6; Declaration of Thomas Tahsuda, Dkt. No. 14-10, at 2. Plaintiff proposed to contract for $502,611.30. Pl.'s Exh. C, Dkt. No. 12-3, at 7. The Fort McDermitt Tribe, on whose behalf Plaintiff was seeking to contract, was never eligible to contract for $502,611.30 in tribal shares for the EMS program. The Fort McDermitt Tribe has a total service unit share of $554,080. Admin. Rec. 0105 (FY 2013 Resource Allocation Table). However, Plaintiff did not have a resolution to access to the Fort McDermitt Tribe's tribal shares not associated with the EMS program.

SUMMARY OF ARGUMENT

Plaintiff's Complaint should 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 other tribes.

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). Plaintiff's Complaint and Motion for Summary Judgment which seek to enjoin[2] IHS from declining Plaintiff's contract proposal and compel IHS to enter into a contract in excess of the funding available for the Fort McDermitt EMS program necessarily impact the funding available for other tribes. The funding for the Schurz Service Unit is a finite amount.

[2] Plaintiff failed to make any showing in its Complaint or Motion for Summary Judgment that it met the standard for injunctive relief or mandamus. Plaintiff's Complaint, Dkt. No. 4; Plaintiff's Motion for Summary Judgment, Dkt. No. 12. In Plaintiff's Memorandum, Plaintiff argues that it did not have to argue any specific elements of injunctive relief. Pl.'s Mem., Dkt. Nos. 18 and 19, at 36-44. *Cf. Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1098 (11th Cir. Fla. 2004) ("[O]ur cases also suggest that, when Congress authorizes injunctive relief, it implicitly requires that the traditional requirements for an injunction be met in addition to any elements explicitly specified in the statute."). Even the cases cited by Plaintiff do not support the idea that Plaintiff is not required to make any showing regarding statutory injunctive relief. For example, the injunctive relief in *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001), cited by the Plaintiff, was granted only after a showing that "such action would be in the public interest--as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits." *See* Pl.'s Mem., Dkt. Nos. 18 and 19, at 37. With regard to mandamus, an even higher standard applies. The "extraordinary remedy" of mandamus is available only where "(1) the plaintiff's claim is clear and certain; (2) the duty is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available." *Fallini v. Hodel,* 783 F.2d 1343, 1345 (9th Cir. 1986) (citations and quotation marks omitted).

See Def. Cross Motion for Summary Judgment at 7. $3.5 million dollars was available in Fiscal Year ("FY") 2013 for all of the contracting and services provided to twelve tribes. When more is taken for Plaintiff, less is available for the other tribes that also have rights to assert their interest in that funding and propose to contract with IHS in accordance with the ISDEAA or keep the funding with the IHS to provide services directly.

Plaintiff has received a resolution from the Fort McDermitt Tribe consenting to the present litigation for EMS program funding. [3] Although the Fort McDermitt Tribe's April 8, 2014 Resolution ("April 8th Resolution") settles questions about Plaintiff's ability to litigate on behalf of the Fort McDermitt Tribe, Rule 19 still precludes further review because the relief sought by Plaintiff would violate the rights of the other tribes. Fed. R. Civ. P. 19(a)(1)(A) (a party is required when "in [that party's] absence, the court cannot accord complete relief among existing parties."); *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. Wash. 1990) (Upholding the district court's determination that "it could not grant complete relief to the Makah because it would violate the treaty rights of other tribes.").

Plaintiff avows that its proposal sought only funds identified in the "'McDermitt EMS/Ambulance Program Options Analysis' (Options Analysis)… and did seek [sic] nor implicate the tribal shares of other Schurz Service Unit tribes." Pl.'s Mem., ECF Nos. 18 and 19, at 10. However, the very Options Analysis document cited shows that costs were ballooning in a way that the Fort McDermitt Clinic budget could not support, and statements from IHS's Budget Officer

[3] Neither this Resolution nor the previous April 19, 2013 Resolution authorize Plaintiff to contract for tribal shares associated with any other program funding and $0.00 in funding was associated with the EMS program after September 30, 2013. Even if the EMS program had not been eliminated the tribal shares associated with the EMS program when it was in operation were only $38, 746.

explain how these costs were offset with other funds in the Schurz Service Unit—funds that implicate the interests of other tribes. Pl.'s Exh. D, ECF No. 12-4; Declaration of Paulette Brewer ("Brewer Decl."), ECF No. 14-9, at 1-2. Thus, these other tribes also satisfy the "interests" test of Rule 19(a)(1)(B). These interest would be "impaired" if the litigation were to proceed in their absence. Fed. R. Civ. P. 19(a)(1)(B)(i).

The ISDEAA 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. Thus, Plaintiff's contract proposal and litigation in pursuit of the funds it claims are associated with the Fort McDermitt EMS program in no way waives the sovereign immunity of the other tribes that must be joined to the litigation for it to continue. The sovereign immunity of the other tribes makes it infeasible for these required parties to be joined. Further, equity and good conscience require dismissal of Plaintiff's Complaint and Motion for Summary Judgment because proceeding without the other tribes will result in abrogation of these tribes' contracting rights under the ISDEAA and duplicative litigation to determine funding. Thus, Defendants respectfully request that Plaintiff's Complaint and Motion be dismissed pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure.

ARGUMENT

I. Plaintiff's Proposal is Either A Proposal to Redesign the non-EMS Tribal Shares of the Fort McDermitt Tribe or Seeks Access to Funding that Implicates the Interests of the Other Tribes

Plaintiff's Resolution from the Fort McDermitt Tribe permits Plaintiff to pursue the funding associated with the Fort McDermitt EMS program. As of September 30, 2013, the tribal share of funding associated with the Fort McDermitt EMS program was $0.00. Pl.'s Exh. B, ECF No. 12-2,

at 6; Declaration of Thomas Tahsuda, ECF No. 14-10, at 2.[4] If Plaintiff pursues any of the Fort McDermitt Tribe's tribal shares in excess of $0.00, it seeks funding not associated with the Fort McDermitt EMS program. The Fort McDermitt Tribe could be entitled to contract for its full amount of tribal shares at the service unit level and could propose to redesign a portion of these shares consistent with the ISDEAA to carry out an EMS program; but only, with a resolution authorizing the redesign of other service unit shares, which it lacks.

The budget from Plaintiff's proposal uses funding numbers from when the EMS program was in operation in FY 2012. Pl.'s Exh. C, ECF No. 12-3, at 7. The funding in FY 2012 came from an amalgamation of sources. $143, 397 of this funding came from third-party revenues of the Fort McDermitt Clinic.[5] Brewer Decl., ECF No. 14-9, at 2. The rest of the funding for the EMS program was billed to the hospitals and clinics ("H&C") budget of the Fort McDermitt Clinic. However, that budget was only $142, 349 in FY 2012. Defendants' Exhibit ("Defs' Exh.") 6 (FY

[4] Of the $554,080 contractible Schurz Service Unit tribal shares available to the Fort McDermitt Tribe, $38, 746 were identified as tribal shares for the EMS program in FY 2013. The $38,746 associated with the terminated EMS program will be reallocated to other health priorities pending the outcome of this case and available for tribal shares consistent with the negotiated methodology for distributing Schurz Service Unit tribal shares.

[5] In Plaintiff's Memorandum, Plaintiff argued that it is entitled to third-party revenues of the Fort McDermitt Clinic. Pl.'s Mem., Dkt. Nos. 18 and 19, at 17. Plaintiff is not entitled to these third-party revenues for two reasons. First, Plaintiff has not sought to contract for the services at the Fort McDermitt Clinic which generated these third-party revenues. 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. Second, while tribes are permitted to bill third parties directly for services they provide under an ISDEAA contract, those recoveries are considered supplemental to the Secretarial amount. *See, e.g.* 25 U.S.C. 450j-1(m), 25 U.S.C. 458aaa-7(j). Plaintiff, itself, admits that third-party revenue is not a program, function, service, or activity ("PFSA") eligible for contracting under the ISDEAA. Pl.'s Mem., Dkt. Nos. 18 and 19, at 17. Thus, Plaintiff cannot contract for these amounts.

2012 Recurring Base for Hospitals and Clinics). [6] The discrepancy was paid for with other funding from the Schurz Service Unit. Brewer Decl., ECF No. 14-9, at 1-2. It is well settled that IHS can redesign funding to best meet the needs of the tribal people it serves. A unanimous Court held that the Agency's decision to terminate a previously operated treatment program for handicapped children was not subject to judicial review under the relevant statue, but rather was "committed to agency discretion by law." *Lincoln v. Vigil*, 508 U.S. 182, 184 (1993) (citing the Administrative Procedure Act ("APA"), 5 U.S.C. § 701(a) (2)). Transferring funding to eliminate and/or create new programs does not change the total amount of funds that are available to a tribe for contracting. If it did, the Agency would be unable to meet the changing needs of the tribes because the programs and associated funding would be stagnant. In addition, the Secretary cannot be required to reduce funding for programs for a tribe to make funds available to another tribe. *See* 25 U.S.C. § 450j-1(b). All tribes are entitled to their appropriate share of the health care funding.

If Plaintiff does not intend to implicate the funding of other tribes, as it asserts, redesign is the only possible outcome—either by judicial means or the submission of a proposal. The proper

---

[6] There was a rescission in FY 2012 which reduced the total FY 2012 funding for the Schurz Service Unit by $5,921 to $3,694,614, and the amount of the Fort McDermitt Clinic H&C budget by $228. Section 436 (a) in Division E, Title IV, Consolidated Appropriations Act, 2012 (P.L. 112-74). The former number was further reduced by the sequestration and a rescission in FY 2013 resulting in the FY 2013 total adjusted funding for the Schurz Service Unit being approximately $3.5 million. President Barak Obama, Sequestration Order for Fiscal Year 2013 Pursuant to Section 251A of the Balanced Budget and Emergency Deficit Control Act, As Amended (Mar. 1, 2013) (Implementing sequestration at the levels the Office of Management and Budget ("OMB") set in its report to Congress); *See* OMB, Report to the Congress on the sequestration for Fiscal Year FY 2013 required by section 251A of the Balanced Budget and Emergency Deficit Control Act (Mar. 1, 2013); Section 3004 in Division G, Consolidated and Further Continuing Appropriations Act, 2013 (P .L. 113-6) (Rescission of the IHS budget of 0.2 percent).

mechanism for Plaintiff to operate a $502,611.30 EMS program on behalf of the Fort McDermitt Tribe, using only the Fort McDermitt Tribe's tribal shares is for Plaintiff to submit a contract proposal to IHS which included a redesign proposal pursuant to 25 U.S.C. § 450j(j). Since the Agency has not yet received a redesign proposal from Plaintiff, the Agency is not in a position to evaluate such a proposal to determine whether it would be approved. A redesign proposal is evaluated with the same declination criteria as a contract proposal. 25 U.S.C. § 450f(a)(2). This redesign procedure exists because there is a Congressionally-mandated level of oversight for redesign proposal of Title I contracts in the ISDEAA. *See* 25 U.S.C. § 450j(j). Such oversight is not required for Title V compacts. *See* 25 U.S.C. § 458aaa-5(e). The redesign would leave the Fort McDermitt Tribe with $51, 468.70 for direct services at the service unit level.[7]

The Fort McDermitt Tribe asserts in its April 8th Resolution that it does not consider Plaintiff's proposal to be a proposal to redesign services provided at the Fort McDermitt Clinic. Pl.'s Exh. E, ECF Nos. 18-2 and 19-2, at 4. Plaintiff has suggested both that its proposal is not a redesign and that it does not intend to absorb funding used for other tribes. As these are the only two payment

[7] The Phoenix Area Office has indicated that continued operation of the Fort McDermitt Clinic would be unsustainable with a $502,611.30 budget reduction. Ellery Decl. at 2. In response, Plaintiff has argued that IHS has a statutory duty pursuant to Section 301(b) of the Indian Health Care Improvement Act ("IHCIA"), codified at 25 U.S.C. 1631(b), to notify Congress one year prior to the closure of an IHS hospital or outpatient facility. Pl.'s Mem., Dkt. No. 19, at 20 n12. While services provided to IHS beneficiaries at the Fort McDermitt Clinic could be significantly affected and potentially discontinued based on a decision to award funding, whether the Clinic will be closed; and whether the requirements of Section 1631(b) apply and would need to be met prior to a permanent closure of this clinic, is beyond the scope of this declination case brought under the ISDEAA. *Cf. Yankton Sioux Tribe v. U.S. Dept. of Health and Human Services*, 869 F.Supp. 760, 764-765 (D.S.D. 1994) (finding jurisdiction under the Administrative Procedure Act to review actions that implicate 25 U.S.C. § 1631(b)).

sources from which Plaintiff's proposal for a $502,611.30 EMS program could be funded, the Agency is at a loss to determine from which account Plaintiff believes the funds for its proposal will issue. The funding of the Schurz Service Unit was $3.5 million dollars in FY 2013. The service unit tribal shares of the Fort McDermitt Tribe make up approximately 15 percent of that amount. Zero percent of the Fort McDermitt's Tribe's 15 percent of the service unit's funding is currently being used on an EMS program. Either Plaintiff plans to use approximately 91 percent of the Fort McDermitt Tribe's existing portion of the Schurz Service Unit funding to support a new EMS program, or it plans to use other funding not associated with the Fort McDermitt Tribe's fifteen percent share to fund the Fort McDermitt EMS program, funding in which the other tribes have an interest.

a. The Other Tribes are Required Parties to the Litigation because "in that [their] absence, the court cannot accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A).

As stated in Plaintiff's Memorandum, the definition of a required party includes a person who "in that person's absence, the court cannot accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A); Pl.'s Mem., ECF Nos. 18 and 19, at 27. Any relief granted by the Court to Plaintiff without the other tribes will not be complete as it violates the self-determination rights of the other tribes. *See Makah Indian Tribe*, 910 F.2d at 559 (Upholding the district court's determination that "it could not grant complete relief to the Makah because it would violate the treaty rights of other tribes."). Each tribe of the Schurz Unit has the same rights to contract for its portion of programs, functions, services, or activities ("PFSAs") as Plaintiff, or to keep its funding with IHS for the Agency to provide the tribe with services directly. If Plaintiff is awarded a portion of the funding, in which the other tribes have a vested interest pursuant to the ISDEAA,

those rights are abrogated.

b. **The Other Tribes Also Meet the "Interests" Test Under Rule 19(a)(1)(B)**

Although Defendants have met the first prong of the either/or test of Rule 19(a) and have thus met their burden to show that the other tribes are required parties, the other tribes also meet the requirements of Rule 19(a)(1)(B). Rule 19(a)(1)(B) requires joinder where:

> (B) that person claims an interest[8] 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.

Fed. R. Civ. P. 19(a)(1)(B). The other tribes claim an interest in the funding of the Schurz Service Unit because their share of the Schurz Service Unit funding is legally vested under the ISDEAA whether they choose to contract with the Secretary of the Department of Health and Human Services ("Secretary") or leave the funding with IHS to provide direct services. *See Makah Indian Tribe*, 910 F.2d at 559 (Upholding the district court's determination that "the absent tribes had an interest in the suit because 'any share that goes to the Makah must come from [the] other tribes.'").

The Agency's discussion of the Fort McDermitt Tribe's tribal shares in Defendants' Motion to Dismiss and Cross-Motion for Summary Judgment explains how Plaintiff's proposal inextricably

[8] "[C]ourts generally construe 'claims an interest' as though it read 'has an interest' . . . . [s]ince an absentee obviously cannot make 'claims' in the action itself . . . ." Jean F. Rydstrom, Annotation, Who Must be Joined in Action as Person "Needed for Just Adjudication" Under Rule 19(a), Federal Rules of Civil Procedure, 22 A.L.R. Fed. 765, § 8 (1975). *See also State v. Tyson Foods*, Inc., 258 F.R.D. 472, 476 (N.D. Okla. 2009) ("To determine whether an absent party **has an interest** in an action, a court must begin by correctly characterizing the pending action between those already parties to the action.) (emphasis added) (quotation marks and citations omitted).

intertwines the interests of the other tribes so that each tribe is a required party to the litigation. [9] Defs' Mem., ECF No. 14, at 40-43.

Both Plaintiff and the Fort McDermitt Tribe seem to have a fundamental misunderstanding of the amount of funding available for all of the tribes in the Schurz Service Unit. All of this funding totaled $3.5 million dollars in FY 2013, for twelve tribes. This funding is typically not parceled out to individual tribes; however, when a tribe decides it wants to contract with IHS, there must be a method in place for determining the "Secretarial amount" or "106(a)(1) amount" (i.e. "the money the… Secretary would have otherwise spent on the PFSA") in order to determine the appropriate share for each tribe eligible to contract under the ISDEAA. *See* 25 U.S.C. § 450j-1.

The ISDEAA requires the Secretary to enter into contracts with Indian tribes who wish to contract to take over PFSAs and funding, however, the Secretary must also maintain her responsibility to provide services to those tribes who wish to have health care services provided directly by IHS. A PFSA of the IHS typically serves many tribes, therefore, when a tribe seeks to

[9] Contrary to Plaintiff's assertion in Plaintiff's Memorandum that the Agency's argument concerning tribal shares is post-hoc, the Agency did tell Plaintiff that the funding available for the EMS program was $0.00. Pl.'s Mem., Dkt. Nos. 18 and 19, at 20; Pl.'s Exh. B, Dkt. No. 12-2, at 6. Although the term tribal shares is not used in the declination letter, any assertion by Plaintiff that it was not aware that funding of PFSAs was determined by tribal shares would be disingenuous. The tribal share procedure is long-standing within the Agency and Plaintiff is represented by sophisticated counsel who has negotiated many contracts with the Agency that contained language concerning tribal shares. In fact, Plaintiff's proposal requests "all service unit program shares" for the EMS program. Pl.'s Exh. C, Dkt. No. 12-3, at 4. Plaintiff's proposal also cites "[t]he Schurz Service Unit Tribal Shares Allocation Tables" as the source of the Fort McDermitt EMS program funding amounts, although the amount Plaintiff cites, $502, 611.30, does not appear in that document which was only finalized in 2013. Pl.'s Exh. C, Dkt. No. 12-3, at 4; Admin. Rec. 0105 (FY 2013 Resource Allocation Table).

contract for a PFSA, it does not get the entire amount that the Secretary spent on the PFSA, but rather, just its proportionate share of the funding associated with the PFSA. In order to divide resources, the Secretary, through IHS, had to develop procedures at Headquarters, Area, and service unit levels to make a portion of funding available to tribes who wish to contract under the ISDEAA. These procedures, developed after consultation with tribes, determine the allocation of IHS funding.

Plaintiff has argued that the tribal shares procedure and "[d]etermining contract funding amounts" is not a topic on which the Secretary may impose requirements pursuant to the ISDEAA. Pl.'s Mem., ECF Nos. 18 and 19, at 22. However, allocating funding for programs the Secretary is currently operating falls squarely within the discretionary functions of the Secretary. Furthermore, the provision that Plaintiff cites prohibits the promulgation of regulations or imposition of nonregulatory requirements relating to self-determination contracts. 25 U.S.C. § 450k(a)(1). The Secretary has not promulgated regulations. Nor is the tribal shares procedure a nonregulatory requirement imposed on tribes. Rather, the Secretary calculates tribal shares to identify the amount for which a tribe may contract under 25 U.S.C. § 450j-1(a).

Although IHS consults with tribes before determining tribal shares of IHS programs, the ultimate determination of the Secretarial amount rests with the Agency, since it represents the amount of funds that the Agency, in its discretion, would spend to operate the program in question. *See Lincoln v. Vigil*, 508 U.S. at 194 (IHS's allocation of its lump-sum appropriations is committed to the Agency's discretion as a matter of law).

Moreover, when the Secretary administers a program, she has full discretion to move funding in order to sustain budgetary and health priorities. For example, if an account is overspent in one year, the Secretary may move funding from another account to cover the deficiency so that no violation of the Anti-Deficiency Act, Pub. L. 97–258, 96 Stat. 923 (1982), occurs. This is not a reallocation of tribal shares. Nothing in the ISDEAA prohibits the Secretary's reallocation of funding for direct services, even after receiving a contract proposal from a tribe. To suggest otherwise adds terms to the ISDEAA that do not exist. *See Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 974 (D.C. Cir. 2011) (Rejecting a party's interpretation that would "require adding terms to the statute that Congress has not included."). While the Secretary retains this discretion while administering direct services, tribes contracting with IHS understandably need certainty and predictability regarding what funding is available for ISDEAA contracting. The identification of tribal shares serves this purpose, so that any particular tribe that wanted to contract for its "Secretarial amount" would have an idea of how much that amount would be any time it decided to contract to operate the program under ISDEAA. Under Plaintiff's theory of funding availability, tribes would be incentivized to rush to contract under the ISDEAA any time more funding, including third-party revenue, was placed into a program they felt served only or primarily their members, and the Agency's discretion to move funding would be severely limited.

As previously stated, the proper mechanism for Plaintiff to operate a $502,611.30 EMS program on behalf of the Fort McDermitt Tribe is to submit a contract proposal to IHS which includes a redesign proposal for the Fort McDermitt Tribe's contractible tribal shares for a new EMS program pursuant to 25 U.S.C. § 450j(j). But Plaintiff does not want to divert any funding from the Fort McDermitt Clinic. Instead, Plaintiff is attempting to contract, on behalf of the Fort

McDermitt Tribe, for other funding of the Schurz Service Unit in which the other ten tribes of the Schurz Service Unit have an interest. This satisfies the "interests" test of Rule 19(a)(1)(B). Fed. R. Civ. P. 19(a)(1)(B).

Plaintiff erroneously attempts to argue that the other tribes have no "legally protected interest" in the funding because it comes solely from "Fort McDermitt Clinic hospital and clinic funds and revenues." Pl.'s Mem., ECF Nos. 18 and 19, at 33. This represents a misunderstanding of the McDermitt EMS/Ambulance Program Options Analysis (Plaintiff's Exhibit D, ECF No. 12-4) and the declaration of IHS's Budget Officer, Paulette Brewer. The entire H&C budget of the Fort McDermitt Clinic was only $142, 349 in FY 2012. Defs' Exh. 6 (FY 2012 Recurring Base for Hospitals and Clinics). When the $502,611.30 for the unsustainable EMS program was charged to this account, it created a huge deficit which was filled with other funding in the Schurz Service Unit which could have been used to meet competing health care needs had it not been used to pay the deficit. This funding implicates the interests of the other tribes. Brewer Decl., ECF No. 14-9, at 1-2. As previously stated, the budget of a program that the Secretary is operating directly is not parceled out among tribes until a tribe proposes to contract for its portion of the program. Plaintiff has never proposed to contract for the funding or the services provided by the Fort McDermitt Clinic. Thus, the argument that the Fort McDermitt Clinic funds somehow "belonged" only to the Fort McDermitt Tribe is a non sequitur. In fact, the Fort McDermitt Clinic was required by IHS policy to serve any eligible Indian of any tribe who presented for services at the Clinic. And assuming *arguendo* that Plaintiff's argument is correct and the Fort McDermitt Clinic funding did somehow "belong" to the Fort McDermitt Tribe because the budget went to serve the members of

the Fort McDermitt Tribe, the Fort McDermitt Tribe would still have to compete with the Winnemucca Indian Colony of Nevada, whose members are also regularly served by the Clinic.

Further, Plaintiff argues that the other tribes' interest in the funding of the EMS program only arose after the program was cancelled and the funding was "subsequently reallocated." Pl.'s Mem., ECF Nos. 18 and 19, at 36. Again, this shows a fundamental misunderstanding of how the Secretary may operate her programs. When the EMS program was in operation and vastly overspent its allotted budget, the Secretary, in her discretion, moved funding from other areas of the Schurz Service Unit, funding in which the other tribes have an interest, to balance the budget. The other tribes never ceased to have an interest in the funding because the Secretary used the funding to fill holes in other parts of the Schurz Service Unit budget. The other tribes retain a vested interest in their portion of those funds.

Plaintiff also argues that the facts of *Citizen Potawatomi Nation*, 248 F.3d 993 are distinguishable from the case *sub judice* as the other tribes do not have a "legally protected interest." Pl.'s Mem., ECF Nos. 18 and 19, at 32-33. Plaintiff argues that any interest the other tribes have is a "mere expectation." *Id.* However, the other tribes' interest in their portion of the funding has already vested whether they choose to use it for direct services or to contract.[10] If awarded to Plaintiff, this funding is no longer available to those tribes should they choose to contract under the ISDEAA or for the Secretary to use to continue providing services directly. Instead, it will be included as a recurring amount in Plaintiff's ISDEAA contract and will never again be available to the other tribes. It is an expression of a tribe's right to self-determination to

[10] The Secretary, acting through the IHS, is the only person authorized by law to calculate, and necessarily, re-calculate the contractible amount available to a tribe under 25 U.S.C. 450j-1(a)(1).

choose to contract, as Plaintiff has done, or to choose to have one's services provided directly by IHS. Declaration of Cliff Wiggins, ECF No, 14-11, at 2. Awarding Plaintiff's requested relief in litigation could deny the other tribes this choice, which they have an interest in retaining.

In short, Plaintiff is attempting to contract, on behalf of the Fort McDermitt Tribe, for a larger percentage of the Schurz Service Unit than the Fort McDermitt Tribe's EMS program tribal shares allow, which implicates the interests of the other tribes. This would cause enough of a funding quagmire if Plaintiff's idea was original. However, the Walker River Paiute Tribe ("Walker River"), another tribe in the Schurz Service Unit, has also made an argument that it is entitled to more than its tribal share of another PFSA. *Walker River Paiute Tribe v. Director, Phoenix Area, Indian Health Service*, Docket Number: IBIA 14-051 (April 14, 2014). In order to seek the relief it desires, Walker River will be competing for this same Schurz Service Unit funding.

The other tribes also meet the other conditions of Rule 19(a)(1)(B). Allowing the disposition of the Schurz Service Unit funding to occur without the other tribes would impede the tribes' ability to protect their interests to contract under the ISDEAA or to have services provided to them directly. Once the funding is given to Plaintiff, it becomes included as a recurring contract amount and it is no longer available to provide services to the other tribes or for contracting. It also exposes Defendants to substantial risk of multiple inconsistent obligations. In fact, in Defendants' case, it is not only a risk, but a reality. Defendants again point to the case of *Walker River Paiute Tribe*, Docket Number: IBIA 14-051 in which Walker River also seeks access to the same funding from the Schurz Service Unit.

Having shown that the other tribes are required parties, Defendants have also shown how their joinder is infeasible. 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; *See Oklahoma Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe of Oklahoma.*, 498 U.S. 505, 509 (1991) ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories.... Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.") (citations omitted). *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).

c. Contrary to Plaintiff's Contention "Equity and Good Conscience" Do Not Require the Action to Proceed

The only recourse left to Plaintiff is to argue that "equity and good conscience" require the litigation to proceed, but the serious rights at risk defeat that argument as well. Rule 19(b)'s own considerations clearly bode against proceeding in the case *sub judice.* First, the most serious offense is the "extent to which a judgment rendered in the person's absence might prejudice that person." Fed. R. Civ. P. 19(b). An award in Plaintiff's favor, without the presence of the other tribes, means that funding that should be available for those tribes will become legally unavailable. Those tribes have the same statutory rights under the ISDEAA as Plaintiff and the Fort McDermitt Tribe to contract for PFSAs or to have services provided directly. To award Plaintiff a portion of the others tribes' funding would abrogate those rights. Second, this offense cannot be "lessened or avoided by … protective provisions in the judgment." Fed. R. Civ. P. 19(b). As the Agency has stated, the only way to avoid implicating the funding of the other tribes is to allow Plaintiff to

contract for the non-EMS program tribal shares of the Fort McDermitt Tribe. Plaintiff only has a resolution to contract for and consent to litigate for the EMS program tribal shares. Further, Plaintiff has not requested this relief nor does the Agency believe Plaintiff would be satisfied with this relief. In addition, the Fort McDermitt Tribe has indicated in its April 8th Resolution that it does not consider Plaintiff's proposal as a proposal to redesign services provided at the Fort McDermitt Clinic. Pl.'s Exh. E, ECF Nos. 18-2 and 19-2, at 4. Third, judgment rendered without the participation of the other tribes would likely be inadequate as it would call into question all of the funding determinations of the Agency. Litigation to determine the reallocation of the funding of the Schurz Service Unit would be likely to follow. Finally, Plaintiff has an adequate remedy if the action is dismissed. Plaintiff may seek a resolution from the Fort McDermitt Tribe to contract for $502,611.30 of its total $554,080 in tribal shares available at the Schurz Service Unit. Plaintiff would then submit a proposal to contract and redesign pursuant to 25 U.S.C. § 450j(j).

Plaintiff has argued that Defendants are using Rule 19 to avoid judicial review of a declination decision. Pl.'s Mem., ECF Nos. 18 and 19, at 36. However, it is the specific facts of Plaintiff's proposal that make it susceptible to Rule 19 dismissal. Defendants are not aware of another declination in FY 2013 in which Rule 19 was used. In fact, in the Agency's almost 40 year history of contracting, Defendants are only aware of two other times in which Defendants have argued for a Rule 19 dismissal in a declination case. *See Three Affiliated Tribes of the Fort Berthold Indian Reservation v. United States*, 637 F. Supp. 2d 25 (D.D.C. 2009); *United Keetoowah Band of Cherokee Indians in Okla. v. Kempthorne*, 630 F. Supp. 2d 1296 (E.D. Okla. 2009).

d. Defendants Cannot Adequately Represent the Interests of the other Tribes Because Conflicts Exists Between Defendants and the Nonparty Beneficiaries

Walker River's suit exposes as false Plaintiff's assertion that Defendants can adequately represent the interests of the other tribes. This was the exact issue in *Citizen Potawatomi Nation,* 248 F.3d at 999, where the court held that the Federal government could not "adequately represent [the] varied and potentially conflicting interests" of multiple tribes. In *Citizen Potawatomi Nation,* a case concerning funding for the Citizen Potawatomi Nation's ISDEAA compact, the court held that where "some tribes may gain, while some tribes may lose" the Federal government could not adequately represent the interests of nonparty tribes. *See also Makah Indian Tribe* 910 F.2d at 560 (Holding that "potential intertribal conflicts meant the United States could not represent all of [the tribes].").

As in *Citizen Potawatomi*, in the case *sub judice,* there is a limited pot of resources within the Schurz Service Unit and these tribes are in direct competition for those resources. Already two tribes, Plaintiff and Walker River, have made legal claims to this effect. If Plaintiff gets more, Walker River may get less. The same is true for the other tribes.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant Defendants' Motion to Dismiss and deny Plaintiff's Motion for Summary Judgment.

Respectfully Submitted,

RONALD C. MACHEN JR.
D.C. BAR # 447889
United States Attorney
for the District of Columbia

DANIEL F. VAN HORN
D.C. BAR # 924092
Civil Chief

By: /s/

BENTON G. PETERSON, BAR # 1029849
Assistant United States Attorney
U.S. Attorney's Office
555 4th Street, N.W. - Civil Division Washington, D.C. 20530
(202) 252-2534

Of Counsel:
Hilary B. Cooper, Esq.
Sean Dooley, Esq.
Hilary M. Frierson Keeley, Esq.
Office of the General Counsel
U.S. Department of Health and Human Service