UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COOK INLET TRIBAL COUNCIL, Plaintiff, v. CHRISTOPHER MANDREGAN, JR., and SYLVIA MATHEWS BURWELL, And UNITED STATES OF AMERICA, Defendants.	)	Case No. 1:14-cv-1835-EGS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Cook Inlet Tribal Council (CITC) is a tribal health organization that operates various substance abuse programs serving Alaska Native patients in Anchorage, Alaska. The programs are operated pursuant to a contract issued under the Indian Self-Determination Act (ISDA) with the U.S. Indian Health Service (IHS), which is an agency of the U.S. Department of Health and Human Services. In fiscal year 2014 CITC proposed a contract amendment under which the agency would increase the amount of the contract payment to cover the costs CITC incurs for the facilities that house these programs. Although the ISDA entitles CITC to an award of these funds because they are "reasonable and allowable costs" to prudently manage the contract, 25 U.S.C. § 450j-1(a)(3)(A), the agency refused CITC's proposal. CITC now appeals the agency's declination of the proposed contract amendment under the ISDA's special judicial review

provisions, § 450m-1(a), and seeks immediate injunctive relief to compel the Secretary to approve and fund the proposed contract amendment.

THE INDIAN SELF-DETERMINATION ACT

Title I of the Indian Self-Determination Act of 1975, as amended, 25 U.S.C. §§450-450n (ISDA), authorizes Indian Tribes and tribal organizations to contract with the Indian Health Service (as well as with the Bureau of Indian Affairs) to operate federal programs and services that the government otherwise would continue to operate directly for the Tribes and their members.[1] CITC currently contracts with IHS to provide federal health care services under an ISDA Title I contract.

A. The right to "contract support costs" under the ISDA

The ISDA was enacted to give Indian communities more control over the federal services they receive and to assure "maximum Indian participation" so that these services would be "more responsive to the needs and desires of those communities."[2] The Act seeks to achieve this purpose by the "establishment of a meaningful Indian self-determination policy" which encourages the transition from federal dominance of programs serving Indian Tribes to tribal operation of these programs.[3] To execute that policy, Congress dictated in Title I that, at a Tribe's option, it would be mandatory for the federal agency to contract with the Tribe in order to transfer operation of the program to the Tribe. That is, "upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract," the Secretary must by law

[1] H.R. REP. NO. 93-1600 at 14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7775, 7776; S. REP. NO. 100-274 at 1 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620.

[2] 25 U.S.C. § 450a(a).

[3] 25 U.S.C. § 450a(b).

contract with the Tribe or tribal organization to plan, conduct and administer the federal programs that otherwise would be administered by the Secretary.[4]

The ISDA further mandates that Tribes and tribal organizations that contract with IHS are to be paid two types of funding to operate the contracted program. First, tribal contractors are entitled to be paid the Secretary's program funds: "the amount the Secretary would have expended had the government itself [continued to] run the program."[5] This is called the "Secretarial amount."[6]

Second, beginning in 1988, Congress also required the agency to add to the Secretarial amount a type of funding called "contract support costs" (or CSC).[7] Congress added this additional funding because it realized that the Secretarial amount alone did not provide sufficient money to allow Tribes to provide the same level of services the Secretary would have provided if the Secretary had continued to operate the program directly, instead of contracting the operation of the program to the tribal organization.[8] This is for two reasons. First, a federal program is supported not only by the amount spent directly by the Secretary, but also by a wide array of additional services furnished through other federal agencies, from payroll to legal expenses to procurement activities (among others). Since a contracting Tribe would not receive the in-kind benefit of those additional federal services, the burden of providing those services would fall on

[4] 25 U.S.C. § 450f(a)(1).

[5] *Arctic Slope Native Ass'n, v. Sebelius*, 629 F.3d 1296, 1298–99 (Fed. Cir. 2010), *vacated on other grounds*, 133 S. Ct. 22 (2012), *on remand*, 501 Fed. Appx. 957 (Fed. Cir. 2012). *See also* 25 U.S.C. § 450j-1(a)(1).

[6] *Arctic Slope Native Ass'n*, 629 F.3d at 1298–99.

[7] Pub. L. No. 100-472, title II, § 205, 102 Stat. 2285, 2292-93 (Oct. 5, 1988).

[8] *See* S. REP. NO. 100-274 at 9 (1987).

the Tribal contractor and yet not be paid for by the Secretarial amount. And second, the ISDA and other laws impose additional requirements (such as annual audits and insurance) which federal agencies simply do not have to satisfy.[9] The costs of those additional requirements would thus also not be factored into the Secretarial amount, since the Secretary did not have to pay them. For both reasons, Congress required the agencies to supplement the Secretarial amount by paying "contract support costs" to Tribes in an amount necessary to fund "the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management . . . ."[10]

Generally, "contract support costs" include both "indirect administrative costs, such as special auditing or other financial management costs" that are part of a contractor's general overhead, and also certain "direct costs, such as workers' compensation insurance" that are attributable directly to the personnel and facilities associated with a particular program.[11] One of these types of "direct" contract support costs is "facilities support costs."[12] For CITC, these facilities support costs are what CITC pays to house its residential and outpatient substance abuse programs.[13]

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[9] S. REP. NO. 100-274 at 8-9 (1987).

[10] 25 U.S.C. § 450j-1(a)(2).

[11] *Cherokee Nation v. Leavitt*, 543 U.S. 631, 635 (2005) (citing 25 U.S.C. § 450j-1(a)(3)(A)(i), (ii)).

[12] Indian Health Manual (IHM) § 6-3.2D(1)(e), *available at* http://www.ihs.gov/IHM/index.cfm?module=dsp_ihm_pc_main.

[13] For another Tribe, these costs could be the mortgage costs of a clinic housing a contracted program.

The ISDA mandates that upon award of each year's contract, contract support costs "shall be added" to the Secretarial amount.[14] The ISDA also contains a model contract which requires the Secretary to "make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference" into that contract.[15] The total funding amount "shall not be less than the applicable amount determined pursuant to section [450j-1](a) of the [ISDA],"[16] which is to say, the full Secretarial amount and the full contract support cost amount to which the tribal contractor is entitled.

The ISDA also contains a provision specifying that a Tribe's contract support cost requirement may not duplicate funds already being paid to the Tribe as part of the Secretarial amount.[17] This is a dollar-for-dollar offset which ensures the contractor is not paid more in CSC than whatever amount (in addition to the Secretarial amount) is needed to prudently operate the contract. But neither is the contractor to be paid less than that full amount. As noted in the relevant Senate Report, "[i]n the event the Secretarial amount under [§ 450j-1(a)(1)] for a particular function proves to be *insufficient* in light of a contractor's needs for prudent management of the contract, contract support costs are to be available to supplement such sums."[18]

[14] 25 U.S.C. § 450j-1(a)(2) (emphasis added).

[15] 25 U.S.C. § 450*l*(c) (Model Agreement, § 1(b)(4)).

[16] *Id*. (emphasis added).

[17] 25 U.S.C. §450j-1(a)(3)(A) ("such [CSC] funding shall not duplicate any [Secretarial amount] funding provided under subsection (a)(1) of this section.").

[18] S. REP. NO. 103-374, at 9 (1994) (emphasis added).

B. ISDA Provisions Governing Disputes over Contract Amendments

The Act has clear provisions governing disputes over proposed contract amendments. The Secretary may decline to approve such amendments only within a specified time and only for specified reasons. That is, when a tribal organization submits "a proposal to amend . . . a self-determination contract," under section 450f(a)(2):

> the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification . . . that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that—
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> (A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;
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> (B) adequate protection of trust resources is not assured;
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> (C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;
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> (D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a) of this title; or
>
> (E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of [programs covered by the Act] because the proposal includes activities that cannot lawfully be carried out by the contractor.[19]

Further, in the event of a civil action challenging the Secretary's decision to decline a contract amendment, "the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal . . . ."[20] In such an action "the district courts may order appropriate relief" including "immediate injunctive relief to reverse a

[19] 25 U.S.C. § 450f(a)(2) (emphasis added).

[20] 25 U.S.C. § 450f(e)(1) (emphasis added).

declination finding under section 450f(a)(2) . . . or to compel the Secretary to award and fund an approved self-determination contract."[21]

FACTUAL AND PROCEDURAL BACKGROUND

CITC is the Alaska Native tribal health organization designated by Cook Inlet Region, Inc., to provide health care services to Native American beneficiaries of IHS programs in Anchorage, Alaska.[22] CITC qualifies as a "tribal organization" under 25 U.S.C. § 450b(*l*) of the ISDA, and includes on its Board representatives of eight federally-recognized Tribes.[23]

In 1992, CITC submitted a proposal to IHS to provide residential treatment and recovery services at its "Alaska Native Alcohol Recovery Center" in Anchorage (later named the "Ernie Turner Center").[24] The Center provides treatment "to reduce relapse potential and prevent continuing alcoholism and drug abuse."[25] In response, IHS entered into an ISDA self-determination contract with CITC that awarded $150,000 to CITC. Because IHS was not itself operating these programs, the amount of the contract was based on CITC's budget.[26] This 1992

[21] 25 U.S.C. § 450m-1(a).

[22] Statement of Facts (SOF) ¶ 1.

[23] SOF ¶ 1. The eight Tribes are the Chickaloon Village Traditional Council, the Native Village of Eklutna, the Kenaitze Indian Tribe, the Knik Tribal Council, the Ninilchik Traditional Council, the Salamatof Tribal Council, the Seldovia Village Tribe, and the Native Village of Tyonek.

[24] SOF ¶ 2.

[25] SOF ¶ 2.

[26] SOF ¶ 3.

budget included $11,838.50 for facilities support costs, comprised of $6,051.00 for rental costs and $5,787.50 to fund a portion of the salary for a facilities coordinator.[27]

CITC's substance abuse programs have expanded substantially since it first contracted with IHS in 1992, thanks to increases in congressional appropriations. In addition to operating the Ernie Turner Center, CITC now also operates an outpatient treatment center, an intensive transitional program, and outpatient day treatment and assessment services.[28] Reflecting this growth in services, CITC in fiscal year 2014 received a total of $2,518,559.00 under its IHS contract to carry out substance abuse programs.[29] But this 2014 payment still included only $11,838.50 for facilities support costs—the same amount that IHS had originally paid CITC in 1992 and has annually paid CITC ever since.[30] Despite the fact that CITC's facilities support costs had grown to $479,040 by 2013 to accommodate the approximately $2.5 million in program activities that it now administers, and despite repeated requests by CITC for additional facilities support costs, IHS has refused to provide any additional funding to CITC for such costs beyond the original budget amount of $11,838.50.[31]

The agency's failure has had the predictable effect of requiring CITC to divert program funds to cover its fixed facilities support costs, in turn reducing funds CITC should be spending

[27] SOF ¶ 4.

[28] SOF ¶ 5.

[29] SOF ¶ 6.

[30] SOF ¶¶ 6-7.

[31] SOF ¶¶ 7-8.

on program activities and thereby reducing its program services.[32] In 2012, CITC again approached IHS about renegotiating its direct contract support cost requirement to add more facilities support cost funding,[33] but again IHS refused to provide any additional amounts. As it had before, IHS claimed it had already provided CITC with facilities support cost funds, and therefore CITC was not entitled to any additional funding for this purpose.[34] In 2013 IHS provided small additional amounts of direct contract support costs for CITC's training and certification costs, worker's compensation insurance costs, and unemployment insurance costs, but provided nothing further for facilities support costs.[35]

After negotiations on the facilities support cost issue stalled in April 2014, CITC submitted a formal proposal under 25 U.S.C. § 450f(a)(2) to amend its 2014 contract by adding $479,040 in direct contract support cost funding for CITC's full facility support costs.[36] On July 7, 2014, IHS Alaska Area Director Christopher Mandregan issued a letter declining to award CITC's proposed amendment.[37] Area Director Mandregan asserted "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract."[38] Mr.

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[32] SOF ¶ 8. *See also* S. REP. NO. 100-274 at 8-9 (1987); *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2187 (2012) (When Tribes lack adequate contract support cost funding, they have to "reduc[e] ISDA services to tribal members, divert[] tribal resources from non-ISDA programs, and forgo[] opportunities to contract in furtherance of Congress' self-determination objective." (internal citation omitted)).

[33] SOF ¶ 9.

[34] SOF ¶ 10.

[35] SOF ¶ 10.

[36] SOF ¶ 11.

[37] SOF ¶ 12.

[38] SOF ¶ 12.

Mandregan explained that "[f]acility costs were included as part of CITC's program base" in 1992, and therefore "to pay these costs again as CSC would violate" the ISDA's provision against paying duplicate costs.[39] Mr. Mandregan did not provide any other grounds for declining CITC's proposal.[40]

CITC now appeals the agency's decision.

STANDARD OF REVIEW

In general, the Court will grant a motion for summary judgment where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law.[41] Here, there is no dispute of material fact. The only issue is whether CITC is entitled to judgment as a matter of law.

This action arises under the ISDA, not under the Administrative Procedures Act. Since this is a civil action to review the Secretary's decision to decline a proposed amendment to an ISDA contract, review of the agency's decision is de novo under the ISDA.[42] Moreover, "the Secretary [has] the burden of proof to establish by clearly demonstrating the validity of the

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[39] SOF ¶ 13.

[40] SOF ¶ 14.

[41] FED. R. CIV. P. 56(a); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

[42] 25 U.S.C. § 450m-1; *Pyramid Lake Paiute Tribe v. Burwell*, No. 1:13-cv-1771, at *8-9 (D.D.C. Oct. 7, 2014). *Accord Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, 945 F. Supp. 2d 135, 141-42 & n.5 (D.D.C. 2013); *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F. Supp. 2d 1059, 1067 (D.S.D. 2007); *Cherokee Nation of Okla. v. United States*, 190 F. Supp. 2d 1248, 1256-1258 (E.D. Okla. 2001), *aff'd* 311 F.3d 1054 (10th Cir. 2002), *aff'd in part, rev'd in part* 543 U.S. 631 (2005); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306, 1316-17 (D. Or. 1997). *But see Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103, 109 (D.D.C. 2009) (finding APA standard appropriate for particular set of procedural facts in that case, where Plaintiff stated claims for relief under both the ISDA and APA, and Plaintiff had not raised the Indian canon of construction).

grounds for declining the contract proposal . . . ."[43] That is, unlike APA actions, the burden is not on CITC to establish the illegality of the agency's action; instead, the burden is squarely on the agency to "clearly demonstrat[e]" its actions satisfy the ISDA's high standards. And unlike in APA actions, review is de novo and is not strictly limited to the administrative record.[44] Additionally, unlike APA actions, there is no deference to the agency's interpretation of law. To the contrary, the Supreme Court has noted that, in interpreting IHS's obligations, "[c]ontracts made under [the] ISDA specify that '[e]ach provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor . . . .'"[45] The Supreme Court has interpreted this language to mean that the Government "must demonstrate that its reading [of the ISDA] is clearly required by the statutory language."[46]

ARGUMENT

The ISDA provides that tribal organizations are entitled to be paid "contract support costs," for "activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management . . . ."[47] Such contract support costs include "direct" contract support costs which, according to IHS's Indian Health

[43] 25 U.S.C. § 450f(e)(1).

[44] *See Cherokee Nation*, 190 F. Supp. 2d at 1256-57 ("It is clear from the plain language of the [ISDA] there is no such language indicating that review under the ISDA is limited to the restrictive APA standard."); *Shoshone-Bannock Tribes of the Fort Hall Reservation*, 988 F. Supp. at 1318 (Defendants' request to limit the record denied because APA does not govern standard of review in ISDA cases.).

[45] *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2191 (2012); *see also* 25 U.S.C. § 450*l*(c) (Model Agreement, § 1(a)(2)); R. 14 (CITC's contract states "[e]ach provision of the [ISDA] and each provision of this contract shall be liberally construed for the benefit of the Contractor . . . ." 2013 Contract §(a)(2)).

[46] *Ramah*, 132 S. Ct. at 2191.

[47] 25 U.S.C. § 450j-1(a)(2).

Manual, include "facilities support costs to the extent not already made available."[48] In its declination of CITC's proposed contract amendment, the agency did not dispute the eligibility of CITC's facility support costs as an appropriate type of direct contract support costs. And for good reason: a tribal contractor must ensure it has adequate space to provide the services required by its contract; understandably, then, the requested facilities support costs are necessary "to ensure compliance with the terms of the contract and prudent management."[49]

While one facility, the Ernie Turner Center, and the $11,838.50 in facility support costs it required in 1992, may have been sufficient when CITC was providing $150,000.00 worth of services in 1992, it is self-evident that one facility is plainly not sufficient to support the approximately $2.5 million contract that CITC operates today. In order to "prudently manage" its many IHS programs today, which are more than 16 times bigger than they were in 1992, CITC necessarily needs more space, and that space comes at a higher cost. Despite these common sense facts, the agency refuses to provide additional facilities support cost funding above the minimal amount it agreed to provide 23 years ago, insisting that CITC is forever locked into that amount and no more.

Defendants raise four affirmative defenses in their Answer. First, the government asserts that it paid Plaintiff all of the CSC "due under its Model Contract/Annual Funding agreement for FY 2014."[50] This assertion is beside the point because this case is not about whether IHS

[48] IHM § 6-3.2D(1)(e).

[49] 25 U.S.C. § 450j-1(a)(2). In fact, at the request of a tribal contractor, the ISDA explicitly directs the Secretary to enter a lease for facilities that will be used for the administration and delivery of services and to compensate the tribal contractor for that lease. 25 U.S.C. § 450j(*l*). That compensation "may include rent, depreciation . . . principal and interest paid or accrued, operation and maintenance expenses, and such other reasonable expenses . . . ." *Id.*

[50] Docket 7 at 1 ¶ 1.

complied with the contract, but rather whether IHS improperly refused CITC's proposal to amend the contract in order to increase the amount of funding due under the contract in fiscal year 2014.[51]

The second and third defenses assert that CITC's facilities support costs are not eligible CSC, because they are already part of the Secretarial amount. IHS thus reasons that to pay additional facilities support costs as CSC would duplicate funds already provided by the agency in the Secretarial amount.[52]

Defendants' assertions here are wrong. The only facilities funding provided as part of CITC's Secretarial amount was the $11,838.50 provided in CITC's original contract. Therefore, only $11,838.50 of the requested $479,040 of costs may be considered duplicated amounts. The remainder—$467,201.50—is not duplicative of anything. The Tribe does not dispute the portion of Area Director Mandregan's letter which declined to award $11,838.50, but the Tribe does contest the agency's denial of the additional $467,201.50 in facilities support costs.

Lastly, Defendants argue that CITC is seeking to compel IHS to fund an expansion of CITC's programs, and that the agency cannot be compelled to do so.[53] That assertion is also incorrect. CITC is not expanding anything; it is seeking only to compel IHS to fund the reasonable and prudent costs of operating the much larger programs supported by the increased program funding that IHS itself added to CITC's contract over the years. If IHS expects CITC to provide more program services—as the sharp increase in program dollars under contract reflects—then IHS must be prepared to fund the additional contract support costs (including the

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[51] SOF ¶ 11.

[52] Docket 7 at 2 ¶¶ 2-3.

[53] Docket 7 at 2 ¶ 4.

increased facilities support costs) associated with running those programs, precisely as the ISDA commands.

A. Additional facilities support costs would not duplicate existing CITC funding.

Similar to its second and third defenses, the first and main contention in the agency's declination letter is that the amounts CITC has requested for increased facilities support costs would "duplicate" amounts that are already provided as part of the Secretarial amount. According to declination letter, the Secretarial amount that was transferred to the Tribe in 1992 included a payment of $11,838.50 for facilities support costs. Thus, the agency decision letter claims, any additional payment of any amount for any facilities support costs would "duplicate" the $11,838.50 IHS is already paying, no matter how much the Tribe's contract with the agency has grown since 1992, and no matter how much the Tribe is now actually paying in facilities support costs to operate those programs. The agency's reading of the ISDA is absurd, and there is no legal support for it.

The first and simplest answer is that there cannot be any "duplication" if the agency is given a 100% credit for the previously-calculated and currently paid portion of the facilities support costs (here, the $11,838.50). The additional funding CITC seeks are only for increased costs over-and-above that original sum, and those new and increased costs do not duplicate anything. Since CITC is receiving no payment at all for these new and increased costs, IHS cannot plausibly claim that any payments it would make for these increased costs would "duplicate" payments it is not actually making.

The core theory of the IHS declination letter is that CITC is forever frozen to receiving no more than $11,838.50 in facilities support costs, because any payment in excess of that amount would "duplicate" a category of funding CITC is already receiving. The notion is that if

the agency includes any sum for a particular overhead function in the original Secretarial amount—presumably, even just one dollar—that fact categorically and forever bars the contractor from being paid any additional contract support costs to cover the actual costs the contractor is incurring for that function.

This extreme argument makes no sense, and nothing in the statute supports it. The ISDA provides that contract support cost funding is to pay a Tribe its overhead and administrative costs in whatever amount is "reasonable" for activities that "must be carried on" in order to "ensure compliance with the terms of the contract and prudent management."[54] There is nothing in the statute that forever caps the payment of these costs to the amount the Secretary spent or budgeted for that overhead function when the Tribe initially took over the program. So long as the additional costs the Tribe claims are reasonable and necessary for the Tribe to prudently carry out the contract (and the agency declination letter did not dispute this is the case for CITC), then those additional costs are eligible CSC costs which must be added in full to the contract.

To be sure, the statutory duplication provision prohibits the payment of contract support costs that would "duplicate" funds already being paid. But in adding this provision, Congress squarely recognized that the funds provided in the Secretarial amount for administrative costs may often be insufficient for a tribal contractor to operate the contracted program—which is precisely why Congress added the contract support cost provisions in the first place. As the relevant Senate Report notes, if the Secretarial amount is "insufficient in light of a contractor's needs for prudent management of the contract, contract support costs are to be available to supplement such sums."[55] The word "insufficient" is plain enough: it means "not enough."

[54] 25 U.S.C. § 450j-1(a)(2).

[55] S. REP. NO. 103-374, at 9 (1994) (emphasis added).

This is a complete answer to the Secretary's theory that, even if just $1 is paid for facilities support costs, a contractor thereafter is barred from seeking any additional sums as contract support costs, no matter how insufficient the Secretarial amount is, and no matter how concededly reasonable and necessary those additional costs are (here, CITC's facilities support costs to run vastly expanded residential and outpatient treatment centers).

The agency misconstrues the ISDA's duplication provision as some kind of a categorical restriction: so long as some money is paid for a cost item inside the Secretarial amount, the contractor is foreclosed from ever seeking any additional funding for costs in that same category (or perhaps even from incurring such costs) as contract support costs. But that is simply not what the statute says, and the Secretary carries a heavy burden to "demonstrate that its reading [of the Act] is clearly required by the statutory language."[56]

Not only is the agency's reading of the statute not consistent with the statute (much less "clearly required" by it); the meaning of the statutory duplication provision is contrary to the agency's position. The duplication provision ensures that the agency does not pay the same amount of funding twice, not that an initial payment amount for a category of overhead costs is forever frozen in time, without regard to future growth in the size of the program or to the reasonable need for increased overhead costs as a program expands or expenses increase.

In other words, if the agency is annually paying some amount of money for overhead costs as part of the Secretarial amount (here, $11,838.50 for facilities support costs), the duplication provision says the agency should not have to pay that same money again—*i.e.*, duplicate the payment (the $11,838.50). But that does not mean the agency should not pay any additional amounts in CSC to supplement the Secretarial amount in order to cover additional

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[56] *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2191 (2012).

reasonable costs of the same kind, and the statutory prohibition on duplicated payments does not prohibit a Tribe from recovering otherwise necessary costs in a given category of overhead simply because IHS in the beginning paid $1 (or $11,000) toward that cost. Nor does the statute forever cap the amount of funding for a type of overhead cost to the amount provided in the Secretarial amount at the time a Tribe first takes over a program; if that were the case, a Tribe would have no contract support cost requirement except for unique costs the federal government never incurs—another result that finds no support anywhere in the Act.

The Secretary's position is absolutely contrary to the legislative history of the duplication provision, which was added to the ISDA to "assure against any inadvertent double payment of contract support costs which duplicate the Secretarial amount already included in the contract."[57] Since the 1994 ISDA amendments expanded the definition of CSC, the duplication provision assured that, notwithstanding that expansion, Congress was not authorizing the agency to pay the same costs twice and thus make a "double payment." That is all the duplication provision means, nothing more, and the Secretary's effort to expand it into a categorical bar against the payment of additional prudent and necessary costs must fail. This interpretation is congruous with Congress's overall motivation for expanding the definition of CSC in 1994, which was to make clear that "[i]n the event the Secretarial amount under section 106(a)(1) for a particular function proves to be insufficient in light of a contractor's needs for prudent management of the contract, contract support costs are to be available to supplement such sums."[58] Congress was

[57] 140 CONG. REC. 28,326 (1994) (comments of Sen. McCain regarding proposed amendment of S. 2036); 140 CONG. REC. 28,629 (1994) (notes to Committee amendment of H.R. 4842) (emphasis added).

[58] 140 CONG. REC. 28,631 (1994) (section-by-section analysis of proposed amendments to the CSC provisions of the Act).

concerned that if CSC could not supplement such sums, program funds would have to be used to cover those costs:

> [T]he Committee's objective [was] to assure that there is no diminution in program resources when programs, services, functions or activities are transferred to tribal operation. In the absence of the [amended section], a tribe would be compelled to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid.[59]

But that kind of diversion of program funds to pay overhead costs is precisely what has happened because of the agency's refusal to fund CITC's increased facilities support costs. The Secretary has expanded CITC's program by a factor of 16 since CITC's initial contract in 1992, but yet has failed to pay one penny more for increased facilities support costs to accommodate the expanded program. Effectively, the Secretary is requiring CITC to divert program funds to pay for the additional facilities support costs, the very evil Congress sought to eliminate in the 1994 amendments.

CITC has requested payment of $479,040 in facilities funding, because that is the amount CITC is actually incurring as "necessary" for the "prudent management" of its programs. The agency declination letter does not dispute that this sum is both "necessary" and "prudent" to cover CITCs facilities support costs. Of this sum, the agency provided only $11,838.50. CITC is therefore entitled to the difference between its actual facilities support costs of $479,040, and the $11,838.50 the Secretary already provided, netting out to an additional $467,201.50 in facilities support cost funding.

B. IHS is responsible for additional contract support costs due to additional IHS program funds.

IHS asserts in its Answer—but not in the declination letter here on review—that "the [ISDA] does not obligate the IHS to fund Plaintiff's expansion of its substance abuse programs

[59] *Id.*

beyond the level that the IHS was providing at the time Plaintiff contracted for those programs."[60] This *post hoc* justification for the declination should be rejected for two reasons.

First, the agency never offered this as a ground for the declination.[61] Therefore, the Secretary may not raise it for the first time here.[62]

Second, even if the agency had timely raised this defense, it would fail. This is because CITC did not take over an ongoing program that IHS was already running. Instead, it contracted to run a new program which Congress had just newly funded. This is why the amounts provided in the original Secretarial amount were negotiated based on CITC's budget. Over the years (and thanks to congressional increases), IHS has provided additional program funds in the Secretarial amount. But IHS has never added to the Secretarial amount additional facilities funds needed to support these ever-growing treatment programs. So, contrary to the Secretary's new assertion in her Answer, CITC has not independently chosen to expand its programs and then asked IHS to fund that expansion. The programs have expanded because the Secretary's contract with CITC has expanded. As such, it was inevitable that CITC's facilities support costs would expand, too. Under the ISDA, IHS is responsible for paying these additional facilities support costs, subject only to the availability of appropriations to do so. 25 U.S.C. § 450j-1(b).

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[60] Docket 7 at 2 ¶ 4 (Answer).

[61] SOF ¶¶ 13-14.

[62] *See* 25 U.S.C. § 450f(e)(1) (Secretary must clearly establish validity of grounds stated for declining contract proposal); *Pyramid Lake Paiute Tribe v. Burwell*, No. 1:13-cv-1771, at *13 (D.D.C. Oct. 7 2014) ("As a threshold matter, this argument cannot support the Secretary's motion for summary judgment because she did not make it in the declination letter."); *id*. at *9 ("The Secretary's written notice to the tribe must explain the reasons for a declination; she may not rely on post-hoc justifications." (citing 25 U.S.C. § 450f(a)(2)).

CONCLUSION

The Director's July 7, 2014 decision constitutes an illegal declination of CITC's proposed contract amendment and should be overturned. CITC is entitled to an order reversing the Secretary's declination, a declaration that CITC's contract amendment request is approved by operation of law, and immediate injunctive relief to award the proposed contract amendment adding an additional $467,201.50 ($479,040 less $11,838.50) in direct contract support costs to CITC's 2014 contract.

Respectfully submitted this 9th day of March 2015.

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