UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MANIILAQ ASSOCIATION,	)	
	)	
PLAINTIFF,	)	
	)	
v.	)	
	)	
SYLVIA BURWELL, et al.,	)	Case No. 1:15-cv-00152-JDB
	)	
DEFENDANTS.	)	
	)	
	)	
	)	

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

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I. Introduction

This appeal under Title V of the Indian Self-Determination and Education Assistance Act ("ISDEAA") requires the Court to determine whether § 105(*l*) of the ISDEAA, 25 U.S.C. § 450j(*l*), compels the Secretary of the Interior to negotiate and fully compensate a facilities lease under that section and its implementing regulations at 25 C.F.R. § 900.70 and 25 C.F.R. § 900.74, or whether the ISDEAA permits the Secretary to limit lease compensation to a discretionary "Secretarial" amount established under different authority.

In enacting the ISDEAA, Congress declared its intent to establish "a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. § 450a(b). Congress further expressed its commitment to "supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." *Id*. *See also, Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 639 (2005). The specific statutory provision in this case provides as follows:

> (1) 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 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 this subchapter.
>
> (2) The Secretary *shall compensate* each Indian tribe or tribal organization that enters into a lease under paragraph (1) for the use of the facility leased for the purposes specified in such paragraph. Such compensation may include rent, depreciation based on the 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*) ("§ 105(*l*)") (emphasis added). The Secretary has promulgated regulations to implement § 105(*l*) pursuant to negotiated rulemaking with the participation of Indian tribes, as required by Congress. 25 U.S.C. § 450k(d); 25 C.F.R. §§ 900.69-900.74. Those regulations provide three specific options for lease compensation, any one of which may be proposed by a tribe or tribal organization requesting a § 105(*l*) lease:

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

25 C.F.R. § 900.74. In turn, 25 C.F.R. § 900.70 lists various elements of compensation that may be included if not duplicative, including rent, depreciation, principal and interest paid or accrued, various operation and maintenance expenses, repairs and alterations, and other reasonable expenses.

After Plaintiff Maniilaq Association ("Maniilaq") and the Indian Health Service ("IHS") could not agree on the terms of a § 105(*l*) lease which Maniilaq proposed to incorporate into its ISDEAA funding agreement, Maniilaq submitted a final offer requesting lease compensation pursuant to 25 C.F.R. § 900.74(c). Plt. Ex. H, ECF No. 10-9, at Exhibit 8. The IHS rejected Maniilaq's final offer on the ground that Maniilaq's funding request exceeded the amount to which Maniilaq was entitled under the ISDEAA. Plt. Ex. H, ECF No. 10-9. The Secretary's rejection decision was not based on the validity of the amounts proposed by Maniilaq for each

cost element under 25 C.F.R. § 900.70(a) through (h), which the IHS refused to even negotiate, but rather on the fact that the $249,842 lease amount requested by Maniilaq exceeded the $30,921 amount that the IHS had historically allocated to lease clinic space in the village of Kivalina under different leasing authority, and which the IHS subsequently transferred to Maniilaq through its funding agreement after Maniilaq acquired its own clinic space in Kivalina.

The Secretary now seeks to defend the IHS's rejection decision primarily on the grounds that: (1) in the Secretary's view, the level of compensation under § 105(*l*) and its implementing regulations is discretionary, and (2) under § 106(a)(1) of the ISDEAA, the Secretary is not required to provide any funding beyond the $30,921 that the IHS historically allocated to its Kivalina Village Built Clinic ("VBC") lease. Section 106(a)(1) provides that "The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract[.]" 25 U.S.C. § 450j-1(a)(1). The Secretary's own regulations, however, provide three specific compensation options for a § 105(*l*) lease and do not reserve for the Secretary any discretion to disregard those options in favor of different funding criteria of her choosing. Moreover, § 106(a) does not govern lease compensation under § 105(*l*), nor does it limit the compensation that may be received through an ISDEAA funding agreement pursuant to § 105(*l*) or numerous other ISDEAA provisions.

Because the Secretary cannot meet her burden to show that the grounds for her rejection decision were valid, Maniilaq respectfully requests that the Court deny the Defendants' Motion for Summary Judgment, and grant Maniilaq's Motion for Summary Judgment seeking

declaratory and injunctive and mandamus relief ordering the Secretary to award and fund the final offer lease request.

II. The IHS does not contest that the standard of review is *de novo,* and the burden of proof lies with the Secretary to demonstrate, by clear and convincing evidence, the validity of her decision.

The proper standard of review in an appeal of an agency rejection decision under the ISDEAA, and where no claims are made under the Administrative Procedure Act ("APA"), is *de novo*. *Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, 945 F. Supp. 2d 135, 141–142 (D.D.C. 2013); *Pyramid Lake Paiute Tribe v. Burwell*, No. 1:13-cv-01771, 2014 WL 5013206 at *4-5 (D.D.C. Oct. 7, 2014) (citing *Seneca Nation*). *See also Cheyenne River Sioux Tribe v. Kempthorne,* 496 F. Supp. 2d 1059, 1066–67 (D.S.D. 2007); *Cherokee Nation of Okla. v. United States*, 190 F. Supp. 2d 1248, 1258 (E.D. Okla. 2001), *rev'd on other grounds*, 543 U.S. 631 (2005); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306, 1318 (D. Or. 1997). Further, questions of law are normally reviewed *de novo* in appeals of agency action. *Maniilaq Ass'n v. Burwell*, No. 1:13-cv-00380, 2014 WL 5558336 at *5 (D.D.C. Nov. 3, 2014) ("*Maniilaq I*").

The Secretary appears to agree that *de novo* is the appropriate standard of review in this case, as the Defendants acknowledge that Maniilaq has not made any claims under the APA and that this case turns on questions of law. Defs. MSJ at 17. The Secretary also acknowledges that she has the burden of proof to establish the validity of the grounds for her rejection decision. Defs. MSJ at 17 (quoting 25 U.S.C. § 450f(e)(1)). However, the Secretary cites the standard applicable to Title I self-determination contracts, rather than the burden of proof for appeals of

agency action under Title V of the ISDEAA, which applies in this case. Title V provides as follows:

> In any appeal (including civil actions) involving decisions made by the Secretary under this part, the Secretary shall have the burden of proof of demonstrating ***by clear and convincing evidence***—
> (1) the validity of the grounds for the decision made; and
> (2) that the decision is fully consistent with provisions and policies of this part.

25 U.S.C. § 458aaa-17 (emphasis added).

With respect to the interpretation of governing law, the Secretary argues that the Indian canon of statutory construction does not apply, but only because "the relevant language in the ISDEAA and its implementing regulations is clear and has been consistently implemented[.]" Defs. MSJ at 38. Maniilaq believes that the relevant statutory and regulatory language is clear in requiring the Secretary to fully compensate a § 105(*l*) lease according to the compensation options set forth in the regulations. In the event that this Court does find ambiguity in the statutory or regulatory provisions at issue, the Indian canons command that the provisions be interpreted in Maniilaq's favor. *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001). This is especially true where the ISDEAA is concerned, as Congress provided in Title V that "Each provision of this part and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe." 25 U.S.C. § 458aaa-11(f).[2] In interpreting a

[2] Congress also provided in 25 U.S.C. § 458aaa-11(a) that:

> Except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive orders, and regulations in a manner that will facilitate—
>
> (1) the inclusion of programs, services, functions, and activities (or portions thereof) and funds associated therewith, in the agreements entered into under this

similar rule of construction in Title I of the ISDEAA, the Supreme Court has summarized the requirement as follows: "The Government, in effect, must demonstrate that its reading is clearly required by the statutory language." *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2191 (2012) (citing 25 U.S.C. § 450*l*(c)).

III. Section 105(*l*) and the implementing regulations entitle Maniilaq to full lease compensation on the basis of the reasonable, nonduplicative cost elements listed therein.

This case turns on the proper interpretation of § 105(*l*) of the ISDEAA, 25 U.S.C. § 450j(*l*), and implementing regulations at 25 C.F.R. §§ 900.69-900.74 with respect to the level of compensation that the IHS is required to provide under a § 105(*l*) lease. Pursuant to 25 U.S.C. § 450j(*l*)(2), the Secretary "***shall compensate*** each Indian tribe or tribal organization that enters into a lease[,]" which may include certain listed costs "and such other reasonable expenses that the Secretary determines, ***by regulation***, to be allowable." 25 U.S.C. § 450j(*l*)(2) (emphasis added). Congress thereby gave the Secretary specific rulemaking authority to establish the *elements* of compensation for a § 105(*l*) lease, while mandating that a lease must be compensated.[3]

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section;
(2) the implementation of compacts and funding agreements entered into under this part; and
(3) the achievement of tribal health goals and objectives.

[3] That specific authority was significant, because in enacting the 1994 ISDEAA amendments that created § 105(*l*) Congress provided that the Secretary "may not promulgate any regulation, nor impose any nonregulatory requirement, relating to self-determination contracts or the approval, award, or declination of such contracts," unless specifically authorized. 25 U.S.C. § 450k(a)(1). Congress also required that any regulations must be promulgated under negotiated rulemaking procedures and with the active participation of Indian tribes. 25 U.S.C. § 450k(d).

The regulations adopted by the Secretary provide that there are three compensation options available for a tribe or tribal organization proposing a § 105(*l*) lease: (1) fair market rental; (2) a combination of fair market rental and the cost elements listed in 25 C.F.R. § 900.70; or (3) the cost elements listed in 25 C.F.R. § 900.70 only. 25 C.F.R. § 900.74. The referenced provision at 25 C.F.R. § 900.70 states that "[t]o the extent that no element is duplicative, the [listed] elements may be included in the lease compensation."

The Secretary and the IHS are bound by these regulations, which have the force of law. *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. E.P.A.*, 752 F.3d 999, 1009 (D.C. Cir. 2014) ("It is axiomatic, … that an agency is bound by its own regulations" and an agency "is not free to ignore or violate its regulations while they remain in effect.") (internal quotations and citations omitted); *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 748 (2004) (formal regulations with the force of law are binding on the agency that promulgated them). Together, the statute and regulations entitle a tribe or tribal organization eligible for a § 105(*l*) lease not to a specific dollar amount, but to full compensation of the negotiated, reasonable, and nonduplicative cost elements listed in the regulations.

Throughout her brief, the Secretary repeatedly misrepresents Maniilaq's position with respect to the compensation required under § 105(*l*) and the implementing regulations. The Secretary charges that Maniilaq asserts "an unbridled entitlement to funds" under the regulations and that the IHS must pay "whatever facility costs [Maniilaq] dictates." Defs. MSJ at 4, 18. *See also*, Defs. MSJ at 2, 23, 24, 30, 32, 34. Maniilaq, however, has never claimed that it can dictate whatever lease amount it desires for any facilities lease. Maniilaq argues only that the Secretary is bound by her own regulations, which require payment of certain reasonable and

nonduplicative costs when proposed as lease compensation, and that Maniilaq is entitled to mandamus and injunctive relief in this case due to the Secretary's improper rejection of its final offer under Title V of the ISDEAA.

Maniilaq's position has consistently been that § 105(*l*) and the implementing regulations require the IHS to "negotiate over the appropriate amount for each cost element included in a tribe's proposal." Plt. MSJ at 20. First, as Defendants themselves state in their brief, "the tribal contractor must make a proposal for a lease that contains *one of the three options* in 25 C.F.R. § 900.74." Defs. MSJ at 34 (emphasis added); Plt. MSJ at 20 ("It is up to the tribe or tribal organization proposing a lease to choose *from among the three options*, which the negotiated rulemaking committee and the Secretary agreed were appropriate bases for compensation[.]") (emphasis added). Second, as Defendants also state in their brief, "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." Defs. MSJ at 34 (emphasis added); Plt. MSJ at 22 n.9 (noting that a tribe or tribal organization proposing a § 105(*l*) lease is limited to proposing the compensation options provided in the regulations); Plt. MSJ at 20 (noting that the Secretary "may decline to provide duplicative costs.").

Where the parties part ways in their interpretations of the regulatory requirements is evidently in what occurs after the Secretary has determined whether the proposed costs comport with the regulations and whether any of the proposed costs are duplicative. Maniilaq believes that "[t]he Secretary may negotiate over the appropriate amount for each cost element included in a tribe's proposal, and of course may decline to provide duplicative costs. But the Secretary

may not ignore the regulatory cost elements that a tribe or tribal organization has proposed pursuant to the negotiated regulations and unilaterally elect to determine (or limit) lease compensation on the basis of factors not included in the regulations at all." Plt. MSJ at 20-21. In other words, provided the proposed costs comport with the regulatory criteria and are not duplicative, the Secretary must negotiate the appropriate amount for the cost elements and include them as lease compensation in fulfillment of Congress' directive that the Secretary "shall compensate" the tribe. The Secretary, on the other hand, argues that ultimately § 105(*l*) "is discretionary when it pertains to what [the] compensation will consist of" and, therefore, the Secretary is free to disregard the proposed elements and the regulatory criteria if she would prefer to utilize some other metric for determining compensation (or, perhaps, pay only a "nominal" amount or no monetary compensation at all). *See* Defs. MSJ at 11, 34.

The Secretary's interpretation of the regulations, under which the tribes but not the Secretary are bound by the compensation options listed in 25 C.F.R. § 900.74, does not "flow[] in a straightforward manner to give full effect to the intent of Congress in Section 105(*l*)" as her brief claims. *See* Defs. MSJ at 34. Congress directed that the Secretary "shall compensate" tribes and that such compensation may include specific costs listed in the statute, or determined by regulation. 25 U.S.C. § 450j(*l*)(2). By this provision, Congress did not intend to permit the Secretary to reserve for herself, by regulation or otherwise, total discretion to determine lease compensation even after a tribe proposes reasonable and nonduplicative costs pursuant to the statutory and regulatory guidelines.

To the contrary, the 1994 amendments to the ISDEAA were enacted in response to the failure of the IHS and the Bureau of Indian Affairs ("BIA") to carry out Congress' intent, through

the 1988 amendments to the ISDEAA, to "increase[] tribal participation through contracting in the management of federal Indian programs and to help ensure long-term financial stability for tribally-run programs." S. Rep. No. 103-374, at 3 (1994). This failure included proposed regulations that tribes believed would "raise new obstacles and burdens for Indian tribes seeking the opportunities for effective tribal self-government promised by the [ISDEAA.]" *Id*. The Senate Committee Report thus described the purpose of the 1994 amendments as being "to limit the promulgation of regulations under the Indian Self-Determination and Education Assistance Act and to prescribe the terms and conditions which must be used in any self-determination contract between an Indian tribe and the Departments of Interior and Health and Human Services." *Id*. at 1. In light of this Congressional purpose, and the concomitant requirement imposed by Congress that the Secretary promulgate implementing regulations only through negotiated rulemaking with tribes, it is irrational to view the regulatory cost elements as mere suggestions which may be allowed only in the Secretary's discretion.

While Maniilaq has never contended that the § 105(*l*) implementing regulations permit a tribe or tribal organization to "dictate" any amount of compensation it desires for a § 105(*l*) lease, Maniilaq does assert that it is entitled, in this case, to mandamus and injunctive relief ordering the Secretary to award and fund Maniilaq's final offer proposal as proposed. Here, the Secretary refused to negotiate the amounts of the regulatory cost elements that Maniilaq proposed, and chose instead to reject Maniilaq's final offer on the basis of her interpretation of the ISDEAA and the § 105(*l*) implementing regulations as discretionary. Plt. Ex. H, ECF No. 10-9, at 5. Title V of the ISDEAA permits the Secretary to reject a final offer only where certain criteria are met, and puts the burden on the Secretary to show that the grounds for her rejection decision were

valid. 25 U.S.C. § 458aaa-6(c)(1)(A); 25 U.S.C. § 458aaa-6(d). Since the Secretary's interpretation of the ISDEAA and the § 105(*l*) implementing regulations is contrary to law, she cannot meet that burden here. Nor, at this stage in the proceedings, may the Secretary seek to rely on grounds for rejection that were not included in the rejection decision letter. 25 U.S.C. § 458aaa-6(c)(1) (requiring that the written rejection notification include a specific, supported finding that one of the statutory rejection criteria applies); 25 U.S.C. § 458aaa-6(d) (placing the burden on the Secretary to demonstrate the validity of the grounds given for rejecting the final offer); *Pyramid Lake Paiute Tribe*, 2014 WL 5013206 at *7. Thus, Defendants may not now question the basis of the compensation amounts proposed by Maniilaq as a post-hoc rationale for upholding the Secretary's rejection decision. *See* Defs. MSJ at 15 n.9.

Title V specifically provides for mandamus and injunctive relief to compel the Secretary to award and fund a final offer proposal. 25 U.S.C. § 458aaa-10(a); 25 U.S.C. § 450m-1(a). In this case, since the Secretary cannot show that her rejection was proper under the statutory criteria identified in the rejection letter, the remedy is injunctive and mandamus relief ordering the Secretary to award and fund Maniilaq's final offer.[4]

IV. The context and legislative history does not contravene the plain language in § 105(*l*) requiring compensation.

The plain language of § 105(*l*) requires that the Secretary shall compensate a tribe, as provided in the statute or as determined by regulation. That requirement is no less clear when

[4] Maniilaq does not contend, as Defendants characterize it, "that IHS may not assert its statutory right in [the final offer] process to reject such a final offer pursuant to the rejection criterion at 25 U.S.C. § 458aaa-6(c)(1)(A)(i)." Defs. MSJ at 20. Rather, Maniilaq asserts that such criterion does not apply because the Secretary's rejection of the proposal without consideration of the standards imposed by § 105(*l*) and the implementing regulations was improper.

considered in context or in light of the purpose of the ISDEAA and legislative history of § 105(*l*) itself.

In 1970, the IHS began leasing village built clinic facilities to carry out the Community Health Aide Program with funds appropriated to the IHS in that year. *See* Plt. Ex. I, ECF No. 10-10, *IHS Technical Handbook for Environmental Health and Engineering*, Chapter 33-3.3 (describing the VBC leasing program). At that time, the IHS did not have its own leasing authority, and evidently utilized leasing authority delegated by the Administrator of General Services ("GSA").[5] *See* 40 U.S.C. § 585 (authorizing the GSA to enter into leases); 41 C.F.R. §§ 102-73.145-.155 (describing GSA categorical space leasing delegation to federal agencies); Defs. Ex. 11, ECF No. 15-13 (VBC lease with the City of Kivalina, incorporating GSA Form 3517, "General Clauses, Acquisition of Leasehold Interest in Real Property").

GSA leasing authority under § 585 authorizes the Administrator to enter into leases "on terms the Administrator [or the delegated agency] considers to be ***in the interest of the Federal Government*** and necessary for the accommodation of the federal agency." 40 U.S.C. § 585 (emphasis added). The IHS chose to enter into "full service" leases with Alaska Native villages which, in return for a rent payment, required the villages to operate, maintain and repair the property for the IHS. *See* Defs. MSJ at 21; Plt. Ex. J, ECF No. 10-11, at 4. In 1976, cognizant of the VBC leases in Alaska and similar leasing activity in Oklahoma, Congress provided new direct leasing authority to the IHS in § 704 of the Indian Health Care Improvement Act (IHCIA),

[5] In *Maniilaq I*, the Secretary stated in her brief that "The IHS relies on its categorical space delegation of authority from GSA to lease [VBCs]." Memorandum of Law in Support of Motion to Dismiss or in the Alternative for Summary Judgment at 5, *Maniilaq Association v. Burwell*, No. 1:13-cv-00380, 2014 WL 4178267 (D.D.C. July 19, 2013), ECF No. 21.

Pub. L. No. 94-437, renumbered as § 804 of the IHCIA, 25 U.S.C. § 1674. *See* H.R. Rep. No. 94-1026, at 122-123 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2652, 2760-61. That leasing authority was intended, in part, to "strengthen the self-determination effort by permitting contracts with tribal groups who desire to construct health facilities for lease to the Indian Health Service and allow the tribes constructing such facilities to realize a return from their capital investment." *Id*. at 122.[6] Section 804 leases differ markedly from "full service" leases under GSA authority, and were intended to be fully compensated. *Id*. However, the § 804 leasing authority is discretionary rather than mandatory, and has never been used by the IHS to lease VBC facilities in Alaska. Instead, the IHS has continued to utilize "full service" leases under its GSA authority, thereby shifting all operation and maintenance costs above the agency-determined rental amounts over to the villages. *See* Plt. Ex. K, ECF No. 10-12.

In 1994, Congress amended § 105 of the ISDEAA to provide a *mandatory* leasing authority upon tribal request. The legislative history of the Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, states simply with respect to the new leasing authority that: "New subsection 105(*l*) overcomes existing impediments to the leasing of facilities owned by Indian tribes and tribal organizations and which are used in the operation of programs contracted under the Act." S. Rep. No. 103-374, at 8 (1994). In addition to providing that the Secretary "shall enter" into a § 105(*l*) lease "[u]pon the request of an Indian tribe or tribal organization," Congress provided that:

[6] The House Report noted that "in small communities in the less populous States with substantial Indian populations, such as Oklahoma and Alaska, the direct leasing authority would provide assistance to the Indian Health Service program in fulfilling its responsibility to provide high quality health care to the Indian people. Furthermore, the authority is consistent with the Federal goal of providing American Indians and Alaska Natives with sufficient options to permit maximum tribal involvement—a policy of self-determination." *Id*. at 123.

> The Secretary shall compensate each Indian tribe or tribal organization that enters into a lease under paragraph (1) for the use of the facility leased for the purposes specified in such paragraph. Such compensation may include rent, depreciation based on the 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.

As noted previously, the purpose of the 1994 amendments overall was to address the failure of the IHS and BIA to faithfully execute the intent of the ISDEAA, including by way of proposed regulations that clearly stated the Secretary's position with respect to facilities leasing with ISDEAA tribal contractors: "The expenses associated with the use and depreciation of real property owned by the contractor used in the performance of a self-determination contract shall be recovered in accordance with the cost principles covered in Subpart D. *The Secretary will not negotiate a separate lease agreement with the contractor*." 59 Fed. Reg. 3166, 3198 (Jan. 20, 1994) (joint Department of the Interior and Health and Human Services Notice of Proposed Rulemaking) (emphasis added).

The historical context thus reflects that the IHS had refused to enter into fully compensated facilities leases with ISDEAA tribal contractors under its discretionary IHCIA leasing authority, as illustrated in the 1994 Notice of Proposed Rulemaking. In the case of VBCs in Alaska, the IHS had continued to utilize its GSA delegated authority, which permitted the agency to insist on terms (including compensation) favorable to the government. In response to the failure of the IHS to enter into leases with ISDEAA tribal contractors on terms that furthered tribal self-determination, Congress passed § 105(*l*), which by its plain terms requires that the IHS enter into a lease at the request of a tribe or tribal organization and that the Secretary compensate the tribe or tribal organization based on appropriate criteria listed in the statute or determined through negotiated rulemaking.

The Secretary acknowledges Congress' intent to repudiate the Notice of Proposed Rulemaking in the 1994 amendments. Defs. MSJ at 27. However, to support her argument that compensation under 105(*l*) is totally discretionary (even though entering into the lease is mandatory), the Secretary argues that Congress had two very limited purposes in adding § 105(*l*). First, the Secretary argues that Congress enacted § 105(*l*) as mandatory leasing authority to address the fact that tribes and tribal organizations needed a facility lease with the IHS in order to access 100% Federal Medical Assistance Percentages (FMAP) funding under the Health Care Financing Administration's interpretation of governing law at that time. Defs. MSJ at 28-30. However, the Secretary cites no legislative history to support her claim that this was a "key rationale" for § 105(*l*), and the Senate Report cited above does not mention FMAP as a consideration in the amendments. Even if access to 100% FMAP was one of the purposes for which Congress enacted § 105(*l*), that would not overcome the plain language of the statute which, in addition to requiring that IHS grant requested leases, requires that the IHS *compensate* for such leases. Congress would not have included § 105(*l*)(2) if the only purpose of the amendment were to circumvent a technicality preventing tribes and tribal organizations from accessing 100% FMAP.

Second, the Secretary argues that § 105(*l*) was intended to provide ISDEAA-specific cost principles in response to the 1994 Notice of Proposed Rulemaking, which provided that real property costs would be recovered in accordance with generally applicable OMB cost principles. The Secretary argues, however, that by establishing new cost principles § 105(*l*) was not intended to require any level of lease compensation. Defs. MSJ at 30. The legislative history does not support this argument, which also makes little logical sense. The references to cost

principles in the oversight hearing cited by the Secretary were not made in connection with leasing, but with financial management and allowability of costs for self-determination contracts generally. *See Indian Self-Determination and Education Assistance Act, Oversight Hearing before the Subcomm. on Native American Affairs of the H. Comm. on Natural Resources*, 103d Cong. 2d Sess.75-76 (1994) ("Oversight Hearing") (written testimony of S. Bobo Dean); *Id*. at 155 (Indian Self-Determination Amendments Regulations Comments submitted by Hobbs, Straus, Dean & Walker). Even to the extent that cost principles may have been relevant to the specific question of facilities leases,[7] the Secretary's argument that the adoption of new cost principles was not intended to have any impact on the amount of funding available is completely unsupported. In the absence of any evidence weighing in the Secretary's favor, it is far more logical to conclude that if tribes and tribal organizations objected to the existing cost principles it was because the existing principles were failing to result in the full and necessary compensation.

The Secretary's cost principles argument leads her nowhere, but she attempts to support it by noting that § 105(*l*) provides that the listed costs "may" be included as lease compensation and that written guidance distributed in 1999 stated that "the leases must be funded from resources currently available under the [tribe or tribal organization's] self-determination

[7] The comments on the Notice of Proposed Rulemaking submitted by Hobbs, Straus, Dean & Walker and referenced by the Secretary in her brief, Defs. MSJ at 31, note as follows: "Neither agency has ever expressly described the basis for its policy against leasing space from the tribe for tribal operation of the program. To the extent the agencies believe the standard cost principles in OMB Circulars A-87, A-122 or A-21 preclude even arms-length leases with tribes for tribally-operated programs, the need to reinstate the ISDA-specific cost principles advocated by tribes is underscored." Oversight Hearing at 164. The comments further state: "This issue directly impacts the ability of many tribal contractors to deliver services to Indian beneficiaries. The agencies must cease their unexplained and unyielding posture of refusal to work with tribes on this issue." *Id*.

contract." Defs. MSJ at 19, 31. Maniilaq has already addressed the use of the word "may" in § 105(*l*), Plt. MSJ at 21, and in any event the clear regulatory scheme dispenses of any argument that the Secretary reserves total discretion to determine lease compensation or to ignore the cost elements listed in the statute based only on the use of the word "may."[8] As for the 1999 guidance, Defendants cannot rely on internal agency procedures to overcome the plain language and clear requirements of the statutory provision and implementing regulations. *Cent. Laborers' Pension Fund*, 541 U.S. at 748 ("[N]either an unreasoned statement in [a] manual nor allegedly longstanding agency practice can trump a formal regulation with the procedural history necessary to take on the force of law."). The guidance only shows that the IHS has misinterpreted and misapplied § 105(*l*)—and deprived tribes and tribal organizations of their right to receive full lease compensation under § 105(*l*)—since at least 1999. Given the IHS's historical obstinacy in the area of leasing contractor-owned tribal facilities, this is perhaps not surprising, despite Congress' contrary intentions in § 105(*l*).[9]

[8] Congress provided that compensation under a § 105(*l*) lease, which Defendants now admit is mandatory according to the statutory language, Defs. MSJ at 19, 32, "may" include certain listed costs. 25 U.S.C. § 450j(*l*)(2). Through this language, Congress permitted the Secretary to identify additional and alternative compensation costs, *but only by regulation*. *Id.* ("… and such other reasonable expenses that the Secretary determines, *by regulation*, to be allowable.") (emphasis added). Moreover, Congress required that such regulations be promulgated only through negotiated rulemaking with the affected tribes. 25 U.S.C. § 450k(d). The Secretary's regulations at 25 C.F.R. § 900.74 clearly identify three possible compensation options. The statutory and regulatory scheme does not permit the Secretary to stray from the cost elements described in those three compensation options, though the word "may" is used to indicate that any one of the three compensation options may be chosen over another. *See* Plt. MSJ at 21-23.

[9] The agency's longstanding though illegal position may explain why few tribes may have ever sought full lease compensation under § 105(*l*). Defs. MSJ at 28. Indeed, there is little incentive to do so as long as the IHS continues to insist that even under a § 105(*l*) lease the requesting tribe is only entitled to whatever amounts it is already receiving for its facility.

V. Section 106(a)(1) of the ISDEAA does not relieve the Secretary of the requirement to fully compensate a § 105(*l*) lease.

Section 106(a)(1) of the ISDEAA requires that the Secretary provide no less than the amount she would have otherwise provided to operate a PFSA when she transfers that PFSA to a tribal contractor through an ISDEAA contract or compact. 25 U.S.C. § 450j-1(a)(1). Nothing in § 106(a)(1), however, limits the funding that can be added to an ISDEAA funding agreement or relieves the Secretary of substantive funding requirements under other statutory or regulatory provisions simply because they would result in an increase in funding to the requesting tribe or tribal organization. Where, as here, other statutory or regulatory provisions do exist and require certain funding, the IHS must abide by those requirements and cannot rely on caselaw applying § 106(a) to uphold agency decisions in the *absence* of any specific funding requirements.

A. Section 106(a) is not the only provision governing funding that may be transferred through an ISDEAA funding agreement.

The Secretary argues that her rejection of Maniilaq's final offer was valid under § 106(a)(1) because the Secretary would only have spent $30,921 to procure clinic space in Kivalina, as evidenced by the Secretary's historical lease with the City of Kivalina. *See* Defs. MSJ at 20-21. But Defendants' argument that § 106(a) is the only provision of the ISDEAA addressing the amount of funds provided, and that all funding transferred through a funding agreement is subject to § 106(a)(1), is simply incorrect. Defs. Br. at 20, 21 and 22 n.13. The mere fact that funding is included in an ISDEAA funding agreement does not mean that it is § 106(a) funding or subject to limitation by § 106(a)(1). Not only do other provisions of the ISDEAA address amounts of funding to be provided, but the IHS routinely transfers non-106(a) funding through ISDEAA funding agreements, including Maniilaq's.

Section 105 of the ISDEAA itself contains multiple provisions that impose funding requirements or otherwise address the amount of funds to be provided by the Secretary. For example, § 105(c)(2) provides that "The amounts of [self-determination] contracts may be renegotiated annually to reflect changed circumstances and factors, including, but not limited to, cost increases beyond the control of the tribal organization." 25 U.S.C. § 450j(c)(2). And, with regard to construction contracts, § 105(m)(4)(c) provides:

> The total amount awarded under a construction contract shall reflect an overall fair and reasonable price to the parties, including the following costs:
>
> (i) The reasonable costs to the tribal organization of performing the contract, taking into consideration the terms of the contract and the requirements of this subchapter and any other applicable law.
>
> (ii) The costs of preparing the contract proposal and supporting cost data.
>
> (iii) The costs associated with auditing the general and administrative costs of the tribal organization associated with the management of the construction contract.
>
> (iv) In the case of a fixed-price contract, a fair profit determined by taking into consideration the relevant risks and local market conditions.

25 U.S.C. § 450j(m)(4)(c). These construction compensation requirements are similar to the lease compensation requirements in § 105(*l*) in that the payment of reasonable costs is required (subject to negotiation), but they are not "program" costs the Secretary otherwise would have borne. Taken together, the three provisions in subsections (c), (*l*), and (m) of § 105 defy the Secretary's argument that § 106(a) alone determines all of the funding amounts that may be included in an ISDEAA funding agreement.[10]

[10] Even § 106 itself recognizes that § 106(a) does not set a ceiling for funding to be included in any funding agreement and that § 105 provides authority to increase the amount. *See* 25 U.S.C. § 450j-1(b)(5) (providing that the amount of funds in subsection (a) "may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this subchapter or as

Other ISDEAA provisions permit non-106(a) funding to be included in a funding agreement. Most notably under Title V, § 505(b) permits tribes and tribal organizations to receive competitive grant funding through their ISDEAA funding agreements:

> (1) In general
> Each funding agreement required under subsection (a) of this section shall, as determined by the Indian tribe, authorize the Indian tribe to plan, conduct, consolidate, administer, and receive full tribal share funding, ***including tribal shares of discretionary Indian Health Service competitive grants*** (excluding congressionally earmarked competitive grants), for all programs, services, functions, and activities (or portions thereof), that are carried out for the benefit of Indians because of their status as Indians without regard to the agency or office of the Indian Health Service within which the program, service, function, or activity (or portion thereof) is performed.
>
> (2) Inclusion of certain programs, services, functions, and activities
> Such programs, services, functions, or activities (or portions thereof) include all programs, services, functions, activities (or portions thereof), ***including grants (which may be added to a funding agreement after an award of such grants)***, with respect to which Indian tribes or Indians are primary or significant beneficiaries, administered by the Department of Health and Human Services through the Indian Health Service and all local, field, service unit, area, regional, and central headquarters or national office functions so administered under the authority of—
> (A) section 13 of this title;
> (B) the Act of April 16, 1934 (48 Stat. 596; chapter 147; 25 U.S.C. 452 et seq.);
> (C) the Act of August 5, 1954 (68 Stat. 674; chapter 658) [42 U.S.C. 2001 et seq.];
> (D) the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.);
> (E) the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2401 et seq.);
> (F) any other Act of Congress authorizing any agency of the Department of Health and Human Services to administer, carry out, or provide financial assistance to such a program, service, function or activity (or portions thereof) described in this section that is carried out for the benefit of Indians because of their status as Indians; or
> (G) any other Act of Congress authorizing such a program, service, function, or activity (or portions thereof) carried out for the benefit of Indians under which appropriations are made available to any agency other than an agency within the

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provided in section 450j(c) of this title.").

> Department of Health and Human Services, in any case in which the Secretary administers that program, service, function, or activity (or portion thereof).

25 U.S.C. § 458aaa-4(b) (emphasis added). Pursuant to this provision, Maniilaq's funding agreement at § 4(d) permits grant funds awarded under the Special Diabetes Program for Indians (SDPI) grant program, 42 U.S.C. § 254c-3, to be included in the funding agreement:

> **(d) Inclusion of Statutorily Mandated Grant.** In accordance with Section 505(b) of Title V, and its implementing regulations, the Parties agree that the Secretary shall add the following statutorily mandated grants, which are administered by DHHS through IHS, to the [funding agreement] after they have been awarded. Grant funds will be paid to Maniilaq as a lump sum advance payment through the PMS grants payment system as soon as practicable after award of the grant. Maniilaq will use interest earned on such funds to enhance the programs for which the grant was awarded, including administrative costs. Maniilaq will comply with all terms and conditions of the grant award, including reporting requirements, and will not reallocate grant funds nor redesign the grant program. Grant programs added to this [funding agreement] in accordance with this provision include the following: Diabetes Grant. …

Plt. Ex. B, ECF No. 10-3, at § 4(d) (p. 14). This grant funding does not reflect an amount under § 106(a) that the Secretary would have otherwise provided to administer a special diabetes program herself, as the Secretary does not operate a special diabetes program but simply administers grants under SDPI. *See* 42 U.S.C. § 254c-3(a) ("The Secretary shall make grants for providing services for the prevention and treatment of diabetes in accordance with subsection (b) of this section.").

Other funds that the IHS categorizes as non-106(a) funding but regularly includes in ISDEAA funding agreements include Methamphetamine and Suicide Prevention Initiative (MSPI) and Domestic Violence Prevention Initiative (DVPI) funds. These funds are awarded at the discretion of the Director, in order to meet the greatest need as determined by the IHS. In a

recent letter to Marilynn Malerba, Chairwoman of the Tribal Self-Governance Advisory Committee, Acting IHS Director Robert McSwain noted:

> The funds associated with MSPI and DVPI awards have been distributed using various mechanisms throughout all parts of the IHS system. As a result of Tribal recommendations to promote efficiency and expediency in awarding MSPI and DVPI, the IHS agreed in some cases to fund MSPI and DVPI as separate amendments to Indian Self-Determination and Education Assistance Act (ISDEAA) agreements. The MSPI and DVPI amendments imposed their own unique requirements separate from the ISDEAA agreement. For example, the amendments required additional reporting, did not allow for rebudgeting and redesign, and specifically stated that the funds were non-recurring.

Letter from Robert G. McSwain, Acting Director, IHS, to Marilynn Malerba, Chairwoman, Tribal Self-Governance Advisory Committee (May 18, 2015), Plt. Ex. L. Maniilaq receives both types of funding through amendments to its funding agreement. Plt. Ex. M.

Like lease funding under § 105(*l*), funding for construction contracts, SDPI, MSPI, and DVPI is determined according to each provision's own statutory and regulatory criteria. They are not determined by the amount the Secretary would have otherwise provided to operate a program under § 106(a), but they may all be transferred through an ISDEAA funding agreement. These provisions and their operation clearly establish that, contrary to the position argued by the Secretary in this case, § 106(a) is not the only provision governing funding that may flow through ISDEAA funding agreements and does not operate to limit funding required or awarded pursuant to other provisions of law.

B. The cases relied on by the Secretary do not support her rejection of Maniilaq's final offer because none of the cited cases involve a specific statutory or regulatory provision requiring compensation or funding.

In light of the § 105(*l*) compensation requirement, the cases cited by the Secretary provide no support whatsoever for her assertion that she need not increase Maniilaq's funding

amount for the Kivalina clinic. None of the cited cases involves a statutory or regulatory requirement, like § 105(*l*) and its implementing regulations, to provide full funding for the reasonable costs of the plaintiff tribe or tribal organization. As such, the holdings in those cases involve only § 106(a) and are simply inapplicable to the circumstances presented in this case.

First, Defendants cite *Quechan Tribe of the Fort Yuma Indian Reservation v. United States*, Case No. 11-16334, 2015 U.S. App. LEXIS 5258 (9th Cir. Apr. 1, 2015), for the proposition that "[t]here is no obligation on IHS to increase the Secretarial amount simply because a request is made by a tribe[.]" Defs. MSJ at 22. In that case, the Quechan Tribe alleged that the IHS had a duty under the federal trust responsibility to Indians, and under general statutes providing for Indian health care, to maintain the Fort Yuma Service Unit in good repair and to allocate additional funding to the Unit. As noted by the Secretary in her brief, the Ninth Circuit held that it "cannot compel IHS to maintain the Unit ***because there is no specific, unequivocal statutory command requiring IHS to do so***." Defs. MSJ at 23 (citing *Quechan Tribe*, 2015 U.S. App. LEXIS 5258 at 3) (emphasis added). In this case, by contrast, Maniilaq is asking this Court to enforce § 105(*l*) and its implementing regulations, not a general trust duty under common law or broad statutory authorizations to provide health care to Indians. This crucial difference renders the Ninth Circuit's decision in *Quechan Tribe* utterly inapplicable to the present circumstances.

Second, Defendants cite *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell*, 729 F.3d 1025 (9th Cir. 2013) for the proposition that "[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." Defs. MSJ at 24, quoting *Los Coyotes*,

729 F.3d at 1035. In *Los Coyotes*, the Ninth Circuit held that the amount requested by the Tribe for operation of a law enforcement program on its reservation exceeded the amount to which it was entitled under the ISDEAA because the BIA did not then fund or operate any such program – in other words, the Tribe was attempting to use the ISDEAA to create a new program that the BIA was not required to operate under any other statutory provision. *Los Coyotes*, 729 F.3d at 1035. Under those circumstances, the Ninth Circuit held that it was proper for the Secretary of the Interior to deny the contract proposal because, under § 106(a)(1) of the ISDEAA, the Secretary was only required to provide what she otherwise would have provided for the program, which was zero. *Id*. at 1036.

Again, the obvious distinction between this case and *Los Coyotes* is that there is no statutory provision in the ISDEAA or elsewhere, and no BIA regulations, requiring any specific funding level for law enforcement or entitling a tribe or tribal organization to reimbursement for any specific law enforcement costs. As the Ninth Circuit noted, distinguishing the *Los Coyotes* case from others involving mandatory payment of contract support costs under the ISDEAA, "there is no 'meaningful law to apply' to the BIA's allocation of funds for law enforcement. The ISD[EA]A is silent on how the BIA should prioritize its funding of law enforcement." *Id*. at 1037 (internal citations omitted). That scenario is entirely different than the one presented in this case, where § 105(*l*) and its implementing regulations specifically address how the IHS is to provide compensation for the use of health care facilities owned by tribal contractors.

For the same reason, *Lincoln v. Vigil*, 508 U.S. 182 (1993), is not applicable to this case. In *Lincoln*, the Court held that the IHS's decision to discontinue a directly operated program that provided diagnostic and other health services to handicapped Indian children in the Southwest,

and to reallocate the program's resources elsewhere, was unreviewable under the APA because it was "committed to agency discretion by law." *Lincoln*, 508 U.S. at 193. There was no law or regulation applicable to the handicapped Indian children's program under which the Court could review IHS's decision to terminate the program, nor was the ISDEAA involved. In contrast, the D.C. Circuit has distinguished *Lincoln* where the ISDEAA is intervening law to apply to evaluate the agency's decision with respect to contract support costs. *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338, 1343-1344 (D.C. Cir. 1996) (The BIA had no legal discretion under *Lincoln* to impose a funding penalty on contracting tribes for late filing of requests for contract support costs, because the ISDEAA was intervening law and the agency did not have the legal discretion to contravene the ISDEAA's requirements.).

This case is more akin to *Ramah*, in that a provision of the ISDEAA and its implementing regulations speak directly to a mandatory award of funding. The requirement in § 105(*l*) that the Secretary "shall compensate" a tribe or tribal organization for certain listed costs or "such other reasonable expenses that the Secretary determines, by regulation, to be allowable" echoes the requirement in § 106(a)(2) that "reasonable and allowable costs" for contract support costs "shall be added to the [contract] amount[.]" *See* 25 U.S.C. 450j-1(a)(2).[11] Further, the implementing regulations provide a clear standard of compensation against which to measure the Secretary's decision.

The historic lease amount of $30,921 incorporated into Maniilaq's funding agreement was established based on village built clinic leases entered between the IHS and the City of Kivalina under discretionary leasing authority, not under § 105(*l*). Under that discretionary

[11] *See also* Section VII, *infra*.

leasing authority, the IHS entered into "full service" annual leases in amounts determined by an administratively created formula, not based on actual costs. *See* Defs. MSJ at 21. Section 105(*l*) was enacted in 1994 as separate and distinct mandatory leasing authority. Maniilaq's decision to invoke that mandatory leasing authority (as Maniilaq had the right to do under the ISDEAA) introduced new statutory and regulatory compensation requirements that command full payment of certain reasonable and negotiated costs. The IHS cannot ignore those requirements simply because the lease amount for the Kivalina lease was set at a different level when it was established under the IHS's discretionary leasing authority and funding formula. Nothing in § 106(a) excuses the Secretary from complying with § 105(*l*) and its implementing regulations simply because they require an increase over the historical lease amount that was subsequently transferred to Maniilaq through its funding agreement.

VI. Maniilaq's proposed lease compensation does not result in duplication of costs or funding.

The Secretary argues that any lease payments for the Kivalina facility above the historical secretarial amount of $30,921 would somehow result in a duplication of costs. Specifically, Defendants argue that since the IHS paid for the same types of services under its $30,921 lease with the City of Kivalina from 1994 through 2011, any additional amount would be duplicative because it would "necessarily" be for costs already included in the $30,921 amount. Defs. MSJ at 35-36. This argument completely ignores the fact that in its final offer Maniilaq specifically proposed to retrocede back to the IHS the $30,921 that was established as the discretionary VBC lease amount with the City of Kivalina. Plt. Ex. H, ECF No. 10-9, at Exhibit 8, p. 3. Thus, because those funds would no longer be in Maniilaq’s funding agreement they do not in any way

duplicate the amount owed under the regulatory cost elements for Maniilaq's § 105(*l*) lease as provided in 25 C.F.R. § 900.70 and 25 C.F.R. § 900.74.

The Secretary's claim that the IHS paid for the same cost elements with the historical lease amount is also very misleading. Tribes and villages in Alaska have long complained that the IHS's "full service" VBC leases fail to cover the full cost of upkeep and require the villages that own the VBCs to "subsidize the day-to-day operating costs of their clinics and defer long-term maintenance and improvement projects." Plt. Ex. K, ECF No. 10-12, at 4; *see also id*. at 16-22. In 2007, it was estimated that lease funding provided by the IHS covered only approximately 55% of operating costs. *Id* at 4. *See also id*. at 18. Under its discretionary lease authority, IHS has chosen to maintain lease amounts at the formula-determined levels rather than increase VBC lease funding to meet actual costs, thus shifting the burden to the villages themselves. If the members of those villages want access to local health care, they will simply be forced to subsidize the clinic costs, as they have done. However, under § 105(*l*) and the implementing regulations at 25 C.F.R. § 900.70 and 25 C.F.R. § 900.74, the compensation requirements are different and the Secretary must compensate Maniilaq for the reasonable and nonduplicative costs listed in one of the three options in 25 C.F.R. § 900.74.

Further, it is worth underscoring that despite Maniilaq's agreement to withdraw its initial final offer to allow the parties to negotiate, the IHS refused to negotiate with Maniilaq over the amount to be paid for its actual costs and the Secretary did not reject Maniilaq's final offer proposal on the ground that the proposed costs were unsubstantiated. Instead, the Secretary rejected the final offer simply because the amount requested was greater than the $30,921 historical Kivalina lease amount. Plt. Ex. H, ECF No. 10-9, at 6 ("While the IHS has not asked

Maniilaq to substantiate its actual village clinic costs during negotiations, the increase in the amount of the costs to run its new clinic is not relevant because the Secretarial amount consists of what she paid at the time the program was transferred."). Rather than negotiate the reasonable, non-duplicative costs according to the statutory and regulatory criteria, IHS adopted an all-or-nothing strategy and rejected Maniilaq's proposal out of hand because it exceeded the historical, "full service" amount. Since that rejection was improper under the Title V rejection criteria, Maniilaq's remedy is mandamus and injunctive relief ordering the Secretary to award and fund the final offer proposal as submitted.

VII. Defendants concede that agency funding is legally available to pay § 105(*l*) lease compensation, which is mandatory pursuant to § 105(*l*)(2) and the implementing regulations.

The IHS stated in its rejection letter that "no additional funds are available" to compensate Maniilaq's § 105(*l*) lease request over the historical VBC lease amount and that the increase "would only be available by reducing the amount available to other Tribes; and under the ISDEAA, IHS is prohibited from reducing the funding for one Tribe to make it available to another." Plt. Ex. H, ECF No. 10-9, at 1, 4. In her brief, however, the Secretary clarified that "IHS is not making the argument that there is no funding legally available to pay the costs Plaintiff is seeking now." Defs. Br. at 37. Maniilaq agrees that nothing in the IHS appropriation prevents the IHS from fully funding Maniilaq's § 105(*l*) lease request, and therefore the funding is legally available. Moreover, contrary to the Secretary's assertion that nothing in the ISDEAA *requires* IHS to pay the requested amount, § 105(*l*) and its implementing regulations mandate that the IHS pay full lease compensation.

Though the Secretary dismisses the Supreme Court precedent set in *Salazar v. Ramah Navajo Chapter* and *Cherokee Nation v. Leavitt*, the mandatory contract support costs at issue in those cases are actually quite similar to the mandatory lease compensation under § 105(*l*). The Supreme Court's holding in those cases was not only that funding was legally available to pay contract support costs, but also that the agencies were *required* to fully pay those costs in light of the available funding. *Cherokee Nation*, 543 U.S. 631; *Salazar*, 132 S. Ct. 2181.

With respect to contract support costs, the ISDEAA requires that the Secretary pay "an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management" but which are not included in the § 106(a)(1) program amount. 25 U.S.C. § 450j-1(a)(2). The statutory requirement in § 105(*l*) that the Secretary "shall compensate each Indian tribe or tribal organization that enters into a lease under paragraph (1) for the use of the facility leased for the purposes specified in such paragraph" is analogous in that it requires, in general terms, full compensation of reasonable costs.

Pursuant to statute, contract support costs include "the costs of reimbursing each tribal contractor for reasonable and allowable costs" of direct program and indirect administrative expenses "except that such funding shall not duplicate any funding provided" in the § 106(a)(1) program amount. 25 U.S.C. § 450j-1(a)(3). "Reasonable and allowable costs" are not defined by statute and ultimately the dollar amount of contract support costs owed is subject to negotiation according to criteria established by regulation and administrative guidance.[12] This is similar to

[12] *See* 25 C.F.R. § 900.8(h); Indian Health Service, Indian Health Manual: Chapter 3 – Contract Support Costs, http://www.ihs.gov/ihm/index.cfm?module=dsp_ihm_pc_p6c3. As explained in this manual, negotiation of indirect contract support cost amounts generally involves the

§ 105(*l*), which states that "[s]uch compensation may include rent, depreciation based on the 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). Under this statutory mandate, the Secretary is required to negotiate and fully fund § 105(*l*) lease compensation as provided in the implementing regulations, which define the allowable costs and provide tribes and tribal organizations with three specific options (or sets of allowable costs) in proposing lease compensation.

The Secretary points out in her brief that Maniilaq, as a self-governance tribal contractor under Title V, has the ability to redesign programs and reallocate funding and therefore, like the IHS, must sometimes choose between competing priorities. Defs. MSJ at 36. Maniilaq is well aware of the difficult choices that the IHS and tribes across the country are forced to make in the face of chronically inadequate funding for basic health care needs. However, while Congress may not appropriate sufficient funding to fully fund every program or service it authorizes, Congress has acted to require full funding of certain fundamental needs, such as contract support costs and costs for facilities under § 105(*l*). This makes sense: Congress has prioritized these needs because virtually none of the health care programs or services that Congress otherwise has authorized and funded – including, for example, the CHAP program - could function properly without basic administrative support or adequate facilities to house them. A fundamental purpose of provisions like § 106(a)(2) and § 105(*l*) in the ISDEAA is to ensure that tribal contractors have assurances that these basic and necessary costs will be provided under their contracts to the same extent as they are provided by the Secretary to the IHS for its own directly

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application of an indirect cost rate separately negotiated between the tribe or tribal organization and its assigned federal agency and awarded according to that agency's criteria.

operated programs. Without assurance that these resources are available, the success of self-determination contracting and self-governance compacting and the policies underlying the ISDEAA itself would be undermined.

VIII. Conclusion

As with contract support costs under § 106(a)(2), the ISDEAA in § 105(*l*) creates a legal requirement that the IHS fully fund certain reasonable costs in support of a tribe or tribal organization's ISDEAA contract activities. The implementing regulations set out more specifically the allowable costs and the parameters for negotiations which will produce the full funding requirement. In this case, the Secretary refused to negotiate with Maniilaq for the cost elements Maniilaq proposed pursuant to one of the stated regulatory options for compensation. The Secretary then rejected Maniilaq's final offer not on the basis of the legitimacy of the proposed costs, but on the basis of her flawed legal theory that the compensation requirements in § 105(*l*) and its implementing regulations are discretionary and excused by § 106(a). Because the Secretary cannot meet her burden to show that the grounds for her rejection decision were valid, Maniilaq is entitled to mandamus and injunctive relief under 25 U.S.C. § 450m-1(a) and 25 U.S.C. § 458aaa-10(a) ordering the Secretary to award and fund the final offer lease request.

Respectfully submitted,

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