UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MANIILAQ ASSOCIATION,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 15-0152 (JDB)**
SYLVIA BURWELL, **in her official capacity as Secretary,** **U.S. Department of** **Health and Human Services,**	)	
and	)	
ROBERT MCSWAIN **in his official capacity as Acting Director,** **U.S. Indian Health Service,**	)	
Defendants.	)	

DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

Defendants, Sylvia Burwell, Secretary of the U.S. Department of Health and Human Services ("HHS") and Robert McSwain, Acting Director of the U.S. Indian Health Service ("IHS") (collectively "Defendant"), by and through undersigned counsel, respectfully moves this Court for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure ("Defendant's Motion"). In support of this motion, the Court is respectfully referred to the attached memorandum of points and authorities and exhibits and statement of material facts not in dispute. A proposed order is attached.

Respectfully submitted,

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Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

Defendant Sylvia Burwell, Secretary of the U.S. Department of Health and Human Services, et al., ("HHS"), through counsel, respectfully submits this memorandum in Opposition to Plaintiff's Motion for Summary Judgment (ECF No. 10) and in support of Defendant's Cross Motion for Summary Judgment filed this date. Maniilaq Association ("Maniilaq" or "Plaintiff"), filed suit under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 450, *et seq.*

I. INTRODUCTION

This case concerns a proposal by Plaintiff Maniilaq, an association comprised of twelve Alaska native village tribes, to bring about an 808% increase in funding for one of its village health clinics located in Kivalina, Alaska, through an unprecedented and unsupported use of the ISDEAA's leasing provision, Section 105(*l*), found at 25 U.S.C. § 450j(*l*), instead of using funds in its Funding Agreement ("FA") with the Indian Health Service ("IHS") pursuant to Section 106(a), found at 25 U.S.C. § 450j-1(a). If the Court were to endorse Plaintiff's argument, this would lead to the illogical result that the Secretary must fund every Maniilaq lease request, for any amount, simply because Maniilaq makes the demand.[1] Because of their importance to this case, Defendant has included Section 105(*l*) and Section 106(a) as exhibits. Ex. 16, Ex. 17.

A brief background to the Plaintiff's claim in this case is as follows:

Between 1994 and 2011, the IHS, an agency of HHS, supplied clinic space in Kivalina, Alaska through its Village Built Clinic Lease/Construction Program (VBC Program), alongside the funding that is provided for the operation of the Community Health Aide Program (CHAP) which used the clinic at this location. Ex. 11. The annual lease amount for Kivalina, including related expenses, was $30,921. *Id.*

Plaintiff requested three years ago that the IHS discontinue leasing clinical space for the program because Maniilaq then owned its own clinical space and no longer needed IHS to lease space on its behalf. Ex. 9. Accordingly, the lease was terminated. Because the funds emanated from the overall funding due to Maniilaq pursuant to Section 106(a) of the ISDEAA, 25 U.S.C. §

[1] While the dispute here is related to the clinic in Kivalina, Plaintiff makes clear that it intends to follow this same approach for each of its village clinic locations. ECF No. 10 (Plt. MSJ) at 20; ECF No. 10-9 at 32 (Plt. Final Offer, December 5, 2014). It is highly likely that other Alaska tribes would follow suit, and then the many tribes throughout the country that are carrying out IHS programs pursuant to the ISDEAA in their own facilities.

450j-1(a), the lease amount ($30,921) was added to Plaintiff's Funding Agreement (FA) as part of what is referred to as the "Secretarial amount" for the VBC Program. The Secretarial amount is a portion of Maniilaq's FA. In 2011, the FA provided to Maniilaq totaled over $41,000,000, in FY 2014, it was over $44,000,000. Ex. 10, Plaintiff's Exhibit G at ECF No. 10-8 at 8-10. In FY 1997, Maniilaq's FA was approximately $15,000,000, so it has nearly tripled since that time. Ex. 13.

The current dispute stems from Maniilaq's proposal to retrocede the Kivalina VBC Program back to IHS, effective February 2015, and then—through a back and forth maneuvering using isolated language in the leasing provision found at of Section 105(*l*) of the ISDEAA—to get that same Village Built Clinic (VBC) Program funding provided to it ($30,921)—but increased by 808% to $249,842. Ex. 6.

Although Maniilaq can retrocede the program back to IHS, its attempt to unilaterally change the funding level due pursuant to the ISDEAA by a novel reading of the leasing provisions found at Section 105(*l*) of the ISDEAA is without precedent and unsupported by law. Section 106(a) controls the amount of funding that Maniilaq receives, not Section 105(*l*). Section 106(a) provides that the Secretarial amount of the FA "shall not be less than the [ ] Secretary would have otherwise provided for the operation of the programs . . . without regard to any organizational level within . . . [HHS], . . including supportive administrative functions." *Id.* § 450j-1(a)(1) (Section 106(a)(1)). The Secretarial amount explicitly includes funding for "programs, functions, services, and activities," ("PFSA") including the leasing of space and related expenses. There is no provision in the ISDEAA that requires IHS to provide any additional funding outside of this provision.

Plaintiff attempts to circumvent the ISDEAA's funding provision by asking this Court to rely on isolated language in Section 105(*l*)(2) which states that the Secretary "shall compensate [the Indian tribe] that enters into a lease under paragraph (1) for the use of the facility leased for the purposes specified in such paragraph." The compensation may include rent, depreciation, principal and interest, operation and maintenance expenses, "and such other reasonable expenses that the Secretary determines, by regulation, to be allowable." *Id*. There is nothing in the language of Section 105(*l*) that dictates the tribe may arbitrarily set an amount for lease funding.

As the Ninth Circuit observed in another case seeking mandatory payments by an Indian tribe from the Defendant agency, "[t]he Tribe's reading [of contracting provisions of ISDEAA] would also lead to the illogical result that the Secretary must fund every contract request, for any amount—[a] result we must avoid." *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell*, 729 F.3d 1025, 1035 (9th Cir.). This would be an "absurd result." *See Aponte v. Gomez*, 993 F.2d 705, 708 (9th Cir. 1993) (observing that courts should avoid interpreting a statute in a way that leads to absurd results).[2]

Finally, nothing in the cases cited by Plaintiff authorizes the extraordinary action it requests. Indeed**, t**he urging of an unbridled entitlement to funds is unsupported by law. As the Ninth Circuit has observed, "If the agency spends $500,000 on law enforcement on a reservation, the Secretary can decline a contract request if the tribe asks for $700,000 to take over law enforcement on the reservation. Its limit would be $500,000." *Los Coyotes Band of Cahuilla & Cupeño Indians*, 729 F.3d at 1035 In that case, there was no amount allocated by the agency for law enforcement. The $200,000 amount increase was simply an example given by the Ninth Circuit in rejecting the argument. However, that is exactly the scenario in this case. Plaintiff

[2] The Ninth Circuit coverage includes Alaska and it regularly hears cases involving self-determination and other matters impacting Indians and Alaska Natives.

wants an increase of more than $200,000. Defendant urges this Court to follow the Ninth Circuit, reject Maniilaq's claim, grant summary judgment to Defendant, and dismiss this case, with prejudice.

II. FACTUAL AND PROCEDURAL BACKGROUND

The principal mission of IHS is to provide health care for American Indians and Alaska Natives throughout the United States. *See Lincoln v. Vigil*, 508 U.S. at 185 (1993); *see also* S. Rep. No. 102-392, 102d Cong., 2d Sess., at 2-3 (1992), reprinted in 1992 U.S.C.C.A.N. 3943. IHS delivers health care to American Indians and Alaska Natives through three separate mechanisms: (1) by providing health care services directly through its own facilities; (2) by contracting with tribes and tribal organizations pursuant to the ISDEAA to allow those tribes to independently operate health care delivery programs previously provided by IHS; and (3) by funding contracts and grants to organizations operating health programs for urban Indians. *Id*. at 4.

A. IHS Programs, Services, Functions and Activities ("PSFA")

IHS's authority to provide health care services to American Indians and Alaska Natives derives primarily from two statutes. The first, the Snyder Act, 25 U.S.C. § 13, is a general and broad statutory mandate authorizing IHS to "expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of Indians" and for the "relief of distress and conservation of health." 25 U.S.C. § 13 (providing the authority to the Bureau of Indian Affairs; 42 U.S.C. § 2001(a) (transferring the responsibility for Indian health care to the predecessor of the IHS). The second, the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. §§ 1601–1683, establishes numerous programs specifically created by Congress to address particular Indian health initiatives, such as alcohol and substance abuse treatment,

diabetes, medical training, and urban Indian health. IHS relies on both of these statutes to develop the numerous programs, services, functions, and activities (PSFA) that it operates for the benefit of Indian tribes. One such PSFA, the VBC Program, is at issue in this litigation.

1. The Village Built Clinic Lease/Construction ("VBC") Program

IHS has operated the VBC Program since 1969. The VBC Program is only operated in Alaska, where ninety-nine percent of IHS funds are managed by tribal organizations such as Maniilaq. The VBC Program exists as a means of acquiring and maintaining clinical space for the Community Health Aide Program ("CHAP"). Ex. 8. Leases executed under the VBC Program are and have always been "full service" leases. This means that in exchange for an agreed upon monthly amount, $30,921 in this case, the lessor is responsible for all expenses related to maintaining and operating the facility. Ex. 11. The expenses include, as the lessor's obligation in the lease, among other things, heating, utilities and maintenance. Ex. 8 at 4-5. Through its VBC Program, IHS has been one source of federal funding for the more than 150 clinics in Alaska, but there have also been other sources. The Denali Commission, an independent federal agency, has provided extensive assistance for construction and renovation of Village Built Clinics in Alaska.[3]

2. The Community Health Aide Program ("CHAP")

The CHAP was initiated during the tuberculosis epidemic of the 1950s. Village volunteers, later known as community health aides, helped to bring tuberculosis under control, and CHAP developed to address a wide variety of health concerns in Alaska including high infant mortality. IHS formally established the CHAP in 1968, and the program under IHS management has been acclaimed for its "major role in improving the health status of Alaska

3 *See* https://www.denali.gov/programs, section on health facilities.

Natives." *See* GAO Report, *Innovative Programs Using Nonphysicians*. GAO/HRD-93-128, found at http://www.gao.gov/products/HRD-93-128. The CHAP became a provision of the IHCIA in 1992. Pub. L. No. 102-573. The program has been so successful that there is growing interest in using aspects of the model, including Dental Health Aide Therapists, in some of the Lower 48 states. *See, e.g., Current Use of Dental Health Aide Therapists in Indian Country and Beyond*, overview currently posted at the IHS Dental Portal at http://www.ihs.gov/doh/DHAT.pdf. In addition, to the Dental Health Aide Therapists, the CHAP has now developed an additional focus area: Behavioral Health Aides.

Under the CHAP program established in the IHCIA, IHS is to "develop and operate a [CHAP] in the State of Alaska." 25 U.S.C. § 1616*l*(a). IHS is to train persons to become community health aides, to develop a curriculum for the community health aides that will meet the health goals of the IHCIA as set forth in 25 U.S.C. § 1602, and to create and maintain a Federal Community Health Aide Program Certification Board by which individuals who complete the training curriculum are certified to provide services in the program. 25 U.S.C. §§ 1616*l*(a)-(b). Further, the Secretary must develop a system under which the aides are evaluated to assure the provision of quality health care, health promotion, and disease prevention. 25 U.S.C. § 1616*l*(b)(6). By statute, IHS, through its Federal Community Health Aide Certification Board, is responsible for these functions in the oversight and creation of the CHAP, including the Alaska Dental Health Aide Therapist Program, although the daily operation of programs are carried out through tribes and tribal organizations, using IHS funding.

IHS is meeting its statutory requirements for the CHAP; there is no requirement in the CHAP provision that IHS carry out a VBC Program, or provide clinical space or leases. The CHAP itself is not at issue in this litigation.

B. The Indian Self-Determination and Educational Assistance Act ("ISDEAA").

In 1975, Congress enacted the ISDEAA, Pub. L. No. 93-638, 88 Stat. 2003, to encourage Indian self-determination by permitting Indian tribes to assume operation of certain federal programs, including health care programs, that the United States previously operated for the benefit of Indians. *See* 25 U.S.C. §§ 450, 450a. Title I of the ISDEAA, 25 U.S.C. §§ 450f–450n, authorizes the Secretary of HHS, upon the request of an Indian Tribe, to enter into a "self-determination contract." *See id*. 25 U.S.C. § 450f(a)(1). A self-determination contract is a contract for "the planning, conduct and administration of programs or services which are otherwise provided [by IHS] to Indian tribes and their members pursuant to Federal law." *Id*. at § 450b(j).

In 1988, Congress created Title III of the ISDEAA, authorizing the Secretary of the Department of Interior to negotiate self-governance compacts with a selected number of Indian Tribes. Pub. L. 100-472, title II, Sec. 201(a), (b)(1), Oct. 5, 1988, 102 Stat. 2288, 2289. *See* 25 U.S.C. § 450f (note). Congress amended the ISDEAA in 1992 to extend the same authority to IHS, thereby permitting IHS to negotiate self-governance compacts and funding agreements under Title III of the ISDEAA. Pub. L. 102-573, title VIII, Sec. 814, Oct. 29, 1992, 106 Stat. 4590. *Id*. § 450f. Tribes that entered into self-governance compacts assumed comprehensive responsibility for planning, conducting, consolidating, administering, and even redesigning all health care PSFAs previously provided by IHS. *Id*. Although self-governance compacting began as a demonstration project under Title III, Congress made self-governance a permanent part of the ISDEAA through the Tribal Self-Governance Amendments of 2000, Pub. L. 106-260, 114 Stat. 711 (Aug. 18, 2000).

Plaintiff is a Self-Governance Tribe under Title V of the ISDEAA, but some of the Title I provisions apply to its compact and associated funding agreements. *See* Section 516 of the ISDEAA, 25 U.S.C. § 458aaa-15. The total amount in Maniilaq's FA now totals $44 million. *See* Plaintiff's Exhibit G. ECF No. 10-8 at 8-10.

Approximately 99% of the IHS funds allocated for Alaska, including funds Congress appropriates for hospitals and clinics, are now managed by tribal health organizations, including Maniilaq. Under the provisions of the ISDEAA, tribal health organizations compacting under Title V of the ISDEAA have the flexibility to determine how these funds and any increases are allocated to all programs, including the VBC Program or any other program toward which the tribe wishes to reprogram and to rebudget funds as it is entitled to do under the ISDEAA. *See* 25 U.S.C. § 458aaa-5(e).

C. ISDEAA Title V Contracting Process

Tribes and tribal organizations seeking to administer IHS-operated PSFA pursuant to ISDEAA Title V must negotiate and enter into a written funding agreement (FA) with IHS. 25 U.S.C. § 458aaa-4. The FA must identify the PSFA (or portion thereof) to be performed by the contracting tribe or tribal organization and set forth various terms related to each PSFA including the amount of funds to be provided. *Id*. The amount of funds required under an FA is determined by Section 106(a) of the ISDEAA, codified at 25 U.S.C. § 450j-1. *See also,* 42 C.F.R. § 137.79 ("What funds must the Secretary include in a funding agreement?"). Section 106(a) establishes that tribes and tribal organizations are only required to be provided two categories of funding: (1) the amount IHS otherwise would have spent to operate the PSFA, and (2) contract support costs. 25 U.S.C. § 450j-1.

Should negotiations concerning the terms of an FA break down, a tribe may present the IHS with a proposal that is labeled "final offer." 25 U.S.C. §458aaa-6(b). Within 45 days of receipt of a final offer, IHS must either accept or reject the tribe's proposal. *Id.* If the IHS fails to respond within 45 days, the proposal is deemed approved by operation of law. *Id.*

IHS is permitted to reject a final offer by providing written notification containing a specific finding supported by controlling legal authority that the Tribe's final offer falls within one of the following "rejection criteria":

(1) The amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this title;

(2) The [PSFA](or portion thereof) that is the subject of the final offer is an inherent federal function that cannot legally be delegated to an Indian tribe;

(3) The Indian tribe cannot carry out the [PSFA] (or portion thereof) in a manner that would not result in significant danger or risk to the public health;

(4) The Indian tribe is not eligible to participate in self-governance under section 503.

25 U.S.C. §458aaa-6(c)(1)(A)(i-iv). The IHS must also offer technical assistance to help the tribe overcome the Agency's objections to the final offer. 25 U.S.C. §458aaa-6(c)(1)(B).

D. IHS Leasing Authorities

IHS has two leasing authorities, the Section 105(*l*) provision of the ISDEAA and a provision in the Indian Health Care Improvement Act ("IHCIA") at Section 804, found at 25 U.S.C. § 1674. Section 804 is a discretionary authority under which IHS has discretion as to whether to enter into the lease, but if it does so the compensation is required. Section 105(*l*)(1) requires IHS to lease a tribally-owned facility in which a tribe administers and delivers ISDEAA programs at that tribe's request, and authorizes certain allowable costs: "Upon the request of an Indian tribe or tribal organization, the Secretary shall enter into a lease with the Indian tribe or tribal organization that holds title to . . . a facility used by the Indian tribe or tribal organization

for the administration and delivery of services under this Act." 25 U.S.C. § 450j(*l*)(1). Section 105(*l*)(2) states that IHS shall pay lease compensation and "[s]uch compensation may include rent, depreciation based on the useful expenses, and such other reasonable expenses that the Secretary determines, by regulation, to be allowable." 25 U.S.C.§ 450j(l)(2). The implementing regulations at 25 C.F.R. § 900.70, reiterate the statute and spell out the allowable costs: "[t]o the extent that no element is duplicative, the following elements may be included in the lease compensation . . ."

Section 105(*l*) leases have been used: 1) to bestow tribal facilities with "Facility of the Service" status for purpose of accessing preferential Medicaid billing rates, and 2) to fulfill the leasing requirement contained in the IHS joint venture construction program authority, 25 U.S.C. § 1680h(e). For both of these uses, IHS has provided only a nominal $1 amount or no monetary compensation at all for the Section 105(*l*) leases.[4] Additional monetary compensation is not required under a Section 105(*l*) lease because the Secretarial amount already contains an amount meant to compensate the tribe for the use of its facility.[5]

E. Factual Background

Plaintiff has contracted to operate the VBC Program since 1996. The VBC Program is memorialized in Section 3(a)(1)(xiv) of Plaintiff's FA, Ex. 10, which states:

> Village Built Clinic Lease/Construction Program: Provide funds to eligible entities to support the rental of Community Health Practitioner/Aide clinic space. To provide construction, maintenance and upkeep of Village Clinic Facilities.

[4] This is because the purpose of the lease is not compensation but "to formalize the relationship between the facility and the contracted program(s)." Ex. 12 at 8-1.

[5] See 25 C.F.R. § 900.73. "Is a lease with the Secretary the only method available to recover the types of costs described in § 900.70? No. With the exception of paragraph (i) in 900.70, the same types of costs may be recovered in whole or in part under section 106(a) of the [ISDEAA] as direct or indirect charges to a self-determination contract."

From 1996 to 2012, Plaintiff operated the VBC Program by entering into a "Buyback/Withhold" Agreement with IHS.[6] Pursuant to this agreement, IHS retained the funds it otherwise would have transferred to Plaintiff and procured clinical space from the City of Kivalina, Alaska, on behalf of Plaintiff. Plaintiff used the Kivalina clinic to operate its IHS-funded CHAP. The Buyback/Withhold Agreement as it pertains to VBCs is in Plaintiff's FA Appendix E. Ex. 10.

Plaintiff requested that, effective from the beginning of 2012, IHS discontinue procuring the Kivalina clinical space under the Buyback/Withhold Agreement and that those funds remain within its ISDEAA contract. Maniilaq stated in its request that "the new clinic is owned by Maniilaq and Maniilaq will be responsible for operation and maintenance of the facility." [7] Ex. 9. In accordance with Maniilaq's request and pursuant to Section 106(a) of the ISDEAA, the IHS discontinued its retention of the VBC program funds and began annually transferring those funds to Plaintiff through the FA in support of the program. Ex. 9.

Shortly thereafter, in a February 29, 2012 letter to IHS, Plaintiff stated that it would "address this longstanding problem" of "chronic underfunding of the [VBC] Leasing Program" by retroceding the VBC Program and negotiating new leases for each of its village clinics funded by that program. Plaintiff's Exhibit C.

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[6] The Buyback/Withhold Agreement is explained in the following way in Maniilaq's FA: "Maniilaq Association may carry out its responsibility to provide PSFAs included in this Agreement by using the services or other resources of the federal government . . ." Ex.10 at 15.

[7] The full text of this letter, at Ex. 9, is as follows: "This letter is to notify you that the Maniilaq Association will be moving into a new clinic facility in Kivalina no later than January 1, 2012. The new clinic is owned by Maniilaq and Maniilaq will be responsible for the operation and maintenance of the facility. As such, we request Paula Poncho cancel the Kivalina Village Built Clinic (VBC) lease as of January 1, 2012. In addition, we request that the buy back for the VBC lease for this location remain within the Maniilaq Associaton Funding Agreement. We are very pleased that we can move into the new facility. Kivalina is the last of our member villages to receive a replacement clinic. Thank you for your assistance with this matter." (Emphasis added).

On October 28, 2014, Plaintiff submitted a proposal to IHS to amend its ISDEAA contract. Ex. 1. The proposal was styled a "final offer" thus triggering the ISDEAA requirement that IHS within 45 days either accept Plaintiff's proposal or reject it in accordance with one or more "rejection criteria" identified by the ISDEAA. 25 U.S.C. § 458aaa-6(b). *Id.*

The parties had no previous discussions concerning funding for the Kivalina Clinic. In its ISDEAA contract proposal, Plaintiff proposed: (1) to partially retrocede its VBC Program as it concerned its clinic in Kivalina as of January 1, 2015, (2) to enter a lease with IHS for the Kivalina VBC Program under Section 105(*l*) of the ISDEAA, including compensation, (3) that compensation for this lease would consist of $249,852 annually, prorated over a period of nine months for fiscal year (FY) 2015, and (4) that the following language be amended into its ISDEAA contract for FY 2015: "The attached lease of the Village Built Clinic in the Native Village of Kivalina is incorporated into the funding agreement and made a part thereof." Ex. 1. By email dated October 30, 2014, IHS notified Plaintiff that the ISDEAA did not permit IHS to negotiate the proposed ISDEAA contract amendment, but that instead it was required to prepare an acceptance or rejection to the proposal. Ex. 2. IHS further requested that Plaintiff withdraw its final offer so that the parties could negotiate regarding Plaintiff's proposal.

Plaintiff responded on October 31, 2014, stating that it did not agree with the IHS position that the ISDEAA did not require the IHS to negotiate during its response period to a final offer, but to facilitate resolution it would "suspend" its final offer until November 15, 2014. Ex. 2.

In a letter dated November 5, 2014, the IHS Director requested that Plaintiff immediately withdraw its final offer in its entirety before negotiations proceed. Ex. 3. Plaintiff agreed, and IHS submitted a written counter-proposal on December 1, 2014 to open negotiations. Ex. 4, Ex.

5. In its counter-proposal, the IHS first responded to Plaintiff's proposal to retrocede that portion of its VBC Program that accounted for its clinic in Kivalina by asking that Plaintiff return the funding for the portion of the VBC Program that it was retroceding. Without the return of the annual funding paid to Plaintiff in support of Kivalina clinic, the IHS could not accept its retrocession proposal because that program funding would be used by IHS for the lease compensation: "The return of these funds is essential to the Agency's ability to fund your request for a lease." Ex. 5 at 1.

On December 4, 2014, the parties held a teleconference after which, on December 5, 2014, Plaintiff submitted a second final offer that reiterated the same terms as the one submitted in October with the exception of agreeing to return the $30,921 annual share of its VBC Program funding to be used to fund the proposed lease. Ex. 6.

IHS issued a rejection of Plaintiff's second final offer on January 7, 2015, under the ISDEAA rejection criterion that the amount of funds Maniilaq proposed in its final offer exceeds the applicable funding level to which the tribe is entitled to under Title V of the ISDEAA. 25 U.S.C. § 458aaa-6(c)(1)(A)(i). IHS explained that this criterion was correctly applied because "Maniilaq is asserting through its final offer that it is entitled to an amount of funding exceeding its Secretarial amount of $30,921; but there is no basis in the authority that it is citing to, Section 105(*l)* of the ISDEAA, for an increased Secretarial amount." Ex. 7.

IHS further explained that this Court's prior decision in *Maniilaq Assn. v. Burwell*, Civ. No. 13-380 (J.Hogan) (D.D.C. August 22, 2014), *opinion amended and superseded*, No. 13-380 (D.D.C. Nov. 3, 2014), 2014 U.S. Dist. LEXIS 117084 (referred to by Plaintiff as "*Maniilaq I*"), did not compel the IHS to grant Maniilaq's lease proposal for its clinic in Kivalina—on the

contrary, Judge Hogan explicitly withheld making a holding on the compensation issue.[8] Further, IHS explained that Section 105(*l*) of the ISDEAA and its implementing regulations do not require that IHS provide Maniilaq with the level of compensation that it dictates.[9] Ex. 7 at 5-6.

The IHS pointed out that before Plaintiff had requested that the IHS' lease with the City of Kivalina for clinical space be cancelled, the IHS had paid for the same costs now requested and that the regulations prevented the IHS from paying additional facility cost elements that were duplicative. 25 C.F.R. § 900.70. Moreover, the IHS informed Plaintiff that the partial retrocession of the VBC Program that it proposed in its final offer meant that amount was a "Secretarial amount" under Section 106(a)(1) of the ISDEAA—a conclusion further supported by the fact that the retroceded funds are the same amount the IHS paid to Kivalina until 2012 for the same facility space and services for Maniilaq's VBC Program—and the IHS was not obligated by the ISDEAA to pay more than the Secretarial amount when a tribal contractor takes over a PSFA, such as the VBC Program. Ex. 7 at 5-7.

On January 30, 2015, Plaintiff filed a Complaint in this Court challenging the IHS rejection decision and subsequently filed a Motion for Summary Judgment on March 11, 2015. The IHS filed its Answer to the Complaint on April 10, 2015. Following an extension of time granted by the Court, the Defendant now submits her Opposition and Cross Motion for Summary Judgment.

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[8] Ex. 7 at 4. Judge Hogan makes this clear in Footnote 3 of his opinion where it states that it "need not address" the mandatory leasing provisions under 25 U.S.C. § 450j(*l*)."

[9] It is also notable that Maniilaq provided no documentation backing up the amount it requested for the lease; nor did it indicate that any would be forthcoming. It just dictated the amount without any support: $40,969 for depreciation, $40,970 in reserve for facility replacement, $25,556 for salary / wages, $25,596 for management fees, $7,258 for fringe, etc., etc. Ex. 6 at 4.

III. STANDARD OF REVIEW

A. Summary Judgment

"Summary judgment is properly regarded . . . as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1); *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (describing "central purpose" of summary judgment as being to "weed out those cases insufficiently meritorious to warrant . . . trial"). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 322; *Tao v. Freeh*, 27 F. 3d 635, 638 (D.C. Cir. 1994). A genuine issue of material fact is one that would change the outcome of the litigation. *Anderson*, 477 U.S. at 247. Factual disputes that are irrelevant or unnecessary will not be counted. *Id.* at 248. In determining whether a genuine issue of material fact exists, the trier of fact must view all facts, and reasonable inferences drawn therefrom, in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Once the moving party has met its burden, the burden shifts to the nonmoving party who "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 248. Moreover, mere conclusory allegations are not enough to survive a motion for summary judgment. *Harding v. Gray*, 9 F.3d 150, 154 (D.C. Cir. 1993); *Rowland v. Riley*, 5 F. Supp.2d 1, 3 (D.D.C. 1998); *Benn v. Unisys Corp.*, 176 F.R.D. 2 (D.D.C. 1997). As the Supreme Court has instructed: "the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element

essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

B. **Burden of Proof under the ISDEAA**.

Under the ISDEAA, when a tribal contractor appeals an agency decision, 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).

C. Other Standards and Considerations.

Although Defendant would ordinarily urge this Court to consider review of this matter under an Administrative Procedure Act ("APA"), standard, it does not do so here for two reasons: (1) Plaintiff does not plead the APA as a jurisdictional basis, and, therefore, cannot receive the benefit of its provisions, and (2) this matter involves an interpretation of a statutory provision, Section 105(*l*),that is so baseless and, thus, it can easily be resolved by relying on judicial precedent as more fully set forth *infra* in V. Argument. *See e.g., Lincoln v. Vigil*, 508 U.S. 182 (1993); *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell*, 729 F.3d 1025 (9th Cir. 2013); *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S.*, Case No. 11-16334, 2015 U.S. App. LEXIS 5258 (9th Cir., April 1 2015).

IV. ARGUMENT SUMMARY

Plaintiff makes several arguments to support its contention that the IHS must compensate Maniilaq fully for the facility costs that it alleges to have incurred, none of which comport with the facts underlying this case. Defendant, on the other hand, relies on two legal bases in support of its decision to reject Maniilaq's final offer, either of which when taken together or in the alternative, are sufficient legal authority for this Court to hold in favor of the Defendant.

A. Section 106(a)(1) Controls the Kivalina Lease Payments

The first legal basis is the authority to transfer funds to tribal contractors/compactors associated with IHS programs that are transferred to tribal management under the ISDEAA. This authority, at Section 106(a)(1), directs the IHS to transfer to the tribal contractor/compactor the amount of funds that the IHS spent when it was providing the transferred program services. 25 U.S.C. § 450j-1(a)(1). As explained in detail in Argument Section (A)(1), the $30,921 that the IHS paid first to fund a VBC lease with the City of Kivalina for Plaintiff's benefit and later, in 2012, was added to Plaintiff's FA at its request, can only be understood as a "Secretarial amount" or the amount the IHS would have paid if it continued to provide space for the clinic in Kivalina under the VBC Program. If, as Plaintiff contends, this amount of funding does not represent Kivalina's portion of the VBC Program, then the IHS was without authority to transfer the $30,921 to Maniilaq when it requested cancellation of the IHS lease with the City of Kivalina and for that amount to be added to its FA. The parties agree on these facts yet Plaintiff is at a loss to explain why the IHS would continue to pay out these funds and asks this Court to simply accept it. ECF No. 10 ("Plt. MSJ") at 36. As Section 106(a) funds, the Secretary has discretion to limit the lease amount.

B. Even if Section 105(*l*) Would Apply, It Also Grants the Secretary the Discretion in Determining the Amount of the Lease Compensation

Defendant's second legal basis is the language of Section 105(*l*) itself, as well as the language of its implementing regulations. 25 U.S.C. § 450j(l), 25 C.F.R. §§ 900.69–74. Plaintiff contends that the statutory language mandates that the IHS pay whatever facility costs Plaintiff dictates. Plt. MSJ at 11, 12, 20, 23, 28, 36, 40. Said language cannot be strained to such extremes.

Defendant has consistently agreed that Section 105(*l*) mandates compensation be provided for the lease as set out in the first sentence of Section 105(*l*)(2). However the remainder of that statutory section grants discretion to IHS as to what compensation will be granted and that such compensation not be duplicated in the lease or through the payment of similar costs in the Tribe's FA. Thus, under either theory or both, the IHS was legally justified in rejecting Plaintiff's final offer.

Indeed, the entirety of the words in 105(*l*) and its implementing regulations at 25 C.F.R. §§ 900.69 through 900.74 support the grant of discretion to the Secretary, For example, the elements listed are "allowable" costs that a tribe may "propose" to be included in its lease compensation and the costs must not be "duplicative." This is why a tribal/federal workgroup produced written guidance distributed to all tribes in 1999 stating that the Section 105(*l*) leasing regulations "provide a list of allowable costs for which a [tribe or tribal organization] can be compensated under a lease" and that "the leases must be funded from resources currently available under the [tribe or tribal organization's] self-determination contract." *See Internal Agency Procedures Handbook for Non-Construction Contracting under Title I of the Indian Self-Determination and Education Assistance Act* (1999).[10] Ex. 12 at 8-1. (Emphasis added). In sum, the statutory context in which Section 105(*l*) functions, and the entirety of language in the provision and implementing regulations, weigh heavily against Maniilaq's novel attempt to create a brand new category of required ISDEAA funding

[10] This Handbook was produced "through consensus decision-making" by the tribal / federal workgroup. Ex. 12 at 1 (cover letter for distribution of the Handbook to tribal leaders and other interested parties from the IHS Director and the DOI Assistant Secretary for Indian Affairs). The Handbook also states that "[a] lease for a token sum to formalize the relationship between the facility and contracted program(s) may also be entered into under this same authority." Ex. 12 at 8-1.

V. ARGUMENT

IHS properly rejected Plaintiff's Final Offer because it proposed funding in excess of the Secretarial amount. Plaintiff submitted a proposed FA amendment, including a Section 105(*l*) lease, "in accordance with the final offer provisions of 25 U.S.C. § 458aaa-6 and Section 16 of Maniilaq's FY 2011 FA." Ex. 6. Despite its own use of the ISDEAA process to submit a contract amendment proposal seeking to increase its contract funding, Plaintiff nevertheless contends that IHS may not assert its statutory right in that same process to reject such a final offer pursuant to the rejection criterion at 25 U.S.C. § 458aaa-6(c)(1)(A)(i). Plt. MSJ at 28.

To the contrary, when a tribe proposes a contract in excess of the applicable funding level under the ISDEAA, IHS may utilize the ISDEAA final offer rejection process at 25 U.S.C. § 458aaa-6(c)—it is not bound to accept any final offer for any amount made by a tribe; and for the reasons explained in detail below IHS properly rejected Maniilaq's final offer proposing additional VBC Program funding through a Section 105(*l*) lease and, therefore, has met its burden of proof under 25 U.S.C. § 450f(e)(1).

(A) Section 105(*l*) Must Be interpreted in Connection with Section 106(a), the Only Provision of the ISDEAA Addressing the Amount of Funds Provided

(1) The Lease Funds for the Kivalina Clinic Are a Portion of Maniilaq's "Secretarial Amount"

Section 106(a)(1) of the ISDEAA requires that the Secretary transfer funding when it transfers a program to a tribal contractor under an ISDEAA contract. Upon approval of a Compact or FA, the ISDEAA provides two types of funding to tribal contractors: the Secretarial amount, mentioned above, and an amount for contract support costs.[11] The Secretarial amount

[11] As indicated previously, this case does not involve a dispute over contract support costs. Nor does Plaintiff dispute that the IHS has transferred the entire Secretarial amount required by the ISDEAA.

covers costs for the PSFAs transferred from the IHS to the tribe and "shall not be less than the appropriate Secretary (in this case, the Secretary of Health and Human Services) would have otherwise provided for the operation of the programs . . . without regard to any organizational level within . . . [HHS], . . . including supportive administrative functions." *Id.* § 450j-1(a)(1). Thus, the Secretarial amount explicitly includes funding for all "programs, functions, services, and activities" that the IHS also carried on in its operation of the contracted PSFA.[12]

Plaintiff has included the VBC Program in its FA since 1996. The IHS has records that document exactly how much it cost the Agency to provide a clinic in Kivalina so the Secretarial amount has been clearly established in this case. The Secretarial amount for the lease costs was established, in consultation with Alaska tribes, through the Alaska Area Native Health Service Circular on VBC Program leasing. Ex. 8. As set forth in the Circular, a formula-based amount would be identified for each location and used to acquire and support clinical space for the CHAP. *Id.*

This was a "full service" lease in the amount of $30,921. It was the same amount of funds that IHS paid to provide clinical space for Maniilaq's CHAP from 1996 through 2011—which was done through the Buyback/Withhold Agreement. *See supra* at 14. Pursuant to the Buyback/Withhold Agreement, IHS procured leased space and services for the Plaintiff from the City of Kivalina. Beginning in 2012, Plaintiff ended the Buyback/Withhold Agreement and redirected the Secretarial amount to support its own clinical space, a "replacement clinic" that had been refurbished with non-IHS funds available to Maniilaq. Ex. 9. If the $30,921 represented simply lease funding to the City of Kivalina then there would have been no reason to

[12] "PFSA" and "PSFA" both refer to programs, functions, services, and activities transferred under ISDEAA agreements. For Title V compacts such as Maniilaq's, the reference typically used is PSFA, and that reference is used throughout.

transfer this funding to Maniilaq and pay it on an annual basis as Maniilaq requested, because there was no longer a need for a lease. There is nothing in the ISDEAA or anywhere else that would require IHS to simply give Maniilaq the $30,921 annually after Maniilaq requested that the IHS cancel its lease with the City of Kivalina.

In *Maniilaq Assn. v. Burwell*, 2014 U.S. Dist LEXIS 117084 at 26-27 (D.D.C. 2014), Judge Hogan held that a Section 105(*l*) lease may be included in an FA. To be included in an FA, the Section 105(*l*) lease must fit within the allowable terms of an FA as set forth in Section 458aaa-4(d) of the ISDEAA. *Id.* According to Judge Hogan, the lease fits within the permissible FA terms because the VBC Program is the PSFA for the purposes of Section 458aaa-4(d)(1) and the Section 105(*l*) lease describes the funds to be provided and the duties of the Secretary for purposes of Section 458aaa-4(d)(2)(B) and (D). (". . . incorporation of the lease in the FA 'is simply another way for Maniilaq to receive funding to carry out the VBC lease/construction program.") *Id*. Therefore, the proposed lease funding in the Plaintiff's final offer is part of the "Secretarial amount" for the VBC program—otherwise it would not be permitted in the Plaintiff's FA.[13]

There is no obligation on IHS to increase the Secretarial amount simply because a request is made by a tribe, as recently determined by the Ninth Circuit in In *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S.*, Case No. 11-16334, 2015 U.S. App. LEXIS 5258 (9th Cir., April 1 2015). The Quechan tribe of the Fort Yuma Indian Reservation sued IHS seeking an

[13] IHS previously held the position that a lease instrument is not a PFSA for purposes of the ISDEAA final offer provision, 25 U.S.C. § 458aaa-6(b), but rather a "stand-alone" document. Judge Hogan found otherwise concerning the issue of whether the lease instrument document could be attached to the FA, *Maniilaq Assn. v. Burwell*, 2014 U.S. Dist LEXIS 117084 at 26-27—but in any event funding for associated purposes (in this case VBC Program funding) is always transferred through the FA and accordingly the funding would be subject to Section 106(a).

increased Secretarial amount because "the Unit's facilities are the oldest in the IHS system, are in a condition of disrepair, and create unsafe conditions for tribal members seeking care." *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S.*, 2015 U.S. App. LEXIS 5258 at 2. The tribe argued that the Court should "issue an order compelling IHS to maintain and operate the Fort Yuma Unit safely, and to allocate additional funds to the Unit." *Id*. The Ninth Circuit in *Quechan* disposed of this argument in four short pages, upholding the District Court opinion and stating that the Court:

> cannot compel IHS to maintain the Unit because there is no specific, unequivocal statutory command requiring IHS to do so. *See Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). This court also cannot compel IHS to allocate greater funding to the Unit, because IHS's allocation of the lump-sum appropriation for Indian health care is committed to its discretion. *Lincoln v. Vigil*, 508 U.S. 182, 190—92 (1993).

Id. at 3. Like the tribe in *Quechan*, Maniilaq in this case seeks an increased Secretarial amount by judicial decree. However, as the Ninth Circuit noted, the Secretary has the discretion to reject the request.

It is undisputed that, under the ISDEAA, a tribe can "'step into the shoes' of the United States and assume responsibility and managerial control of services and programs previously administered by the Federal government." S. Rep. No. 107-324 (2002). Pursuant to Section 106(a), the tribe will then receive the funds that the federal government was using to carry out the program that it chooses to take over. But Section 106(a) does not provide a means for a tribe to demand any amount it wants to address a particular need. That is simply not its purpose. In the case of the VBC program, Maniilaq has stepped into (and then out of and then back into) the shoes of the federal government, as is its right under the ISDEAA. But now it seeks more—it seeks to use the ISDEAA to dictate the amount of funding that it says it is entitled to.

The Ninth Circuit also recently held that the Bureau of Indian Affairs (BIA) properly denied an ISDEAA contract proposal for a law enforcement program where the tribe sought to increase the Secretarial amount from zero (there was no currently existing BIA program that the tribe sought to take over) to $746,110. *Los Coyotes Band of Cahuilla & Cupeño Indians*, 729 F.3d 1025 (9th Cir. 2013). The court stated that the purpose of the ISDEAA rejection criterion for proposals for an amount of funds in excess of the applicable funding level "is clear;"

> [T]he ISDEAA does not require the Secretary to increase the amount of money it spends on any program, it simply requires the Secretary to transfer control of that program to a requesting tribe. For example, if the BIA spends $500,000 on law enforcement on a reservation, the Secretary can decline a contract request if the tribe asks for $700,000 to take over law enforcement on the reservation. In that scenario, the tribe would be entitled only to a contract for $500,000.

Id. at 1035. The "applicable funding level" is "the amount that the BIA is currently spending on the program in existence for which the tribe seeks to obtain a contract to operate." *Id*. at 1035. In *Los Coyotes*, the tribe sought to increase the Secretarial amount from zero to $746,110. Here, Maniilaq seeks to increase it from $30,921 to $249,842. The principle is exactly the same and the result should be the same.

The *Los Coyotes* court concluded that it would be "illogical" and this key provision of the ISDEAA rendered "meaningless" if a tribe could not only step into the shoes of the federal government so it can take over a particular program but also force the government to pay it at an amount it dictates for that program.

> If the ISDA does not limit the contract amount to the current level of funding, then § 450f(a)(2)(D) becomes meaningless—a result that we must avoid. *See Gorospe v. C.I.R.*, 451 F.3d 966, 970 (9th Cir. 2006) (observing that courts should avoid interpreting a statute in a way that renders a provision meaningless). The Tribe's reading would also lead to the illogical result that the Secretary must fund every contract request, for any amount—another result we must avoid. *See Aponte v. Gomez*, 993 F.2d 705, 708 (9th Cir. 1993) (observing that courts should avoid interpreting a statute in a way that leads to absurd results).

Los Coyotes, 729 F.3d at 1036. The Secretary is required under Section 106(a)(1) to fund the ISDEAA contract at the amount the Secretary "would have otherwise provided for the operation of the program . . ." When Maniilaq began contracting under the ISDEAA for the VBC Program in 1996, the amount that IHS had been paying the City of Kivalina for the VBC lease was part of the FA—Maniilaq had stepped into the shoes of IHS—except that Maniilaq asked for IHS to continue to lease the space through a buyback/withhold agreement. Under the buyback/withhold agreement between IHS and Maniilaq, IHS continued to lease the space for Maniilaq until the lease was cancelled at the beginning of 2012 and the funds were transferred to Maniilaq through its FA. To allow Maniilaq, through a lease, to increase the Kivalina portion of the VBC Program by 808% would render the ISDEAA's Section 106(a) funding provision meaningless.

2. Section 105(*l*) Does Not Function in Isolation From the Fundamental Workings of the ISDEAA Structure.

Basic principles of statutory construction also compel an interpretation of Section 105(*l*) that considers the overall working of the ISDEAA and the interplay of all of its provisions. Section 105(*l*) must be read in association with Section 106(a) to understand its meaning in the overall structure and workings of the ISDEAA. It is a basic rule of statutory construction that the meaning of words in a statute cannot be understood in isolation—but Maniilaq repetitively points to the words of Section 105(*l*) on compensation in a vacuum without explaining the function of Section 105(*l*) within the overall ISDEAA framework.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme**.**" *Loving v. Internal Revenue Service*, 742 F.3d 1013 (D.C. Cir. 2013) (citing *Roberts v. Sea-Land Services, Inc.*, 132 S. Ct. 1350, 1357, 182 L. Ed. 2d 341 (2012) (holding that, after studying the statute as a whole, the words "awarded compensation" are to be interpreted as "statutorily entitled to

compensation.") The court must "make all parts of the statute . . . fit into a harmonious whole." *F.T.C. v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959). The ISDEAA addresses contract funding in Section 106(a) ("Contract funding and indirect costs (a) Amount of funds provided")—and Section 105(*l*) functions in association with it, not independently, and it does this in part by setting the parameters for lease funding and most fundamentally requiring IHS to enter into a lease when requested by a tribe.

Section 105 of the ISDEAA, is titled "Contract or grant provisions and administration." It contains a variety of provisions, including a listing of the federal contract laws and regulations not applicable to ISDEAA contracts, authorization for use of federal property, access to federal sources of supply, Sections 105(a),(f),(k), and many others. Section 105(*l*) is among the provisions in this section. It is part of a section that sets parameters and conditions for ISDEAA funding but "the amount of funds provided" is covered in the following section, Section 106 of the ISDEAA.

Section 106(a) states that the amount of funds provided "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof." (emphasis added). While many of the provisions of the ISDEAA have bearing on the administration and processing of ISDEAA contracts, the actual funding under ISDEAA contracts is covered by Section 106(a).

Section 105(*l*), on the other hand, does not contain a similar mandate in connection with funds; it does not mean that an additional amount of ISDEAA funding must be added to ISDEAA contracts above the Secretarial amount. In 1988, Congress demonstrated its intent to add an additional amount to the Section 106(a) funding, above the Secretarial amount, when it amended that provision to authorize contract support costs. Pub. L. No. 100-472, 102 Stat. 2292

(1988), codified at 25 U.S.C. § 450j-1(a)(2). If Congress had intended to achieve the same result with a leasing authority, it would have added another section to Section 106(a). Instead, Section 105(*l*) authorizes the costs that can be provided for leasing through the Section 106(a)(1) Secretarial amount. The purpose of Section 105(*l*) is not to provide a new category of funding—or an increased Secretarial amount—and no tribe has ever asserted before Maniilaq that it does have such a meaning.

(B) Maniilaq's Proposed Use of Section 105(*l*) to Force Additional Compensation Is Contrary to the Purpose of Section 105(*l*) As Set Forth in the Legislative History

Section 105(*l*), a provision of the ISDEAA Amendments of 1994, was enacted on October 25, 1994. Pub. L. No. 103-413, 108 Stat. 4250. These amendments, including Section 105(*l*), were largely crafted as a response by Congress to proposed joint Department of the Interior and HHS regulations for the administration of ISDEAA contracts which were published in the Federal Register on January 20, 1994 (1994 Notice of Proposed Rulemaking or NPRM). 59 Fed. Reg. 3166. There was "unanimous denouncement" of the proposed regulations by tribes.

> A mounting sense of frustration on the part of Indian Country has led to the unanimous denouncement of the proposed regulations and a call for legislation that would supplant the regulatory process. Recently, the House and the Senate have introduced similar measures, H.R. 4842, the Indian Self-Determination Act Amendments of 1994, and S. 2036, the Indian Self-Determination Contract Reform Act of 1994, respectively, which would amend the Indian Self-Determination and Education Assistance Act by making key provisions of the Act self-implementing and by establishing a model contract.

The Implementation of the Indian Self-Determination Act and Development of Regulations Following Passage of the 1988 Amendments to the Act, July 29, 1994, Oversight Hearing Record, Subcomm. on Native American Affairs of the House Comm. on Natural Resources, July 29, 1994 (page 2) ("1994 oversight hearing"). (emphasis added).

Section 900.510(a) of the 1994 NPRM provided: (1) that allowable expenses for contractor-provided real property would be determined in accordance with Office of

Management and Budget (OMB) standards; and also (2) that "the Secretary will not negotiate a separate lease agreement with the contractor." 59 Fed. Reg. 3166, 3198. Tribes objected to both of these provisions—and this is what led to Section 105(*l*).

Section 105(*l*) of the ISDEAA directly addresses the issues that tribes had with the 1994 NPRM. It directs the Secretary, upon request, "to enter into a lease with the Indian tribe or tribal organization that holds title to, a leasehold interest in, or a trust interest in, a facility used by the Indian tribe or tribal organization for the administration and delivery of services under [the ISDEAA]." 25 U.S.C. § 105(*l)*(1).

This requirement was necessary for two purposes: (1) to overcome the refusal of the Secretary—as shown in Section 900.510 of the NPRM— to enter into a lease for property owned by the contractor that was to be used in the performance of a Self-Determination Act contracts; and (2) to provide tribes with a set of allowable costs tailored to their needs. The Section 105(*l*) authority has been available now for more than two decades, and sometimes utilized so that tribes could request leases at will; but before the recent maneuverings by Maniilaq there has never been an attempt to point to this provision as a basis for a tribe to demand that the ISDEAA compels additional compensation—available to any tribe at any time for any property used for programs under the tribe's ISDEAA contract. If Section 105(*l*) exists as an independent authority for additional funds required by the ISDEAA, which Defendant denies that it is, then Plaintiff must explain the highly unusual situation where such a provision would not be utilized for this purpose over two decades.

(1) Tribes Historically Needed Leases To Be Eligible For the 100% Federal Medical Assistance Percentage (FMAP) Rate.

As was stated in the decision letter, Ex. 7, a key rationale for the inclusion of Section 105(*l*) in the ISDEAA was that it made payments to the leased facilities from the States eligible

for 100% FMAP. The benefit flowing to the tribe is that the designation of "Facility of the Service" that came with the Section 105(*l*) lease made them eligible for the enhanced IHS Medicaid rate. Ex. 15, Ex. 14. Reimbursement at 100% FMAP was only available for Medicaid services "received through" an IHS facility pursuant to 42 U.S.C. § 1396d(b). To be eligible for 100% reimbursement, the HHS position was that "[i]f the operating body of the IHS-owned or leased facility, be it IHS, or an Indian tribe or tribal organization, enters into contracts to achieve the performance of services offered by the facility, the services may be considered to have been provided through the facility and therefore qualify for the 100%." *Arizona Health Care Containment System*, Departmental Appeals Board, U.S. Department of Health and Human Services, DAB 1779 (August 7, 2001) at 31. At the time, since leases were not available to tribes on request, this interpretation excluded tribally-provided property used in the performance of an ISDEAA contract from obtaining the "Facility of the Service" designation and benefitting from the 100% FMAP clause.

The 1994 ISDEAA amendments, including Section 105(*l*), "legislatively overruled the narrow construction of the statute by [the Health Care Financing Administration (HCFA), the precursor to the Center for Medicare and Medicaid Services (CMS)] that a facility had to be owned or leased by IHS in order to be eligible for 100% FMAP." *State of North Dakota ex rel. Olson v. Centers for Medicare and Medicaid Services*, 286 F. Supp. 2d 1080, 1086 (D.N.D. 2003). "The overruling was accomplished by a mandatory lease provision by which a tribe could request that IHS lease the tribe's health facilities and IHS would be required to do so. 25 U.S.C. § 450j(*l*)." *Id*. This provision brought the facilities within the scope of Section 1905(b) of the Social Security Act, 42 U.S.C. § 1396d(b), and thereby made them eligible for the 100% FMAP reimbursement rate.

The enactment of Section 105(*l*) spurred IHS and HCFA (now the Center for Medicare and Medicaid Services) to adopt a Memorandum of Agreement (MOA) to address the extension of FMAP. Ex. 14. The MOA states clearly the impetus for the change in policy brought about by the need for MOA: "Without this change in policy, states would have had a strong financial incentive to encourage tribes to request that IHS enter into leases of tribal facilities. These requests could have resulted in the processing and signing of possibly hundreds of mandatory leases." Ex. 14.

(2) Section 105(*l*) Does Not Provide a Menu of Mandatory Compensation Options

Section 105(*l*) was also crafted in response to the IHS proposal in Section 900.510 of the 1994 NPRM to apply the generally applicable Office of Management and Budget (OMB) cost circulars rather than ISDEAA-specific cost principles. 59 Fed. Reg. 3166, 3198. Tribes had sought the authority to permit cost recovery or compensation for property use through ISDEAA-specific rules, outside of the normal cost principles that would apply. There are multiple references in the legislative history to "cost principles" but nothing whatsoever backing the Plaintiff's argument that this provision mandates that IHS pay an additional amount for lease compensation at whatever level the tribe requests.

At the time of the enactment of the ISDEAA, the Federal Acquisition Regulation, (FAR) at 41 C.F.R. § 3-4.6013 (1975) governed allowable costs for ISDEAA contracts. Section 3-4.6013 incorporated 41 C.F.R. § 1-15.7 (1970), the basis for the OMB circulars, which provided, for example, that tribal contractors could be "compensated for the use of buildings, capital improvements, and equipment through use allowance or depreciation." The word "compensation" is frequently used to describe eligible allowable costs under 41 C.F.R § 1-15.7.

The 1994 NPRM represented a continuation of the approach by which generally applicable cost principles would apply to the ISDEAA—and this is why it was challenged by tribes.

The 1994 oversight hearing stresses in several places that tribes wanted ISDEAA-specific cost principles and that tribes strongly objected to the draft rules which would have subjected them to the OMB cost principles. At the hearing, S. Bobo Dean of the law firm of Hobbs, Straus, Dean and Walker, stated that the firm's tribal clients requested "the development of certain cost principles specific to self-determination contracts." Oversight Hearing, July 29, 1994, S. Bobo Dean testimony, page 7. Mr. Dean said his clients "remain convinced that the allowability of costs with respect to certain activities should be different for tribes in order to further self-determination goals." (emphasis added). *Id*. at 8. The detailed comments submitted by Hobbs, Straus, Dean & Walker on the 1994 NPRM also stress that "the need to reinstate ISDEAA-specific cost principles advocated by tribes is underscored." 1994 Oversight hearing at 164.

The statutory language states that the allowable costs "may include" a list of items and the regulations also list the items that "may be included." 5 C.F.R. § 900.70. The preamble to the Final Rule states that "the subpart [on lease of tribally-owned buildings by the Secretary] provides a non-exclusive list of cost elements that may be included as allowable costs under a lease between the Indian tribe or tribal organization and the Secretary. 61 Fed. Reg. 32482, 32490. (emphasis added).

Plaintiff would have the Court interpret Section 105(*l*) and its implementing regulations in a total vacuum, but the workings of the ISDEAA are complex and the leasing provision can only be understood in context and through the way it fits into the ISDEAA as a whole. Section 105(*l*) helped to advance self-determination principles through a mandatory lease provision and a

set of ISDEAA-specific cost principles that applied to the lease; but it does not provide Maniilaq (and every other tribe) with the right to request a lease at a level set by the requester (with no documentation accounting for the funds it is requesting). It has never operated in this way and it is not intended for this purpose.

(C) Nothing in the Language of Section 105(*l*) Creates an Entitlement to Additional funding

Maniilaq asserts that the IHS has no discretion under Section 105(*l*) of the ISDEAA concerning the type or amount of compensation required under this section of the ISDEAA and its implementing regulations. Moreover, Maniilaq has stated that it alone has the authority to decide what and how much the IHS must pay under such a lease. Plt. MSJ at 29-35. Plaintiff's interpretation would require this Court to create a new category of ISDEAA funding in excess of the funding requirements of Section 106(a) and in opposition to the legislative history and underlying purpose and language of Section 105(*l*).

The IHS has never disagreed that this section of the ISDEAA mandates that the Agency must enter into a lease of tribal property upon request and that the lease must include compensation. However, Section 105(*l*)(2) of the ISDEAA clearly does not mandate compensation at a level set by the Plaintiff. Indeed, as evidenced by Maniilaq's own request for a huge increase in funding for the lease of its Kivalina facility, which would replace the VBC Program currently in the parties' ISDEAA agreement, the consequences of finding that Section 105(*l*) requires additional compensation for all contractor-owned property would be devastating for the ability of IHS to fund other programs.

Section 105(*l*) states that:

> [s]uch compensation <u>may</u> include rent, depreciation based on useful life of the facility, principal and interest paid or accrued, operation and maintenance

> expenses, and such other reasonable expenses that the Secretary determines, by regulation, to be allowable.

25 U.S.C. § 450j(*l*)(2) (emphasis added). In addition, the discretion of the Agency is again addressed in the regulations which state that "[t]o the extent that no element is duplicative, the following elements may be included in the lease compensation." 25 U.S.C. § 900.70.

The Agency routinely enters into non-monetary leases as appropriate, so that the requesting tribe may enjoy the benefits that attend property that the federal government has an interest in.[14] For example, when the IHS builds a hospital or clinic and then transfers ownership to a tribe under the ISDEAA, the Section 105(*l*) lease amount is always zero because to provide funding for a building that the IHS has already paid once for would be asking the IHS to pay for the cost of the building twice. IHS also provides non-monetary leases as part of its Joint Venture Construction Program under the IHCIA. 25 U.S.C. §1680h(e)(1).

The Plaintiff also incorrectly cites to 25 C.F.R. § 900.74 for the proposition that an Indian tribe "may choose one of three options for that compensation." Plt. MSJ at 32. Section § 900.74 does not give the Indian tribe the authority to choose its compensation; instead the regulation gives the Indian tribe the ability to "propose" lease compensation. Section 900.74 states:

> How may an Indian tribe or tribal organization propose a lease to be compensated for the use of facilities? There are three options available:
>
> (a) The lease may be based on fair market rental.
>
> (b) The lease may be based on a combination of fair market rental and paragraphs (a) through (h) of § 900.70, provided that no element of expense is duplicated in fair market rental.

[14] Ex. 12 at 8-1. "A lease for a token sum to formalize the relationship between the facility and the contracted program(s) may also be entered into under this same authority." The other option is a compensated lease "funded from resources currently available under the [tribe or tribal organization's] self-determination contract."

(c) The lease may be based on paragraphs (a) through (h) of § 900.70 only.

(emphasis added). The regulatory scheme flows in a straightforward manner to give full effect to the intent of Congress in Section 105(*l*). First, the tribal contractor must make a proposal for a lease that contains one of the three options in 25 C.F.R. § 900.74. In this case, Maniilaq proposed a lease containing the third option so that its proposed lease compensation would be comprised of the elements/costs found at 25 C.F.R. § 900.70. Ex. 6 at 4. Second, after receipt of the proposal, the Agency looks to the elements/costs in the contractor's proposal to ensure that the contractor's proposed costs comport with elements/costs laid out in the regulation and, most importantly, that none of these elements/costs are duplicative.[15] This regulatory process is entirely consistent with the language of Section 105(*l*)(2) and in no manner limits the Secretary's discretion as to how much compensation and what manner of costs must be paid in a lease. Ex. 8 at 5-6. Plaintiff would have the Court read this language to mean that it can set the level of the compensation. Plt. MSJ at 11, 12, 20, 23, 28, 36, 40. But there is no language in Section 105(*l*) or in its implementing regulations at 25 C.F.R. Part 900 to command such a reading. Rather, all of the statutory language following this mandate becomes discretionary when it pertains to what that compensation will consist of: "such compensation may include . . . and other such reasonable expenses that the Secretary determines by regulation to be allowable." *Id*. Congress did not say that the Secretary "shall" pay "all" of the costs that identified in the implementing regulations, or "all" of the costs that the requesting tribe proposes under that regulation, only those costs that the Secretary's regulation allows.

[15] "To the extent that no element is duplicative, the following elements may be included in the lease compensation . . ." 25 C.F.R. § 900.70.

In short, nothing in the language of Section 105(*l*) itself creates a new category of ISDEAA funding outside of Section 106(a). It simply provides a means by which tribes may propose leases in accordance with a set of allowable costs.

(D) The 808% Increase Sought by Maniilaq Would Necessarily Duplicate Cost Elements in Violation of 25 C.F.R. § 900.70

The IHS' decision letter gave the duplication of cost elements as one basis for its rejection of Maniilaq's proposal. Ex. 7. The elements Maniilaq proposed for additional compensation had already been addressed in the Agency's annual payments, first under the VBC lease with the Village of Kivalina and again when that amount was added to Maniilaq's FA for its VBC Program—and they would continue to be addressed if the amount were to be first retroceded and then returned to Maniilaq under Section 105(*l*). Duplication here means the duplication of an element or category of costs, not the amount paid for a specific cost. *See* § 900.70 ("to the extent *no element* is duplicative…"). The IHS paid for the same types of services under its lease with the City of Kivalina from 1994 through 2011. The IHS pointed this out in its decision letter:

> IHS' VBC lease with the City of Kivalina documents the costs or elements that it provided as part of its VBC program for Maniilaq and Kivalina. For the Secretarial amount of $30,921, the IHS provide space (927 square feet), janitorial services, water, sewer/sanitation, and all maintenance inside and on the grounds including snow and trash removal.

Ex. 7. The choice of elements Maniilaq proposes under 25 C.F.R. § 900.70 in its final offer would duplicate the elements already paid for by IHS through its Secretarial amount. Maniilaq's request would augment the Secretarial amount but it would also lead to cost element duplication. Maniilaq has asked for, among other items, $63,556 for custodial services and snow removal, as well as travel and per diem for maintenance workers at $3,207; maintenance supplies for $1,180; fuel oil for $14,007, electricity for $3,609; water and sewer for $2,092; and facility

repair (another form of maintenance) for $14,545. Ex. 6. IHS provided all of these services through a lease with the City of Kivalina as late as 2011. If what Maniilaq is proposing were permissible, then any tribe could retrocede a contracted PSFA and demand a lease in a greater amount than the tribe is entitled under Section 106(a), despite the historical funding of those same elements with the amounts already provided by IHS.

Maniilaq dismisses the $30,921 that IHS paid for the costs included in the IHS VBC lease of the clinical space in 2011 as "historical" and "irrelevant," Plt. MSJ at 38, n.13, but only three years ago, IHS was able to obtain clinical space that included most of the elements represented by the funding that Maniilaq is now seeking, and for considerably less than Plaintiff alleges its facility costs to be. Nevertheless, regardless of whether this Court agrees with IHS that the $30,921 is a Secretarial amount or whether this Court decides that the compensation that IHS must give Maniilaq under Section 105(*l*) is completely separate from the Secretarial amount as Plaintiff contends, the IHS would not be obligated to pay any more than the $30,921 that it has been paying Maniilaq annually, either through a lease or directly through Maniilaq's FA.[16]

(E) Plaintiff Has Complete Flexibility to Redirect its Funding to its Lease Costs

Maniilaq is a Self-Governance tribal compactor under Title V of the ISDEAA and may redesign programs and reallocate funding categories without notice or approval of the IHS. *See* 25 U.S.C. § 458aaa-5(e). At any time, Maniilaq is able to reallocate its funding to put additional funds toward its lease costs should it decide that those costs deserve a higher priority. Like IHS, Maniilaq must sometimes choose between a wide variety of needs and decide which programs merit additional funding and which programs may wait until Congress increases the IHS

[16] IHS has been able to historically fund the same elements that Maniilaq has included in its proposal for only $30,921—Maniilaq has not justified that the ISDEAA compels an increase of 808% over that amount.

appropriations. Congress does not provide funding for every program it authorizes tribes and IHS to perform. For example, in the 2010 reauthorization of the IHCIA, Congress gave the tribes and the IHS the authority to provide an expanded array of behavioral health care initiatives but never enacted funding specifically for these new services. *See* Pub. L. No. 111-148, 25 U.S.C. § 1665 through 1667e. Self-Governance Tribes, like IHS, must use their discretion to decide how best to allocate limited funding. Plaintiff could reallocate funding to increase the funding already provided annually for its VBC Program if Plaintiff believes this to be a priority.

(F) Plaintiff's Reliance on Two Supreme Court Cases Conveys a Misunderstanding of IHS's Position Concerning the Legal Availability of Funds

Due to an apparent misunderstanding of the IHS's final offer rejection, Plaintiff relies on two Supreme Court decisions that concern how the Agency should have read a Congressional appropriations cap to support its contention that the entire IHS appropriation is available to pay Plaintiff's lease costs in Kivalina. *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012), or *Cherokee Nation v. Leavitt*, 543 U.S. 631, 634 (2005). These cases are not applicable to the situation at hand, which concerns a completely different issue.

In contrast to the issue addressed in those cases, IHS is not making the argument that there is no funding legally available to pay the costs Plaintiff is seeking now. To the contrary, the IHS position is that nothing in the ISDEAA requires IHS to pay any additional amount, above what it has already made available to the Plaintiff for these costs. Because the Agency has not taken a position similar to the one addressed by the Supreme Court in *Salazar v. Ramah Navajo Chapter* or *Cherokee Nation v. Leavitt.*, neither case is applicable here.

(G) The Indian Canon of Construction Does Not Govern the Court's Interpretation of Section 105(*l*)

In the present case, the relevant language in the ISDEAA and its implementing regulations is clear and has been consistently implemented and, therefore, the Indian canon of statutory construction does not apply. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985) (applying the Indian canon to an ambiguous statute); *see also South Dakota v. Bourland*, 508 U.S. 679, 687, 113 S.Ct. 2309, 2316 (1993); *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 58-59 (D.C.Cir.1991); *Muscogee Creek Nation v. Hodel*, F.2d 1439, 1445 (D.C. Cir. 1988).

Moreover, even if the Indian canon of construction were a factor for the Court to consider in analyzing the meaning of Section 105(*l*) of the ISDEAA, this canon is not determinative of the outcome. *Chickasaw Nation v. U.S.*, 534 U.S. 84, 94 (2001) (. . . canons are not mandatory rules. They are guides that "need not be conclusive.") (citing to *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001). *Id.* Canons are designed "to help judges determine the Legislature's intent as embodied in particular statutory language. And other circumstances evidencing congressional intent can overcome their force." *Id.* at 94. Here, the Court may also be guided by the circumstances which gave rise to Section 105(*l*), which have been discussed in detail in Section B of the Argument (the section on legislative history) and also the statutory context—meaning the way in which Section 105(*l*) operates within the whole machinery of the ISDEAA, and specifically how Section 105(*l*) interacts with the sole ISDEAA contract funding provision at Section 106(a).

VI. CONCLUSION

Based on the foregoing, the Defendant respectfully request that this Court grant this Motion for Summary Judgment in favor of the Secretary, or deny Plaintiff's Motion for

Summary Judgment, because the Secretary properly rejected Maniilaq's final offer proposal under the criterion at 25 U.S.C. § 458aaa-6(c)(1)(A)(i).

Respectfully submitted,

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