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.	)	

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION
TO DEFNDANTS' 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") hereby reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment found at ECF No. 17.

I. Introduction

By enacting the Indian Self-Determination and Education Assistance Act ("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); *see also* ECF No. 17 (Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Cross Motion for Summary Judgment) at 1. ("Pl.'s Opp."). As part of the system Congress set up to bring about this *orderly* transition, it specified in Section 106(a) that the amount of funds provided under a self-determination contract shall "not be less than [the Secretary] would have otherwise provided"—what is known as the "Secretarial" or "106(a)(1)" amount— plus an amount for contract support costs (CSC). 25 U.S.C. § 450j-1(a).[1]

Maniilaq is now seeking to upend the orderly system that Congress carefully constructed by unilaterally dictating an 808% increase in its Secretarial amount for the Kivalina Village Built Clinic (VBC).[2] *See generally* ECF No. 15 (Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment) ("Def.'s MSJ").

As required by Section 106(a)(1), when Maniilaq began contracting, IHS transferred the "programs, functions, services, and activities" ("PFSA") under the ISDEAA and added the Secretarial amount to Maniilaq's Funding Agreement ("FA"). This amount included the funding that IHS paid to the City of Kivalina to lease the Kivalina VBC, Def.'s MSJ at Ex. 11—although, at Maniilaq's request, the IHS retained the amount and through a "buyback/withhold" agreement procured the clinical space on behalf of Maniilaq. *Id*. at Ex. 13. In 2012, when Maniilaq owned its own clinical space, IHS was asked to discontinue the buyback/withhold and leave the amount for the lease in Maniilaq's FA for the continued operation of the PFSA, and it did so. *Id.* at Ex. 9. Given this history and Maniilaq's own statements, the Kivalina VBC program is a PFSA and

[1] The amount of CSC funding required under the ISDEAA is not at issue in this case.

[2] The Secretarial amount is transferred as part of Maniilaq's FA. In FY 2014 Maniilaq's FA totaled over $44 million. ECF No. 10 (Pl.'s MSJ) at ECF No. 10-8 at 8-10.

the funding amount is clearly part of Maniilaq's Secretarial amount—and this fact has not been disputed by Maniilaq.

Given the established identity of these funds as a portion of Maniilaq's Secretarial amount that corresponds to a PFSA awarded and funded under Section 106(a)(1), the obligation on IHS under the ISDEAA is clear: to provide Maniilaq with the amount of funds "otherwise provided" by the Secretary. IHS has met its obligation. If Maniilaq wishes a mandatory increase to the Secretarial amount by any amount (including the 808% increase it seeks here, from $30,921 to $249,842), the proper venue is Congress—which can increase and earmark appropriations—and not this Court. Maniilaq cites to several special initiatives where Congress did provide authority and funds (for example, the Special Diabetes Program for Indians which currently has a $150,000,000 earmark) to show that funds can be added to ISDEAA agreements, above the amount required by Section 106(a)(1), Pl.'s Opp. at 18-22, but this in no way supports Plaintiff's argument that Section 105(*l*) compels IHS to make an award above the Secretarial amount. Congress can address this issue by authorizing and earmarking funds for Alaska VBCs or by increasing the overall IHS appropriation.

Maniilaq is seeking to achieve the same result (additional funding) by having this Court endorse its novel and unprecedented (in the twenty years since the enactment of the law) interpretation of Section 105(*l*)—in particular by taking the words of the provision out of context. But IHS has fully met its obligations under the ISDEAA, and the Court should reject Maniilaq's claim and grant summary judgment in favor of the Defendant.

II. Argument

A. Maniilaq's Unwillingness To Negotiate During The Final Offer Process Demonstrates That It Will Accept Nothing Less Than What It Unilaterally Considers "Full Compensation"

Although Maniilaq attempts to portray the IHS as refusing to negotiate in connection with the increased cost of the lease, Pl.'s Opp. at 3, 10, 27, 28, 31, Maniilaq's actions show that it never intended to negotiate the amount of lease compensation because its position from the beginning has been, and still remains, that it can dictate to the Agency the amount of funds it will receive under a lease for the Kivalina VBC. When Maniilaq proposed the amount of funding it wanted as compensation for the Section 105(*l*) lease ($249,852), IHS made a counter proposal for the amount of funding that the Agency had previously been paying for the same costs ($30,921). ECF No. 15 (Def.'s MSJ) at Ex. 5. Instead of making another counter proposal, or explaining to IHS why its proposed amount of lease compensation was reasonable, Maniilaq shut down negotiations by making a final offer under the ISDEAA. *Id.* at Ex. 6.

This occurred first on October 28, 2014, when Maniilaq submitted its first final offer, *without any prior negotiation*, for a lease of the Kivalina VBC with $249,842 as the compensation. *Id.* at Ex. 1. That final offer was not supported by any bills or explanations of why Maniilaq's costs were 808% higher than what IHS had been paying for clinical space two years before. Under the ISDEAA, IHS was obligated to either accept or reject this offer within 45 days. 25 U.S.C. § 458aaa-6(b). When Maniilaq asked to continue talks as part of its final offer, IHS needed to stop the clock on the 45-day response period, and the Agency asked Maniilaq to withdraw its final offer so that the parties could enter into negotiations again. ECF No. 15 (Def.'s MSJ) at Ex. 2. Maniilaq cooperated and withdrew its final offer on October 31, 2014. *Id*. IHS then made a counteroffer of $30,921, the amount it had paid for clinical space in

Kivalina. *Id.* at Ex. 5. Instead of responding with another offer, or some basis for why Maniilaq's $249,852 was reasonable, Maniilaq again submitted another final offer on December 5, 2014. *Id.* at Ex. 6. Similar to its October final offer, this final offer had no explanation or documentary basis to support the amount Maniilaq wanted. *Id*. Thus IHS was again in the position of having to reject a final offer because Maniilaq refused to continue negotiations when IHS did not immediately concede to its demand. *Id*. at Ex. 7.

Maniilaq's actions demonstrate that it had no interest in giving IHS an opportunity to form an opinion as to whether Maniilaq's amount of compensation was reasonable. Both of its final offers contain the same list of elements from 25 C.F.R. §900.70 with an amount of money assigned to each listed element but without even a bill to show the amount was correct and no explanation for why the amount Maniilaq wanted was so much more than what the Agency paid only 2 years before. ECF No. 15 (Def.'s MSJ) at Exs. 1 and 6. Consequently, Maniilaq's position from the very beginning of the final offer process was that it alone could determine the amount of the lease compensation without any role for the Agency except rubber stamping its approval.

B. Section 105(*l*) And Its Implementing Regulations Do Not Negate The Agency's Discretion And Do Not Create An Entitlement To What Plaintiff Decides Is "Full" Compensation

Maniilaq repeatedly states at numerous places in its pleadings that Section 105(*l*) entitles it to "full compensation." ECF No. 10 (Plaintiff's Motion for Summary Judgment) ("Pl.'s MSJ") at 10, 13, 18, 26, 30; ECF No. 17 (Pl.'s Opp.) at 1, 5, 7, 14, 16, 17, 18, 26, 29, 30, 31. While IHS agrees that the ISDEAA requires "full" funding, the Agency has already fully funded Maniilaq under the ISDEAA and disputes that full funding includes this new category of mandatory lease funding. Maniilaq's interpretation of the legal authorities leads to a process

that, contrary to the law, leaves no discretion with the Agency and requires this Court to create a brand new category of mandatory ISDEAA funding.

According to Maniilaq, the regulations at 25 C.F.R. §§ 900.70 and 900.74 are nothing more than a menu of options from which tribal contractors can choose and be compensated. But Section 900.74 does not give the Indian tribe the authority to choose its compensation, but rather the ability to "propose" lease compensation. (Section 900.74 asks "How may an Indian tribe or tribal organization propose a lease to be compensated for the use of facilities?" and then it lists the three options. *See* 25 C.F.R. § 900.70.) Maniilaq fails to acknowledge that the ISDEAA and the implementing regulations continue to afford IHS significant discretion in determining reasonableness and identifying duplication that cannot be allowed.

To determine whether Maniilaq's proposal is reasonable, IHS must necessarily look beyond how much Maniilaq claims to have paid for each cost element identified in Section 900.70. For example, consistent with the ISDEAA, the Agency must determine if the cost elements are even relevant to Maniilaq's ISDEAA PFSA, given that: (1) the proposed costs are so much higher than what IHS paid only two years previously for the same purpose; (2) Maniilaq has not explained why it is incurring such higher costs; and (3) Maniilaq has not explained why it could not procure the space and services for less than the 808% increase proposed. Especially given that tribal contractors often operate health programs much larger than IHS funds—or is required to fund, as the parties generally agree—such issues must be addressed for the Secretary to exercise her discretion in assessing the reasonableness and non-duplication of the proposed costs. In a case such as this, when a tribal entity puts forward a proposal and refuses to negotiate, the Secretary must exercise her discretion relying on the only information available—the cost of the lease in 2012 in this case—to determine the reasonable, non-duplicative amount

authorized under the ISDEAA and the regulations. *See e.g., Southcentral Foundation v. Roubideaux,* 48 F. Supp. 3d 1291 at 1308 (D. Alaska 2014).

IHS has never disagreed that it must enter into a lease under Section 105(*l*) and that the lease must include compensation; but Congress did not say that the Secretary shall pay "all" costs identified in the implementing regulations or "all" of the costs that the requesting tribe proposes under that regulation. The bottom line is that Maniilaq's repeated assertions (and corresponding actions) about its entitlement to "full compensation" are not supported by Section 105(*l*) and its implementing regulations. Under these authorities, Maniilaq may propose a lease in accordance with a set of allowable costs—but the Secretary, operating through IHS, has significant discretion in how to respond to the proposal and must take into account a number of factors, including reasonableness, duplication, and the ISDEAA and the regulations, among other factors that may be relevant to its considerations.

C. Plaintiff Is Proposing Lease Compensation To Increase The Secretarial Amount For The PFSA Related To The VBC Program, And So The Analogous Case Law, Including *Quechan, Vigil,* and *Los Coyotes* Should Be Followed. *Ramah Navajo School Board* Is Inapplicable Because It Did Not Consider An Analogous Issue And In Any Event Has Been Superseded By Supreme Court Precedent.

To accept Maniilaq's contention that *Quechan, Vigil,* and *Los Coyotes* are not applicable, Pl.'s Opp. at 23-24, the Court must accept Maniilaq's fiction that its proposed ISDEAA contract amendment, styled as a lease proposal, is not a request to increase the level of funding for the PFSA related to its VBC Program, which has been a part of its ISDEAA contract for two decades. This is clearly what Plaintiff is seeking. As the ruling in *Maniilaq Ass'n v. Burwell*, No. 1:13-cv-00380-TFH, 2014 WL 4178267 (D.D.C. Aug. 22, 2014), *opinion amended and superseded by* 2014 WL 5558336 (D.D.C. Nov. 3, 2014) (referred to by Mannilaq as "*Maniilaq I*") explained, a Section 105(*l)* lease is simply another means of describing the funding for the

VBC Lease/Construction Program (VBC Program).[3] Further, the record in this case establishes beyond doubt that Plaintiff—dissatisfied with the level of funding for the VBC Program—is seeking to enlarge that amount by resorting to a litigation strategy aimed at creating a new interpretation of section 105(*l*) mandating "full funding" of the cost of its expanded program and divesting the Secretary of her right to decline contract proposals that exceed the amount she otherwise would have spent to operate the program.[4] Taken together, the ruling in *Maniilaq I* and the record underlying this case establish that the lease compensation sought by Maniilaq is incontrovertibly a Secretarial amount for the VBC Program and therefore squarely within the holding of *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell*, 729 F.3d 1025, 1035 (9th Cir. 2013) ("[I]f the [agency] spends $500,000 on law enforcement on a reservation, the

[3] *Maniilaq I*, 2014 WL 5558336, at *8; *id.* In *Maniilaq I* it was necessary for the Court to find that the proposed lease described the funds for the VBC Program, a contracted program funded through Section106(a) in Plaintiff's FA, because otherwise the lease would not qualify as an allowable FA term pursuant to 25 U.S.C. § 458aaa-4(d). In fact, this was Plaintiff's own argument, which the Court adopted: "Maniilaq persuasively argues that incorporation of the lease into the FA 'is simply another way for Maniilaq to receive funding to carry out the VBC Lease/Construction Program.' . . . Put another way, the [PFSA, or] 'program' for the purpose of 25 U.S.C. § 458aaa–4(d)(1) is the VBC Lease/Construction program. The proposed lease describes 'the funds to be provided,' 25 U.S.C. § 458aaa–4(d)(2)(B), and 'the responsibilities of the Secretary,' *id.* at § 458aaa–4(d)(2)(D), with respect to the VBC Lease/Construction Program." Plaintiff seeks to distance itself from this prior reasoning, instead contending that its proposed lease funding is not related to the VBC Program, but is instead a "historic lease amount" that it is not bound by. ECF No. 17 (Pl.'s Opp.) at 25.

[4] Exhibit C to Plaintiff's MSJ proposes retrocession of the VBC program to be replaced by Section 105(*l*) leases in a greater amount. *See* ECF No. 10 at Ex. C ("The chronic underfunding of the [VBC] Leasing Program has been well documented. The Maniilaq Association intends to address this longstanding problem, beginning in FY 2013, through the steps outlined in this memorandum."); ECF No. 1 (Compl.) at ¶¶ 26-27, 36, 43-45; ECF No. 10 (Pl.'s MSJ) at 2 ("T[he VBC Lease Program] amount has not been meaningfully increased since 1989, and is now insufficient to maintain the clinics. Ex. K."), 16-19, 20 ("Because *the historical lease funding that Maniilaq was receiving through its Funding Agreement* was grossly inadequate to maintain its clinic facilities in a suitable condition for operation of its PFSAs, in February of 2012 Maniilaq notified the AANHS *that it intended to retrocede those VBC lease program funds* and enter into new mandatory (and fully funded) § 105(*l*) leases for each of its clinic facilities. Ex. C." (emphases added)).

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."). Because Maniilaq's proposed contract amendment, styled as a lease proposal and coupled with the retrocession of the VBC Program, is for an amount in excess of what the Secretary is required to provide, this Court should follow *Los Coyotes* and hold that the Secretary properly declined Plaintiff's final offer pursuant to 25 U.S.C. § 458aaa-6(c)(1)(A)(i).

Section 105(*l*) is not "intervening law," as the Plaintiff argues, Pl.'s Opp. at 25, and this matter is not distinguishable from *Los Coyotes* on that basis. Therefore, Plaintiff's contract amendment proposal is not immune from the declination criteria at § 458aaa-6(c)(1)(A)(i), which was properly applied by the Secretary. Plaintiff contends that *Los Coyotes* is distinguishable from the matter at hand because, in *Los Coyotes*, "there is no statutory provision in the ISDEAA or elsewhere, and no BIA regulations, *requiring any specific funding level* [for the program at issue]." Pl.'s Opp. at 24 (emphasis added). Plaintiff's argument is built on the faulty premise that section 105(*l*) requires a specific level of funding. To the contrary, Section 105(*l*) and its implementing regulations require IHS to provide compensation and identify elements that may be proposed for compensation by the tribe, but they do not mandate a particular level of funding.

Plaintiff's analogy comparing Sections 105(*l*) and 106(a)(2) by citing *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d. 1338 (D.C. Cir. 1996),[5] is similarly deceptive because Section 450j-1(a)(2) does not mandate a particular level of funding either. *Ramah Navajo School Board* is inapplicable here because the issue in that case related to allocation of a limited appropriation for CSC amongst tribal contractors by the Department of the Interior, not the

[5] ECF No. 17 (Pl.'s Opp.) at 25 (citing *Ramah Navajo School Board*, 87 F.3d at 1343-1344, for the proposition that "the D.C. Circuit has distinguished [*Lincoln v. Vigil*, 508 U.S. 182 (1993)] where the ISDEAA is intervening law to apply to evaluate the agency's decision with respect to contract support costs").

calculation of the amount of funds required by the ISDEAA.[6] This case does not involve an allocation decision comparable to the one at issue in *Ramah Navajo School Board* and, even if it did, the holding of the D.C. Circuit is no longer valid given the Supreme Court's affirmation that *Vigil* applies to such allocation decisions and that "the ability to direct [CSC] funds was 'committed to agency discretion by law.'" *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2190 (2012) (quoting *Vigil*, 508 U.S. at 193).

Similarly, Plaintiff's efforts to rely on *Ramah Navajo Chapter* and *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), Pl.'s Opp. at 29, and to create a comparison with section 105(*l*) is misplaced. In both cases, the Supreme Court considered the narrow issue of whether limitations on the amount of appropriations available for CSC could limit the amount of CSC owed under the ISDEAA.[7] The Supreme Court held that the appropriations limitations did not limit the amount owed under the ISDEAA,[8] but the Court did not address in either case how to calculate the amount of funds required by the ISDEAA. Therefore, other than affirming *Vigil* discretion, the cases provide no guidance for the issues in this case, which are the meaning of Section 105(*l*) and whether tribes can rely on that provision to compel an increase in the Secretarial amount required under the ISDEAA.[9]

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[6] *See, e.g.*, 87 F.3d at 1344 (characterizing the issue as "the allocation of insufficient [CSC] appropriations").

[7] *See, e.g., Ramah Navajo Chapter*, 132 S. Ct. at 2186 ("At issue in this case is whether the Government must pay those costs when Congress appropriates sufficient funds to pay in full any individual contractor's contract support costs, but not enough funds to cover the aggregate amount due every contractor.").

[8] *See, e.g., Ramah Navajo Chapter*, 132 S. Ct. at 2195.

[9] Tribes are making similar claims with regard to CSC funding after *Ramah Navajo Chapter*, seeking to compel IHS to supplement the Secretarial amount with CSC funding for activities normally carried on by IHS and already funded in the Secretarial amount. The ISDEAA does not authorize CSC funding for this purpose and instead explicitly prohibits CSC funding as a

Finally, *Quechan* and *Vigil* continue to stand for the proposition that neither the ISDEAA nor any other law requires IHS to increase the level of funding for any PFSA in the VBC Program at issue in this litigation. In *Quechan Tribe of the Fort Yuma Indian Reservation v. United States*, No. 11-16334, 2015 U.S. App. LEXIS 5258, at *3 (9th Cir. Apr. 1 2015), 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* [which is the oldest in the IHS system]." (emphasis added). The Ninth Circuit in *Quechan* upheld the District Court opinion, stating that the court "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." *Id.* (citing *Lincoln*, 508 U.S. at 190-92).

Like the tribe in *Quechan*, Maniilaq in this case seeks an increased Secretarial amount by judicial decree; but Section 105(*l*) does not provide Maniilaq with a loophole, allowing it to bypass the ISDEAA's funding provision, Section 106(a). To hold otherwise would be to permit tribes to retrocede any PFSA or portion of a PFSA at any time and demand a lease in excess of what the Secretary would have provided for that PFSA—that is what Maniilaq attempts here with respect to the VBC Program which has been in its ISDEAA contract for two decades. It would be an absurd result for this Court to endorse such maneuvering by Maniilaq.

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supplement for such activities. § 450j-1(a)(2), (3). CSC funding is limited to activities required of the tribe for contract compliance and prudent management, and that are not normally carried on by IHS or are funded by the Agency through resources other than those transferred under the contract. *Id.* As with Plaintiff's claims in this case, the questions of what amount of CSC funding is required by § 450j-1(a) and whether IHS can be compelled to award CSC funding for PFSA, thereby supplementing a tribe's Secretarial funding, are issues not previously addressed by the Supreme Court. Those issues are before the District Court in another case of first impression. *Cook Inlet Tribal Council, Inc. v. Mandregan*, No. 1:14-cv-01835 (D.D.C. filed Oct. 31, 2014) (seeking CSC funding for facilities-related costs).

D. The Fact That Additional Funding Can Be Transferred Through Separate Awards Attached To ISDEAA Agreements Is Not Relevant To The Consideration Of Whether Maniilaq Is Entitled To The Increased Secretarial Amount It Is Seeking.

The Secretary does not dispute that the additional funding referenced by Maniilaq, Pl.'s Opp. at 18-22, including grants, Methamphetamine and Suicide Prevention Initiative (MSPI) awards, Domestic Violence Prevention Initiative (DVPI) awards, and other special initiative funding, can be attached to funding agreements. A variety of special initiatives have been set up by Congress to target specific health issues impacting American Indians and Alaska Natives, with funding determined through competitive processes and then transferred to the recipients through ISDEAA FAs. In addition to the funding listed by the Plaintiff, IHS also transferred American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009), funding to tribes through addendums to existing ISDEAA agreements, with terms and conditions separate from the terms of the underlying ISDEAA agreements. Maniilaq also highlights that funds awarded under the Special Diabetes Program for Indians (SDPI) grant program, 42 U.S.C. § 254c-2, are added to its FA. Pl.'s Opp. at 21. IHS is authorized by law to award these programs and, upon award, to transfer the funding through the ISDEAA agreements with recipient tribes; however, the award for each of these programs and the resulting transfer of funding through an ISDEAA agreement is not a mandated increase to the recipients' Secretarial amounts, as Maniilaq seeks here for its VBC Program.

Moreover, in contrast to Section 105(*l*) and its implementing regulations, the SDPI authority includes an earmarked amount. The SDPI authority in the Public Health Service Act, at 42 U.S.C. § 254c-2, is as follows:

Special diabetes programs for type I diabetes

(a) In general.

> The Secretary, directly or through grants, shall provide for research into the prevention and cure of Type I diabetes.
>
> (b) Funding.
> (1) Transferred funds.
> Notwithstanding section [2104(a) of the Social Security Act, cited as 42 USC § 1397dd(a)], from the amounts appropriated in such section for each of fiscal years 1998 through 2002, $30,000,000 is hereby transferred and made available in such fiscal year for grants under this section.
> (2) Appropriations.
> For the purpose of making grants under this section, there is appropriated, out of any funds in the Treasury not otherwise appropriated--
> (A) $70,000,000 for each of fiscal years 2001 and 2002 (which shall be combined with amounts transferred under paragraph (1) for each such fiscal years);
> (B) $100,000,000 for fiscal year 2003; and
> (C) $150,000,000 for each of fiscal years 2004 through 2015.

Therefore, Congress created a specific authority—with earmarked funding—to address its concern regarding diabetes treatment; in doing so, it authorized a program administered at the Secretary's discretion and did not compel an increase in the Secretarial amounts awarded under the ISDEAA. If Congress wanted to address funding for VBCs or facility lease funding in general in a manner similar to how it addressed diabetes, then it could create a similar provision—also with earmarked funding—addressing those needs, but it has not done so. Therefore, the SDPI is distinguishable from Section 105(*l*).

Similarly, MSPI/DVPI is also a special initiative that was originally set up with earmarked funds in the appropriation.[10] Under the appropriations language, the funding shall be distributed "at the discretion of the Director," and several different mechanisms have been used, including amendments to ISDEAA agreements, with the goal of targeting the areas with the highest needs in Indian Country. It is clear that MSPI/DVPI has been implemented outside of the Section 106(a)(1) methodology and that the funds are not Secretarial amount funds but are

[10] Congress first appropriated funds ($14,000,000) for MSPI in FY 2008, *see* Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007), and the authorization in the appropriation has continued since that time. DVPI funding was initiated in FY 2009.

rather funds that are basically akin to any other federal financial assistance. Tribes are not entitled to all of the benefits of the ISDEAA in association with these funds, including a recurring amount, the ability to redesign and rebudget, and other benefits that would be available if these were PFSA awarded and funded under Section 106(a)(1).

In the case of all types of grants, which can be attached to ISDEAA agreements, the terms and conditions of the grant award govern. *See, e.g.*, 42 C.F.R. § 137.68 (providing that even though tribes compacting under Title V of the ISDEAA may reallocate Section 106(a)(1) funds, they may not reallocate grant funds added to their FA, unless reallocation is permitted by the authorizing statute or the terms and conditions of the grant award); 42 C.F.R. § 137.70 (providing that the reporting requirements outlined in the terms and conditions of the grant award continue to apply even when the award is added to the funding agreement). In fact, the regulations clearly state that "*[n]one* of the provisions of Title V apply" to a grant when it is added to a Title V FA. 42 C.F.R. § 137.73 (emphasis added).

Grants and other special initiative funding are implemented according to their own terms, conditions, and methodologies, outside of the Section 106(a) methodologies. This was explicitly made clear in the original MSPI appropriation, which provided that "these funds shall be allocated outside all other distribution methods and formulas at the discretion of the Director." Pub. L. No. 110-161.[11] Therefore, Maniilaq's listing, in its Opposition, of funding that can be transferred through ISDEAA agreements is a listing of awards of discretionary funding amounts under specific authorities, including appropriations earmarks, that are not an entitlement owed to any particular tribe. As such, the listing is not relevant to the issue before this Court, which

[11] In later appropriations, up to the present, it simply states that the funds shall be distributed "at the discretion of the Director."

concerns whether Maniilaq is *entitled* to an increased Secretarial amount for a PFSA awarded under its ISDEAA agreement.

The funds for the Kivalina VBC lease were clearly part of Maniilaq's Secretarial amount for the PFSA Maniilaq assumed under its ISDEAA contract, and from 1992 through 2011 Maniilaq chose to operate its VBC program, including the Kivalina VBC, through the buyback/withhold agreement. ECF No. 15 (Def.'s MSJ) at Ex. 10, App. E. Pursuant to this agreement, IHS was asked by Maniilaq to retain the funds it otherwise would have been required to pay to Maniilaq as part of its Secretarial amount and to continue to carry out part of the PFSA on Maniilaq's behalf by procuring clinical space from the City of Kivalina. *Id*. Beginning in 2012, Plaintiff ended the buyback/withhold agreement because it now owned its own clinical space, and it redirected the Secretarial amount to support this space rather than have IHS continue the lease with the City of Kivalina. *Id. at* Ex. 9. IHS had no objection to leaving the amount in Maniilaq's FA because of the identity of these funds: they were part of Maniilaq's Secretarial amount, awarded to cover a PFSA associated with the VBC Program. Unless the lease was part of the PFSA assumed by Maniilaq, IHS would have had no reason to transfer this funding to Maniilaq in the first instance, or after it ended the lease with the City of Kivalina. The history plainly shows that the lease was a PFSA assumed by Maniilaq and funded in the Secretarial amount, with Maniilaq initially requesting IHS to continue to carry on the PFSA through the buyback/withhold agreement and later determining to carry on the PFSA itself. Accordingly, the corresponding funds are part of the Secretarial amount associated with the PFSA of the Kivalina VBC Program.

Because the funds at issue in this litigation are part of the Secretarial amount for the PFSA assumed by Maniilaq, none of the other special initiative funding referenced by Maniilaq

(e.g., MSPI/DVPI, SDPI, other grants, all of which are subject to their own methodologies) is relevant to the issue before this Court. The funding at issue here is Secretarial amount funding and, accordingly, IHS is required only to provide what the "Secretary would have otherwise provided" for the PFSA at issue, 25 U.S.C. § 450j-1(a). IHS has done so here, and Section 105(*l*) does not mandate an increase in this amount, especially not the 808% increase proposed by Maniilaq. If it did, that would lead to the absurd result that any tribe could enter an ISDEAA contract in which it agrees to operate a PFSA for the Secretarial amount, and later simply retrocede that same PFSA and ask for a lease in association with the PFSA at an amount vastly higher than the amount properly awarded in the Secretarial amount. This is not the system Congress set up through the ISDEAA, and this is never the way in which Section 105(*l*) has been utilized; nor has a tribe ever proposed such a requirement prior to Maniilaq.

E. Section 105(*l*) And Its Implementing Regulations Can Only Be Understood In Context

Because Maniilaq aims to have the Court consider the meaning of Section 105(*l*) out of context, it is not surprising that Maniilaq, in its Opposition, dismisses the detailed historical and contextual explanation of Section 105(*l*) and its implementing regulations that Defendant provided in its Motion for Summary Judgment, *see* Pl.'s Opp. at 11-17, Def.'s MSJ at 27-32; but the meaning of this provision cannot be understood without understanding why it was developed, in the words of those seeking the legislation, and the purpose that it served. The context is of course important for understanding its meaning.

Maniilaq states that the Defendant provides no support for its assertion that a key rationale for the development of the Section 105(*l*) mandatory leasing authority was to address the fact that tribes and tribal organizations needed a facility lease with IHS in order to access the 100% Federal Medical Assistance Percentage (FMAP) rate. Pl.'s Opp. at 15. But Defendant

provided extensive support and case law for this assertion, and it is indeed a key rationale for the development of Section 105(*l*).[12]

As stated in *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 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. . . . 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." 286 F. Supp. 2d at 1086 (citing 25 U.S.C. § 450j(*l*)). 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 blockage on access to the 100%

[12] The importance of 100% FMAP reimbursement cannot be overstated. IHS facilities are paid under Medicaid at enhanced rates that are approved each year by the Director of IHS and published annually in the Federal Register. *See, e.g.*, 80 FR 18639. Notably, IHS publishes an exclusive rate for facilities in Alaska (which are all tribally-operated), to reflect the higher costs of providing care. *See id*. State Medicaid plans are willing to adopt the IHS-published enhanced rate for IHS facilities because they are compensated by the Federal Government for such costs at 100% FMAP. Although adoption of the IHS-published rate by state Medicaid plans is discretionary, nearly every state with an IHS facility, including Alaska, permits recovery at the IHS published rate. Tribal facilities benefit significantly from being able to recover at the enhanced rate, and it allows tribes, for example, to increase capacity to provide services. In 2009, Congress amended the Medicaid statute to ensure that the IHS rate would also be available to IHS facilities receiving payment from Medicaid managed care entities. *See* 42 U.S.C. 1396u–2(h)(2)(C)(ii). In recent years, Medicaid collections have constituted more the 70% of all IHS third party recoveries. *See* FY 2016 IHS Congressional Justification at CJ 6; available online at: http://www.ihs.gov/budgetformulation/includes/themes/newihstheme/documents/FY2016CongressionalJustification.pdf.

FMAP was not a "technicality" as Maniilaq calls it, Pl.'s Opp. at 15, but rather an established position which created a serious issue for tribes and for which a legislative fix was needed.[13]

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 Bd., U.S. Dep't of Health & Human Servs., DAB No. 1779, at 31-32 (Aug. 7, 2001). 2001 HHSDAB LEXIS 96, *available at* http://www.hhs.gov/dab/decisions/dab1779.html. 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. This HHS position was no technicality; it was a major impediment for tribes that was overcome through passage of Section 105(*l*).

Maniilaq provides no support anywhere in the legislative history—or historical practice—for its assertion that Section 105(*l*)(2) and it implementing regulations were about mandatory compensation and not about allowable costs/cost principles. It just states that this is more "logical" without any support. Pl.'s Opp. at 15-16. The DOI/HHS Internal Agency Procedures Handbook, published in 1999, has an entire chapter (Chapter 8) on "Lease of Tribally-Owned Buildings by the Secretary" and the requirements of Section 105(*l*) and its implementing regulations, 25 C.F.R. §§ 900.69-74. Ex. 12 to Def.'s MSJ. Though Maniilaq

[13] The enactment of Section 105(*l*) (and the subsequent MOU), which permitted tribes to access IHS rates, significantly augments all IHS programs and was not simply a technical adjustment to the law. The MOU allowed IHS and tribes to avoid executing hundreds of mandatory 105(*l*) leases, while permitting tribal facilities to be allowed to receive "the IHS payment rate for services to AI/ANs."

tries to dismiss the importance of the Handbook, it demonstrates the common understanding as to the meaning of Section 105(*l*) shortly after enactment of the provision.

> The opening of Chapter 8 is as follows:
>
> Section 105(*l*) . . . of the Indian Self-Determination and Education Assistance Act (ISDA) requires the agency, at the request of a tribe or tribal organization (T/TO), to enter into a lease with the T/TO for a building owned or leased by the T/TO or to which the T/TO holds a trust interest, that is used for the administration or delivery of services under the ISDA. The 25 C.F.R. § 900.69–74 also contains requirements for these leases.
>
> The regulations provide a list of allowable costs for which at T/TO can be compensated under a lease. *The leases must be funded from resources currently available under the T/TO's self-determination contract.* If new resources become available, these funds may be negotiated and added to the lease.
>
> *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*.

ECF No. 15 (Def.'s MSJ) at Ex. 12 (emphases added).

The Handbook demonstrates the common understanding among all concerned, including tribes, as to the meaning of Section 105(*l*). This Handbook was produced through an "enhanced consultation process" by a 19-member workgroup composed of tribal and Federal representatives that developed the manual through "consensus decision-making." *Id.* at Ex. 12 at 1. The workgroup consisted of 14 tribal members and 5 federal representatives. Alaska was represented in the workgroup. One of the tribal Co-Chairs was Katherine Grosdidier of the Southcentral Foundation, an Alaska Native Tribal Health Organization. *Id.* at 4.

Maniilaq states that this Handbook "only shows that the IHS has misinterpreted and misapplied § 105(*l*)." Pl.'s Opp. at 15. This characterization by Maniilaq of the Handbook—which was produced cooperatively through "consensus decision-making"—is incorrect and misleading to the Court. The Handbook reflects the common understanding, 5 years after the enactment of Section 105(*l*), of guidance that "would further the objectives [of the ISDEAA]."

ECF No. 15 (Def's MSJ) at Ex. 12 at 1. The new leasing provision in the ISDEAA and the implementing regulations certainly advanced the objectives of the ISDEAA by allowing tribes to request leases at any time and through the promulgation of a set of allowable costs long sought by tribes; but it did not create a new mandatory category of funding under the ISDEAA or the opportunity for a free-for-all for tribes to demand leases at any time to unilaterally increase their Secretarial amounts. That would not be the "orderly" process set up by Congress. 25 U.S.C. § 450a(b).

The statute and its implementing regulations must be viewed in context, and the Indian canon of construction does not require that the Court endorse the tribe's interpretation of the language taken out of context. As the Supreme Court has stated, the "canons are not mandatory rules. They are guides that 'need not be conclusive." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)). 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 be guided by the historical context—and, of course, by the statutory context, i.e. by the way the provision functions within the overall statutory framework.

F. Under Self-Governance, Plaintiff Can Easily Reallocate Its Funding In Accordance With Plaintiff's Health Priorities.

Plaintiff complains that IHS is attempting to shift an unfair burden to Maniilaq simply through pointing out that Maniilaq has the authority to redesign programs and reallocate funding to prioritize their health goals within the amount of funding provided by the Secretary. *See* Pl.'s Opp. at 30; *see generally* 25 U.S.C. § 458aaa-5(e). If reallocating some portion of its funding from its hospital-based operations to its village clinics is what Maniilaq decides is a priority, the

redesign authority in Title V of the ISDEAA allows Maniilaq to make that change. Maniilaq seeks to shift the financial burden of this decision to IHS, but nothing in the ISDEAA requires IHS to finance the redesign decisions exercised by a tribe or tribal organization in furtherance of self-governance.

Further, such a result cannot be the intent of Congress, especially with regard to Alaska. Consistent with the ISDEAA, the IHS Alaska Area Office and its service units no longer have any funding to provide services directly, or for tribal contractors to contract for more PFSA, because Congress transferred all of the funding from IHS to Alaska tribal contractors in 1998. Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1598-99 (1997), attached as Ex. 18. Congress enacted Public Law 105-83 in 1997 for the purpose of preventing the partition of the Alaska Native Medical Center and the Alaska Area Office related services through ISDEAA contracting by the then over 200 Alaska tribes and tribal organizations eligible for shares of the medical center. *See generally Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 990 (9th Cir. 1999) (explaining the law). As part of this effort, Congress mandated that only the newly created Alaska Native Tribal Health Consortium (ANTHC) could provide "state-wide services." Pub. L. No. 105-83, § 325(a) "State-wide services" was defined as "all [PSFAs] provided by or through the Alaska Native Medical Center and the Alaska Area Office, not under contract or other funding agreement with any other tribe or tribal organization as of October 1, 1997 . . ." *Id*. at § 325(c). As a result, the IHS Alaska Area Office no longer had funds authorized to expand PFSA such as the VBC Program. Maniilaq's contentions about the lack of funding for leases in Alaska is directly the result of that Congressional action, and Maniilaq must either exercise its self-governance redesign authority,

operate its VBC Program at the level of funding that Congress provided, or as discussed above, seek a Congressional resolution of the issue.

While this history is important, the lack of Congressionally authorized funds is not the legal basis for IHS' declination of Maniilaq's proposal. IHS declined the proposal because the funding exceeds the amount required under the ISDEAA for the related PFSA. IHS cites the lack of funds solely to highlight the practical problem that, as a result of the complete implementation of the ISDEAA in Alaska and the historic underfunding of the VBC Program, any increases above the Secretarial amount for Alaska can only be addressed by Congress providing additional appropriations.[14] As a participant in self-governance, Maniilaq must operate within the same constraints that burden IHS were it carrying out the VBC Program and that burden all other tribes operating under self-determination and self-governance. Section 105(*l*) does not change that. Accordingly, absent additional funding from Congress, it is incumbent upon Maniilaq to reallocate its available funds in accordance with its own priorities and the full Secretarial amount already provided by IHS.

[14] In 2012, IHS responded to a Congressional request for information regarding the VBC Program funding level. Letter from IHS Dir., Yvette Roubideaux, M.D., M.P.H., to Senator Lisa Murkowski (Apr. 24, 2012), attached as Ex. 19. In that letter IHS explained why VBC Lease Program funding has not been a national priority for Tribes: "The IHS has many high priority funding needs and is unable to meet every unfunded need. The IHS works with Tribes through its formal Tribal budget formulation process each year to develop Area priorities for funding, and then a national Tribal budget formulation workgroup reviews the Area priorities and develops national Tribal budget priorities. While the Alaska Tribes have indicated that the VBC lease funding is one of their Area priorities, the national Tribal budget formulation workgroup has not included this funding in their annual budget priority recommendations. Area-specific budget priorities rarely are included in the national Tribal recommendations. The national Tribal budget formulation workgroup has discussed recommending a general increase in the Hospital & Clinics line item for all Areas, with which Alaska Tribes could choose to allocate more funding to the VBC leases while other Tribes may choose other priorities." *Id.* at 3.

III. Conclusion

Based on the foregoing and Defendant's Motion for Summary Judgment, the Defendant respectfully request that this Court grant its Motion for Summary Judgment and deny Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

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