UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FORT MCDERMITTPAIUTE AND SHOSHONE TRIBE, Plaintiff, v. ERIC HARGAN, in his official capacity as Acting Secretary, U.S. Department of Health & Human Services, *et al*. Defendants.	)	Case No. 1:17-cv-00837-TJK

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, by and through the undersigned counsel, respectfully move, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in the Defendants' favor on the ground that there is no genuine issue of material fact. The essential facts of this case, are not in dispute. Therefore, as demonstrated in the accompanying Memorandum of Points and Authorities, Defendants are entitled to judgment as a matter of law.

Respectfully Submitted,

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

Eric Hargan, in his official capacity as Acting Secretary, United States Department of Health and Human Services ("HHS") and Michael Weahkee, in his official capacity as Acting Director, Indian Health Service ("IHS" or the "Agency") (collectively, "Defendants"), oppose Plaintiff Fort McDermitt Paiute and Shoshone Tribe's ("Fort McDermitt Tribe" or the "Tribe") Motion for Summary Judgment.

At issue in this case is the level of funding the Tribe is entitled to receive under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 5301, et seq. Because there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law, Defendants move for summary judgment and oppose Plaintiff's Motion for Summary Judgment.

STATUTORY BACKGROUND

IHS is an agency within HHS whose principal mission is to provide primary health care for American Indians and Alaska Natives throughout the United States. *See* S. Rep. No. 102-392, at 2-3 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 3943. It does so through three separate mechanisms: (1) by providing health care services directly through its own facilities; (2) by contracting with tribes and tribal organizations pursuant to the ISDEAA to allow those tribes to independently operate health care delivery programs previously provided by IHS; and (3) by funding contracts and grants to organizations operating health programs for urban Indians. *Id.* at 4. Through the first two of these mechanisms, IHS delivers health care services through local "Service Units" that are grouped within twelve regional IHS Areas, which in turn are overseen by a Headquarters ("HQ") Office located in Rockville, Maryland.

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

In 1975, Congress enacted the ISDEAA, which allows tribes to contract with the HHS Secretary to operate many of the programs that IHS previously operated for the benefit of American Indians. Tribes may do so by entering into either contracts under Title I of ISDEAA or self-governance "compacts" under Title V. *See* 25 U.S.C. §§ 5329(a), (c), 5384(a). The Title V process begins with a planning phase when a tribe begins "preparation relating to

the administration of health care programs." 25 U.S.C. § 5383(d). Prior to entry into the Self-Governance program, the tribe must have "demonstrated, for 3 fiscal years, financial stability and financial management capability." 25 U.S.C. § 5383(c)(1)(C). Once approved for participation in Self-Governance program, the tribe is eligible for planning grants and may begin negotiating a Self-Governance Compact and Funding Agreement with IHS. *See* 25 U.S.C. §§ 5383(e), 5384, 5385. To the extent the parties cannot reach agreement on the terms of the Compact or Funding Agreement, the tribe may submit a Final Offer to IHS. 25 U.S.C. § 5387(b). Unless the time is extended, IHS must accept or reject the Final Offer with 45 days. *Id*. IHS may only reject a Final Offer by providing:

> (A) a timely written notification to the Indian tribe that contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority, that—
> (i) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this subchapter;
> (ii) the program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe;
> (iii) the Indian tribe cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in significant danger or risk to the public health; or
> (iv) the Indian tribe is not eligible to participate in self-governance under section 5383 of this title;

25 U.S.C. § 5387(c)(1)(A).

The Secretary must provide "the Indian tribe with the option of entering into the severable portions of a final proposed compact or funding agreement, or provision thereof, (including a lesser funding amount, if any), that the Secretary did not reject, subject to any additional alterations necessary to conform the compact or funding agreement to the severed provisions." 25 U.S.C § 5387(c)(1)(D).

Whether a tribe contracts under Title I of the ISDEAA or participates in Self-Governance under Title V, two general categories of funding are available for the tribal program. *See* 25 U.S.C. §§ 5325(a),(g); 25 C.F.R. § 900.19. First, the "Secretarial amount," or "106(a)(1)

amount," "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs . . . without regard to any organizational level within . . . [HHS]." 25 U.S.C. § 5325(a)(1). Second, in addition the Secretarial amount, tribes and tribal organizations also receive a reasonable amount for contract support costs, known as "CSC" or the "106(a)(2) amount," which are costs that the tribe incurs for necessary activities to operate the program but that the Secretary did not incur or that are funded through resources other than those awarded under the contract. 25 U.S.C. § 5325(a)(2). The ISDEAA prohibits the Secretarial amount funding and CSC funding from covering the same types of activities, as these are two separate categories of funding for two different purposes. *See* 25 U.S.C. § 5325(a)(3)(A). Additionally, the ISDEAA requires that the Secretarial amount of funding ". . . shall not be reduced by the Secretary in subsequent years except pursuant to—

(A) A reduction in appropriations from the previous fiscal year for the program or function to be contracted;
(B) A directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;
(C) A tribal authorization;
(D) A change in the amount of pass-through funds needed under a contract; or
(E) Completion of a contracted project, activity, or program."

25 U.S.C. § 5325(b).

The Secretarial amount is colloquially referred to as a tribe's "base" funding, since it generally is not reduced. However, "[n]otwithstanding any other provision . . . the provision of funds . . . is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization . . . ." 25 U.S.C. § 5325(b). The dispute in this case relates to calculating the Tribe's Secretarial amount in light of these authorities and the fact that IHS – when operating a health care program directly – may provide services from Congressionally-appropriated resources and also from third-party collections. Congress specifically authorizes IHS to collect from third-party payers for the health care services it provides, while also placing limitations on how IHS may use the funds.

Although IHS is the federal agency primarily responsible for the health care of Indians, Congress has long recognized that Indians should not be denied health benefits afforded to non-Indians, and that IHS appropriations should not be the sole funding source for the provision of health care to Indians. To further those goals, Congress has enacted cost-shifting measures to augment IHS resources to provide care to Indians. For example, Congress understood that "[a]lthough Indians are eligible for Medicare and Medicaid benefits in the same manner as any other citizens, they have experienced an inability to take advantage of those benefits." H.R. Rep. No. 94 1026(I), at 107 (1976), reprinted in 1976 U.S.C.C.A.N. 2652, 2745. This was so because, prior to the first enactment of the IHCIA, IHS was not permitted to receive payment from Medicare (or Medicaid). Specifically, two statutory restrictions prohibit Medicare from paying federal providers for services like IHS. These "Medicare restrictions" are found at sections 1814 and 1835 of the Social Security Act. 42 U.S.C. §§ 1395f(c), 1395n(d). Through IHCIA, Congress amended the Social Security Act to authorize IHS and tribes to partially participate in Medicare and Medicaid programs. Specifically, section 1880 of the Social Security Act provides that a hospital or skilled nursing facility of IHS "shall be eligible for payments… if and for so long as it meets all of the conditions and requirements for such payments which are applicable generally to hospitals or skilled nursing facilities" under Medicare. *See* 42 U.S.C. § 1395qq(a). Section 1395qq(e) permits IHS freestanding clinics to bill and receive payment for all Medicare Part B covered services. Congress also gave IHS, tribes, and tribal organizations an independent statutory right to bill and receive payment from private insurers and other liable third parties. *See* 25 U.S.C. § 1621e.

Pursuant to 25 U.S.C. § 1621f, IHS and tribes may retain third-party reimbursements, including Medicare and Medicaid payments, rather than requiring that such reimbursements be credited to the Department of the Treasury as miscellaneous receipts. 25 U.S.C. § 1621f. Instead, section 1621f directs IHS and tribes to use reimbursement in accordance with 25

U.S.C. § 1641. *Id.* Unless recoveries are expended to maintain compliance with conditions of participation for Medicare and Medicaid, section 1641(c)(1)(B) provides that the funds shall be used by IHS for reducing health resource deficiencies, "subject to consultation with the Indian tribes being served by the Service unit. . . ." 25 U.S.C. § 1641(c)(1)(B). Relevant here, tribes have the capacity to directly bill when assuming operation of health care programs under an ISDEAA contract or compact. 25 U.S.C. § 1641(d). Upon electing to directly bill, such sums are not transferred by IHS but are received directly by the tribe from the third party payer. The right to retain and expend collections is relevant here because a substantial portion of the transferred program was funded through third-party revenue generated by the program itself, and the Tribe has elected to directly bill. Therefore the funds are no longer available to IHS and, instead, are available directly to the Tribe through its own collections process.

STATEMENT OF FACTS

IHS has operated the Fort McDermitt Clinic in McDermitt, Nevada ("NV") through the Schurz Service Unit[1] in the Phoenix Area of the Indian Health Service ("PAIHS") since the 1970s. Administrative Record ("AR") 143.[2] The Schurz Service Unit is a multi-tribe service unit serving multiple tribes through a combination of contracted and direct service programs. AR124 (showing tribes served). At this time, most resources allocated to the Schurz Service Unit have been contracted by the tribes served. *Id*. The Fort McDermitt Clinic is an ambulatory care clinic that provides a variety of outpatient services, including primary medical care, dental care, mental health care, and alcohol and substance abuse counseling to IHS beneficiaries in the area. AR 147. The beneficiaries served by the clinic are primarily but not exclusively members of the Fort McDermitt Paiute and Shoshone Tribe ("Fort McDermitt Tribe" or the "Tribe"). The

[1] The term "Service unit" means an administrative entity of the Service or a tribal health program through which services are provided, directly or by contract, to eligible Indians within a defined geographic area. 25 U.S.C. § 1603(20).

[2] Many of these facts are taken from the clinic closure report, which can be found in the Administrative Record beginning at 143.

Winnemucca Indian Colony of Nevada ("Winnemucca Tribe") is also eligible to receive services at the Fort McDermitt Clinic and since at least 2013, IHS has used the Winnemucca Tribe's retained portion of Schurz Service Unit resources to fund operations at the clinic. AR 243-267. Since approximately 1993 through August 2013, the Schurz Service Unit administered and operated the Fort McDermitt Emergency Medical Services ("EMS") program, which primarily benefitted members of the Fort McDermitt Tribe. AR 144. IHS identified the Fort McDermitt Tribe as the only entity authorized to contract for all of the funding for that program. *Id*.

In November 2012, Humboldt General Hospital in Winnemucca, NV (the county seat of Humboldt County) established an EMS station site in McDermitt, NV to provide EMS services for both the Indian and non-Indian population in the area. AR 144. Humboldt County is a sparsely populated area; per the 2010 Census, it has a population of approximately 16,528 in a 9,658 square mile area. U. S. Census Bureau, State & County Quick Facts: Humboldt County, Nevada (2010), http://quickfacts.census.gov/qfd/states/32/32013.html. Thus, as of November 2012, there were two EMS programs serving the small, sparsely populated area around McDermitt, NV.

Prior to termination of the program, the operating costs of the Fort McDermitt EMS program had been exceeding the planned budget for the program for some time, requiring IHS to supplement the program with resources from elsewhere in the Schurz Service Unit, including the operating budget of the Fort McDermitt Clinic and third-party revenue collected by the clinic. AR 144. IHS determined that the program was financially unsustainable and, in IHS's view, the establishment of Humboldt General Hospital's EMS program rendered the Fort McDermitt EMS program unnecessary. AR 145. On March 21, 2013, IHS held a meeting with representatives from the Fort McDermitt Tribe and Pyramid Lake Tribe present to discuss these issues and the future of the EMS program, including a possible takeover of the EMS program by the Pyramid Lake Tribe. *Id*. The Pyramid Lake Tribe is one of the Schurz Service Unit tribes that operates its own tribal health clinic. At this meeting, IHS presented a report on the status of the EMS program

to the Indian tribes. *Id*. Among several options, IHS urged serious consideration be given to ending the EMS program because of the ongoing operating losses and the fact that Humboldt General Hospital established an ambulance station in the McDermitt area. All of the options presented involved lowering or eliminating the costs associated with the EMS program. *Id*.

Despite the concerns raised by IHS about costs, on July 8, 2013, PAIHS received the Pyramid Lake Tribe's ISDEAA contract proposal to assume operation of the Fort McDermitt EMS program for the full amount IHS had been expending on the program. *Id*. The proposal was, in IHS's view, financially unsustainable because it would require IHS to permanently redirect necessary resources away from the Fort McDermitt Clinic and other programs administered by the Schurz Service Unit. *Id*. PAIHS suspended operation of the Fort McDermitt EMS program on August 19, 2013. *Id*. This decision was discussed with the Fort McDermitt Tribe on September 12, 2013. *Id*. The program was formally closed and IHS declined the Pyramid Lake Tribe's proposal on September 30, 2013. *Id*. As discussed *infra* at 11, the Pyramid Lake Tribe filed a civil action asking this Court to overturn IHS's rejection of its proposal. The Court directed IHS to award the Pyramid Lake Tribe the requested amount of funding for the EMS program.

The government asserted in *Pyramid Lake* that funding the EMS program at the level requested by the Pyramid Lake Tribe would require significant agency re-allocations, making it necessary to begin the closure process for the Fort McDermitt Clinic. Maintaining operations at the Fort McDermitt Clinic would require IHS to divert funding allocated by IHS for services to other Indian tribes and would particularly impact other Indian tribes served by the Schurz Service Unit. Accordingly, after the case was finalized, IHS began preparations for the closure of the clinic. Permanent closure of an IHS clinic requires notification to Congress pursuant to 25 U.S.C. § 1631.

While IHS was preparing the report, but before it was submitted to Congress, the Fort McDermitt Tribe submitted a notice of intent to contract for operations at the clinic. AR 58. IHS

acknowledged the Tribe's intent to contract in a letter dated March 1, 2016, and offered to provide technical assistance to the Tribe to develop a self-determination contract proposal. In April 2016, the Tribe requested a review of its financial situation for participation in the IHS Self-Governance Program and in May 2016, IHS notified the Tribe that it met the financial requirements for participation. AR 277-281. By resolution dated July 13, 2016, the Tribe formally requested to participate in self-governance under the ISDEAA. AR 55. The dispute in this case arose during this contracting process.

The Tribe submitted its proposed compact and funding agreement to IHS via email on July 27, 2016. AR 311. The Tribe sought to assume control of the clinic under an accelerated timeline no later than October 1, 2016. *Id*. During ensuing negotiations, the Tribe asked IHS to withdraw the clinic closure report. *See, e.g.*, AR 293. IHS declined to withdraw the closure report but indicated that the determination to close the clinic would likely change if the parties could reach an agreement on its assumption by the Tribe. AR 290.

Unable to resolve certain material disagreements during the ensuing negotiations regarding the compact and funding agreement, the Tribe submitted a Final Offer to IHS on October 13, 2016. AR 64. The Tribe included a letter explaining the issues it believed were still unresolved or in dispute: 1) Effective Date of the Compact; 2) The Employee Housing Services; 3) Transfer of EMS Funds[3] 4) Recurring Funding Amounts; and 5) Contract Support Costs. AR 108-111. The submission of the Final Offer triggered a statutory review process for IHS. 25 U.S.C. § 5387(b). IHS responded to the Tribe's Final Offer on November 23, rejecting the Tribe's offer for the five issues identified above. AR 130-232. IHS also rejected the Tribe's Final Offer on the basis that the level of funding provided would be insufficient to carry out all of the

[3] The Fort McDermitt Tribe withdrew its resolution authorizing the Pyramid Lake Tribe to contract for the EMS program with intent to administer the program under its own compact with IHS.

PFSAs identified by the Tribe, some of which were not previously conducted by IHS. AR 136.[4] IHS offered to provide technical assistance to the Tribe to overcome IHS's objections. AR 140. As documented in email correspondence between the parties, the offer for technical assistance was accepted and the parties set up meeting times. AR 518-570. The meetings resulted in a combination of technical assistance and further negotiation. *Id*. Ultimately, the parties were able to resolve three of the five issues, with the health employee housing services and recurring funding amounts remaining unresolved and now at issue here in this case.

Pyramid Lake Paiute Tribe v. Burwell

Pursuant to the ISDEAA, 25 U.S.C. § 5331(a), the Pyramid Lake Tribe brought an action in this Court challenging the agency's decision to terminate the EMS program and to decline the Pyramid Lake Tribe's proposal to assume operations. The Pyramid Lake Tribe brought suit under the ISDEAA against IHS seeking to require IHS to enter into a self-determination contract with the Pyramid Lake Tribe to operate the Fort McDermitt EMS program. *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 539 (D.D.C. 2014). The parties filed cross-motions for summary judgment, and by Memorandum Opinion and accompanying Order entered on October 7, 2014, the Court denied the government's motion, while granting plaintiff's motion in part and temporarily denying it in part. The Court ruled in favor of the Pyramid Lake Tribe on the substantive legal issues before it, while ordering the parties to negotiate regarding the specific terms of the ISDEAA contract.

This Court found unconvincing the government's reliance upon *Lincoln v. Vigil*, 508 U.S. 182, 193-94 (1993), and *Los Coyotes Band of Cahuilla & Cupeno Indians*, 729 F.3d 1025, 1033-34 (9th Cir. 2013), for the proposition that IHS had unreviewable discretion to terminate the EMS program and that the ISDEAA therefore was not even implicated. *Id*. The Court held that *Lincoln* did not involve the ISDEAA, whereas in *Los Coyotes*, the agency was not operating the

[4] IHS withdrew this objection based upon the understanding that the Tribe would rebudget existing contract resources and potentially supplement the program with sources other than the IHS to achieve contract objectives.

relevant program at the time the tribe submitted its proposal. *Id*. at 543. Although the Court acknowledged that the allocation of funds is committed to agency discretion as a matter of law and thus the agency has "the discretion to discontinue an existing program," the Court found that the agency had made no decision until after receiving the Tribe's contract proposal. *Id*.

The Court stated that "[t]he cases relied on by the Secretary therefore present different questions than the one at issue here," which the Court characterized as" at what point the agency must calculate the applicable funding under section [5321(a)(2)(D)]: at the date of the proposal or at the date of the declination letter?" *Id*. The Court opted for the former date, based on the "structure and purpose" of the ISDEAA. *Id*. It therefore concluded that "the agency was not permitted to decline the proposal under section [5321(a)(2)(D)] based on a subsequent cancellation of the program." *Id*. Relevant to the decision here, the Court found it "would be a more difficult case had IHS decided to cancel the EMS program prior to its receipt of the Tribe's proposal." *Id*.

The Court also disagreed with the Secretary's alternative assertion that the base funding of the EMS program did not include funds IHS transferred from the clinic to the EMS program, including clinic third-party collections for purposes of § 5321(a)(2)(D), because those funds did not themselves constitute a "program[], function[], service[], or activit[y]" within the meaning of ISDEAA, 25 U.S.C. § 5321(a)(l). The Court determined that the applicable funding level for an ISDEAA contract is "based on what the Secretary otherwise would have spent, not on the source of the funds the Secretary uses[,]" and that "[i]f the Secretary chooses to augment [her] spending on a program with other funds available to her, nothing in the Act permits her to deduct those amounts from the tribe's funding under an otherwise acceptable [ISDEAA] contract." *Id*. at 544.

STANDARD OF REVIEW

A. Burden of Proof under the ISDEAA

Under the ISDEAA, when a tribal contractor appeals the Agency's rejection of a final offer, the Secretary "shall have the burden of demonstrating by clearly and convincing evidence the validity of the grounds for rejecting the offer (or a provision thereof)." 25 U.S.C. § 5387(d).

B. Standard of Review

Plaintiff brought this action pursuant to the ISDEAA, which provides *no* standard for review. *Cherokee Nation of Oklahoma v. United States.*, 190 F.Supp.2d 1254 (E.D. Okla. 2001), *aff'd*, 311 F.3d 1054 (10 th Cir. 2002), *rev'd on other grounds*, 543 U.S. 631; *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F.Supp. 1306, 1313 (D.Or. 1997). When a statute provides for judicial review but fails to set forth the standards for that review, it is well accepted that the court looks to the Administrative Procedure Act ("APA") for guidance. *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715, (1963); *Sierra Club v. Glickman*, 67 F.3d 90, 96 (5th Cir. 1995) (internal citation omitted) (citing *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983); *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 685 (D.C. Cir. 1982). This Court noted in *Pyramid Lake* that there is disagreement among courts about whether this standard or *de novo* review should apply to claims under the ISDEAA, concluding that "because the Indian law canon applies to the ISDEAA, the Court will review the statute *de novo*." *Id*. at 542.

ARGUMENT

This case involves two outstanding issues addressed by IHS's rejection letter: the Secretarial amount owed for the program being assumed and the addition of housing management services to the contract. After this Court's decision in *Pyramid Lake*, IHS took immediate steps to ensure that the allocation of funding for the Fort McDermitt Clinic – which would represent the Secretarial amount for the program – matched the anticipated and actual expenditures. Consequently, IHS determined that $633,614 was available for the Tribe to contract from the

Hospitals and Clinics ("H&C") budget line, because this total represents the amount of appropriated H&C funding made available for operation of the Fort McDermitt Clinic (and EMS program) in FY 2016, leaving aside the Winnemucca Tribe's share of resources. After deductions for retained and bought-back services,[5] IHS calculated an award of $375,533 to the Tribe for clinic operations in FY 2017. In addition, IHS used third-party revenue collected by the clinic to fund clinic operations. The third party funding is now available to the Tribe outside of the amounts transferred by IHS under its ISDEAA agreement, because the contract authorizes the Tribe to directly collect and retain third-party revenue and use such funding in the same manner that IHS was using it prior to the execution of the contract. Except for funds already transferred to the Tribe in other budget line items, no other funding was used by IHS and therefore, no other funding must be made available under the law by IHS to the Tribe for operation of the clinic. Accordingly, IHS properly rejected the Tribe's request for additional funding.

IHS declined to transfer any portion of clinic resources allocated to the Winnemucca Tribe's contractible share of clinic funds. IHS established the Winnemucca Tribe's portion of the program by relying on shares developed after tribal consultation in 2013. The Winnemucca Tribe's share of the H&C expended to operate the clinic was determined by IHS based upon a service unit user population derived from FY 2012 reports, and this calculation is fully consistent with the ISDEAA and IHS's obligations. Accordingly, IHS properly rejected the Tribe's demand for Winnemucca's share of the clinic resources.

IHS rejected contract language that would have added housing management services to the contract for tribally owned housing. IHS recognizes that under certain circumstances, tribes may contract for the management of federal quarters. In those circumstances, the government is familiar with the condition and operation of such quarters and can ensure that such quarters are managed in accordance with the legal requirements and standards set forth in 25 U.S.C. § 1638a

[5] Retained and bought back-services are services that IHS has agreed to continue providing for the Tribe.

and agency operations manuals. No such circumstances exist here. The Tribe is not proposing to assume management of federal quarters pursuant to 25 U.S.C. § 1638a. Even if management of tribally owned quarters may be contracted on a similar basis, the Tribe did not propose nor did it otherwise articulate the standards under which the housing services for health employees would be conducted. Requiring the government to accept tort liability for private housing, which may also house non-health workers, is an improper expansion of the government's tort liability. Accordingly, IHS properly rejected the proposed function as the rejection relates to the assumption of liability.

A. IHS Awarded the Tribe's Lawful Share of Hospital and Clinic Funding

IHS rejected the amount of recurring H&C funds requested by the Tribe on the grounds that the amount of funds proposed exceeds the applicable funding level to which the Tribe is entitled. 25 U.S.C. § 5387(c)(1)(A)(i). The Tribe is only entitled to its portion of the funds associated with the operation of the Schurz Service Unit, which includes the Fort McDermitt Clinic. *See* 25 U.S.C. § 5325(a)(1). The ISDEAA only imposes a duty on IHS to award a tribe with its portion or share of funding associated with the program to be transferred. Although IHS consults with tribes in establishing their allocable shares of funding, as it did in this case, the primary consideration in determining a tribe's share is "the amount of funds . . . the Secretary would have otherwise provided for the operation of the programs or portion thereof . . . ." 25 U.S.C. § 5325(a)(1). The Tribe submitted a Final Offer indicating the funding for the "H&C amount should be at least $788, 927" but is also claiming in this litigation that the total is $1,106,453.[6] Ultimately, the determination of the Secretarial amount under an ISDEAA contract

[6] The Tribe contends that IHS funding is appropriated into different budget categories and that IHS "cannot use funds from the Dental Services category to provide mental health services." Plaintiff's Motion for Summary Judgment at 13. Although not relevant here, this is not an accurate statement of the law. IHS is funded through a lump sum appropriation for health services, under which the allocation of such is committed to agency discretion as a matter of law. *See Lincoln v. Vigil*, 508 U.S. 182, 193-94 (1993). IHS, of course, must still comply with its separate appropriations for health services, facilities, and contract support costs, as well as its apportionment, which segregates services, facilities, and contract support costs funds consistent with the separate appropriations accounts, but may otherwise reprogram funds available to the agency from one budget activity within each account to another

is not determined by a tribal budget request, the amount requested in a Final Offer, or by the amount claimed in litigation. Instead, the amount is determined by what IHS "would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract." 25 U.S.C. § 5325(a)(1). The Court also concluded "that the applicable funding level for a contract proposal is to be determined from the date the agency receives the tribe's proposal." *Id*. at 543. Notably, IHS received the Tribe's contract proposal on July 27, 2016.[7]

IHS primarily relies on the amount the Agency previously spent – and would continue to spend – to operate the program, which the Agency calculates through a methodology used to determine each tribe's contractible portion associated with the program.[8] This Court concluded "that the amount the Secretary 'would have otherwise provided' should not necessarily be set at the prior year's actual expenditure on the program . . . especially so if the Secretary can establish that the prior year's expenditure was somehow aberrant and would not continue over the term of the contract." *Pyramid Lake*, 70 F. Supp. 3d at 545. This flexibility allows the Secretary to meet alternating needs of various programs and tribes. Indeed, the Agency determined here that it could not continue to fund the clinic at the same level with the H&C resources devoted to the EMS program and so it notified Congress that it intended to permanently terminate operations at the clinic and redirect resources elsewhere.

Because of the *Pyramid Lake* litigation, IHS re-allocated the budget for the Fort McDermitt Clinic and the EMS program to ensure every Tribe served by the service unit would

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budget activity in the same account. *See, e.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2564 (2015). Agency policy relevant to the topics of apportionment and reprogramming may be found online: https://www.ihs.gov/ihm/index.cfm?module=dsp_ihm_circ_main&circ=ihm_circ_9519#13

[7] The Tribe notes that IHS submitted the closure report to Congress after receiving the Tribe's notice of intent to contract. Plaintiff Motion for Summary Judgment at 9. While that timeline is accurate, the closure report was already in the process of being prepared, as evidenced by the financial projections for the clinic, which were finalized in January 2016, and used in the closure report. *See* AR 148. Moreover, the timing of the Tribe's notice has no legal significance, as it was not a proposal or final offer and did not impose any legally cognizable duty on IHS.

[8] Although rejected by this Court, IHS has also argued that the amount available should also be tied to Tribal Shares tables, which show amounts budgeted to support a program, but which in that case did not reflect actual expenditures for the program. *Pyramid Lake*, at 544.

have a contractible share of service unit resources. IHS awarded the EMS contract using only H&C funding rather than third party revenue. Once awarded, this funding was no longer available to IHS for clinic operations. In other words, it was not an amount that IHS would have otherwise used to provide the clinic operations for the contract period proposed by Fort McDermitt. As evidenced by the financial projection prepared for the closure report, IHS projected expenditures of $857,123 for maintaining clinic operations, not including the EMS program. AR 148. IHS expected to allocate $429,060 from appropriated resources to cover such costs, some of which would be still drawn from the H&C line item. Specifically, IHS estimated that $183,223 would come from the H&C budget line after deducting the EMS program award. IHS found it necessary to fund the remaining operating costs through third-party collections received by the clinic. IHS projected that third-party revenues would not keep pace with expected costs, resulting in cost overruns starting in FY2017, thus triggering IHS's decision to close the clinic. AR 145.

In its Final Offer response, IHS calculated that the Tribe's share of H&C funding at the program level, including funds for the EMS program, was $555,254, increasing to $633,417 when adding in contract amounts at the Area and HQ level.[9] These are the amounts IHS determined were expended and available from the relevant recurring appropriations and IHS ultimately awarded these amounts after technical assistance. The Tribe asserts that IHS should have awarded no less than $1,106,453. The Tribe obtained this number by adding the amount for the EMS program ($502,611) to a financial projection showing projected clinic expenses for the H&C line item of $603,842. The problem with the Tribe's calculation is that it relies on financial budget projections that show a projected deficit in the H&C line item of $422,063.50 and assumes that IHS would have funded those deficits. The Tribe is not relying on actual expenditures from the

[9] The Final Offer response also noted that the Winnemucca Tribe's share of H&C resources was $190,177, which could be made available to the Fort McDermitt Tribe pursuant to an appropriate resolution from the Winnemucca Tribe. AR 138.

H&C line item to support its argument for additional funding.[10] IHS relied on such expenditure data for its rejection of the Final Offer, and those amounts were consistent with the projected amounts included with the closure report and the amounts IHS ultimately awarded. As noted in the rejection letter, IHS identified the total H&C available to the Tribe as $633,417. This includes the H&C funding awarded to the Tribe for the EMS program. An additional $190,197 is available for clinic operations, provided a tribal resolution is obtained from the Winnemucca Tribe for Fort McDermitt to contract for the Winnemucca Tribe's funding on its behalf. The Winnemucca Tribe has not provided this resolution.

A substantial portion of the funding sought by the Tribe in its Final Offer as H&C funding was not actually paid for through the H&C budgetary line item at all, but was covered with third-party collections. These "collections represent a significant portion of IHS and Tribal health care delivery budgets." [11] Pursuant to 25 U.S.C. § 1621f, the third-party revenues collected by a Service Unit must be credited back to that Service Unit responsible for the provision of care. 25 U.S.C. § 1621f. These resources are no longer available to IHS because the Tribe has contracted for clinic billing functions and is now able to directly collect such funding itself. AR 27, 36.[12] The circumstances here are distinct from *Pyramid Lake* because in that case IHS retained the billing function and thus the discretion to allocate the revenue from the clinic to fund the EMS program. *See Pyramid Lake*, at 544. Here, IHS has complied with its statutory obligation to transfer the billing function and the funds are no longer available to IHS. Rather, the funds are legally available to be collected directly by the Tribe and may be used by the Tribe in the same manner that they were used by IHS to fund clinic operations.

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[10] As explained in the closure report, IHS budgeted to make up the difference with third-party revenue generated by the clinic in FY2016, not by covering the loss with additional appropriated H&C resources from the Service Unit.

[11] *See* FY2017 Congressional Justification, at CJ 156: https://www.ihs.gov/budgetformulation/includes/themes/responsive2017/documents/FY2017CongressionalJustification.pdf .

[12] To the extent IHS receives reimbursement for services provided by the clinic, it has agreed to transfer such resources to the Tribe, except for pharmacy services. AR 32.

In addition, for FY 2016, IHS funded clinic operations with funding from the Special Diabetes Program for Indians (SDPI). This funding is made via a separate appropriation and administered not through the ISDEAA, but under laws applicable to grants and cooperative agreements. See 42 U.S.C. § 254c–3. The Tribe correctly notes that the SDPI award benefitting the Tribe was not renewed for a new cycle past FY 2017. AR 515.

B. Funding for The Winnemucca Tribe

The other fundamental issue is not how much was spent on the clinic, but whether the Fort McDermitt Tribe is entitled to contract for every available dollar spent to operate the clinic, or just the portion allocated for the Fort McDermitt Tribe. Contrary to the Tribe's position, IHS properly rejected transferring to the Fort McDermitt Tribe that portion of funding that is reserved for services to the Winnemucca Tribe. Plaintiff Motion for Summary Judgment (PMSJ) at 15-16. The Fort McDermitt Tribe is not entitled under the ISDEAA to contract for the entire amount of funding IHS used to operate the Fort McDermitt Clinic because a portion of such funds were allocated by IHS for the Winnemucca Tribe. In this instance, the Winnemucca Tribe's share of the remaining contractible resources in the Schurz Service Unit was established by IHS after consulting with tribes served by Schurz Service Unit. IHS did not rely on active clinic users, as the Tribe wants. AR 243. IHS relied on resource allocation tables developed through tribal consultation in 2013 and IHS chose to use the Winnemucca Tribe's allocated portion of H&C resources to fund operations at the Fort McDermitt Clinic. *See, e.g.*, AR 244, 267. Rejecting IHS's position, the Tribe contends that IHS's reliance on tribal shares tables for this position was rejected in *Pyramid Lake*. PMSJ at 17. *Pyramid Lake* is not directly on point, however, as it only rejected as the proper contract award the amount of money IHS budgeted for a program activity as opposed to the amount it was actually spending for that program activity.[13] *Pyramid*

[13] No Tribe other than the Fort McDermitt Tribe was ever determined by IHS to be eligible to contract for the EMS program and associated funding. This situation is factually different because the Winnemucca Tribe was expressly acknowledged by IHS, as result of the FY2013 consultation, to contract for a part of the funding that is now being

Lake did not squarely address the division of funds that were actually being spent amongst tribes, and although funding the EMS program would impact funding for other tribes, IHS did not argue in that case that any other tribe had a right to contract for the EMS program or associated funding. In this case, however, the Winnemucca Tribe does in fact have a contractible share of resources used by IHS to support the clinic and determined that it would use such funds to provide additional services to the Winnemucca Tribe through the Purchased/Referred Care program. AR 146. Accordingly, IHS has properly rejected Fort McDermitt's request for that funding.

The Fort McDermitt Tribe nonetheless demands that IHS provide the remaining H&C resources used to support the clinic to the Fort McDermitt Tribe only because the Winnemucca Tribe's members are not utilizing the clinic in proportion to the amount of H&C funding that IHS reserved for the Winnemucca Tribe. *See* PMSJ at 15. In essence, according to Fort McDermitt, the Winnemucca Tribe has lost the opportunity to contract for any portion of the Schurz Service Unit H&C budget, because IHS chose to allocate the Winnemucca Tribe's portion of H&C resources to fund a clinic that the Winnemucca Tribe's members have not routinely accessed in the last three years. *See* AR 578.[14] This would leave the Winnemucca Tribe with no H&C resources available for contracting at the Service Unit level because, if in the future it so chooses, it would be last to assert its right to self-determination.[15] Apparently, in the Tribe's view, this is acceptable because the Winnemucca Tribe has been historically "primarily served outside the Clinic using contract health". Plaintiff Motion for Summary Judgment at 15. There is nothing in the ISDEAA that compels such a draconian result, and the Court should not accept such arguments here. The ISDEAA's "statutory language itself makes clear that the [IHS] may allocate funds to one tribe at the expense of another." *Salazar v. Ramah*

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used to operate the Fort McDermitt Clinic. AR 252.

[14] Of course, the table Fort McDermitt uses for support shows that Fort McDermitt tribal members constitute about 76% of users at the clinic, yet the Tribe demands that IHS give them 100% of the funding.

15 The Tribe also believes IHS has overstated the number of actual Winnemucca users. AR 112 N. 2.

Navajo Chapter, 567 U.S. 182, 193 (2012) (referencing 25 U.S.C. 5325(b), formerly 450j-1(b)). Relevant here, each tribe has a contractible portion of the remaining H&C resources at the Schurz Service Unit, as determined by IHS after tribal consultation and it is those resources combined were used to fund oerations at the clinic.

C. Employee Housing Services

IHS declined the Tribe's housing services proposal on the basis that "the amount of funds proposed in the final offer exceeds the applicable funding level to which the tribe is entitled under [Title V of the ISDEAA]" and "the program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot be legally delegated to an Indian tribe." 25 U.S.C. §§ 5387(c)(1)(A)(i), 5387(c)(1)(A)(ii). AR 133. After reconsideration, IHS no longer objects to inclusion of the activity on the basis that the function is inherently federal.[16] IHS also does not object to inclusion of management services for tribally owned housing on the basis that it is not a function specifically enumerated in the 25 U.S.C. § 5385(b)(2). IHS has reconsidered its position in light of 2010 amendments to the IHCIA, which expressly authorize tribes to manage federal quarters notwithstanding any other law. 25 U.S.C. § 1638a. The 2010 amendments set forth standards for such management, including the imposition of fair rental rates to be used to maintain the property. The law directs the tribal health program to use rental payments "for the maintenance (including capital repairs and replacement) and operation of the quarters." 25 U.S.C. § 1638a(b)(3).

Although the 2010 amendments expressly authorize contracting for federally owned quarters only, IHS believes that it may also contract for housing management services of tribally-owned housing, limited to services for *tribal health employees only.* Since IHS has no control

[16] IHS reevaluated the Tribe's offer in preparation for this litigation and reconsidered it based on 25 U.S.C. § 1638a, which apparently was not raised or discussed by either party during negotiations, but which is pertinent to the functions proposed by the Tribe. Section 1638a indirectly supports the inclusion of such functions insofar as they are tied to health programs, even though the Tribe is not proposing to contract for the management of Federally-owned quarters.

over the property or knowledge of its condition, however, IHS maintains that the Tribe must adopt through contract language the standards that apply to the management of the federally owned quarters as set forth in 25 U.S.C. § 1638a. Without such contractual assurances the Agency believes the function continues to be an improper acceptance of liability by the government as set forth in the declination letter.[17]

CONCLUSION

IHS has fully complied with its statutory obligations under the ISDEAA by awarding the Tribe all the funding to which it is entitled to operate the Fort McDermitt Clinic. IHS lawfully declined the Tribe's Final Offer on the basis that the funding requested was in excess of what IHS is required to provide and because some of it is reserved to provide services to another Tribe. Furthermore, IHS believes it has met the standard for declining the Tribe's employee housing services function, but believes the parties may be able to reach agreement on language that would overcome IHS's objections.

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[17] The express goal of the Tribe's language proposal is to ensure coverage for such services under Federal Tort Claims Act ("FTCA"). AR 133. Even to the extent IHS agrees to add the activities to the funding agreement, IHS cannot guarantee that any particular act or omission will be afforded FTCA coverage.

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