UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COOK INLET TRIBAL COUNCIL, Plaintiff, v. CHRISTOPHER MANDREGAN, JR., Area Director, Indian Health Service, Alaska Area Office, and SYLVIA MATHEWS BURWELL, Secretary, Department of Health & Human Services, and UNITED STATES OF AMERICA, Defendants.	)	Case No.: 1:14-cv-1835-EGS

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Cook Inlet Tribal Council (CITC) is entitled to the additional facilities support costs it requested in its proposed contract amendment in 2014. The agency's arguments to the contrary fail to "clearly demonstrat[e] the validity of the grounds for declining the contract proposal," which is the high statutory standard the Secretary must satisfy for a reviewing court to sustain a contract declination.[1]

The agency's main defense boils down to its simple proposition that if the program funding provided in a contract (the Secretarial amount) contains any amount of funding for a

[1] 25 U.S.C. § 450f(e)(1).

particular category of cost, there can be no contract support cost (CSC) funding, in any amount, ever, for any cost in that same category.[2] That proposition, though simple, is simply wrong. The agency's assertion would eliminate most of the very costs that Congress has declared are to be "eligible" for contract support cost funding under 25 U.S.C. § 450j-1(a)(3), and which the agency's own Manual has long agreed are eligible contract support costs. It would render superfluous the statute's prohibition against duplication of contract support cost funding amounts and program funding amounts, § 450j-1(a)(3)(A), since costs funded with program funds, by the agency's definition, could never also be funded by CSC amounts. And it would routinely require that program funds within the Secretarial amount be diverted to shoulder the full burden of such contract support costs, defeating the core purpose of the statute's contract support cost provisions—which was to eliminate "the onerous choice [contracting Tribes confronted] of either reducing the level of services to pay for administrative costs, or else reducing their level of effort to maintain their administrative systems."[3] This is the very reason why Congress directed that contract support costs "shall be added," *i.e.*, paid in addition to, the Secretarial program amount.[4]

The agency's radical assertion that a type of funding, such as facility costs, is not eligible for contract support cost funding if any portion of it is already funded within the Secretarial amount is therefore unsustainable. Indeed, it is a patently wrong application of a statute which

[2] We sometimes refer to this theory as "categorical duplication."

[3] S. REP. NO. 100-274, at 13 (1987); *see also* S. REP. NO. 103-374, at 9 (1994) ("Throughout this section the Committee's objective has been 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 section 106(a)(2) as amended, a tribe would be compelled to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid.").

[4] 25 U.S.C. § 450j-1(a)(2).

the Supreme Court has instructed must "'be liberally construed for the benefit of the Contractor . . . .'"[5] Just as in *Ramah*, the Government here cannot "demonstrate that its reading [of the ISDA] is clearly required by the statutory language."[6]

Defendants have also raised no issue of material fact.[7] Specifically, Defendants cannot clearly demonstrate—in fact they cannot prove at all—that they have already paid the claimed facilities support costs as part of the Secretarial amount, and they cannot rely on an unsupportable inference to preclude an entry of summary judgment.[8]

For all of these reasons, CITC respectfully requests this Court grant Plaintiff's Motion for Summary Judgment and deny Defendants' Cross-Motion.

[5] *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2191 (2012) (quoting 25 U.S.C. § 450*l*(c) (model agreement § 1(a)(2))).

[6] *Id.* at 2191.

[7] Defendants admit Plaintiff's Material Facts Not in Dispute (Docket 13-2) 1, 2, 3, 5, 9, 10, 11, and 12. Defendants also admit Fact 4 and simply argue it is not material. Defendants' objection to Fact 6 is not well taken because Defendants agree with Plaintiff's assertions regarding the total 2014 contract amount and that the amount included $11,838.50 for facilities-related costs. Defendants object to Fact 7 but do not cite any record evidence to support their contrary assertion that "IHS has always compensated CITC for its facility costs through its Secretarial amount." Defendants' objection to Fact 8 suffers from the same infirmity. Defendants offer no substantive objections to Facts 13 and 14, which quote record evidence.

[8] *Burke v. Gould IV*, 286 F.3d 513, 517 (D.C. Cir. 2002) ("Federal Rule of Civil Procedure 56(e) makes clear, however, that in opposing a motion for summary judgment that is supported as provided in the Rule, the adverse party 'may not rest upon the mere allegations or denials of the adverse party's pleading, but ... by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.'" (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986))).

ARGUMENT

I. THE INCLUSION OF A CATEGORY OF FUNDS IN THE SECRETARIAL PROGRAM AMOUNT DOES NOT MAKE THAT CATEGORY INELIGIBLE FOR ADDITIONAL CONTRACT SUPPORT COST FUNDING.

IHS asserts that the statute makes a "clear delineation between the activities funded by the Secretarial amount and those eligible for CSC funding . . . ."[9] Taking off from that flawed premise, the agency reasons that because a small amount of funding for the "category of facility costs" was included in the original Secretarial amount, CITC cannot ever receive any CSC funding for any additional costs in that category.[10] But the agency is wrong in its premise that an activity cannot be funded both by the Secretarial amount and by contract support costs; indeed, according to the IHS Policy Manual, that is the general rule rather than the exception.[11]

The statute is perfectly clear in defining "[t]he contract support costs that are eligible costs. . . ."[12] "Eligible" contract support costs are defined broadly and include both all manner of "direct program expenses" and all manner of "administrative or other [overhead] expense[s]," so long as the costs are "reasonable and allowable."[13] Subsection (a)(3) contains no exclusion for any costs which are already partly funded by the Secretarial program funding amount. To the

[9] Docket 16 (IHS Opp'n) at 4 (emphasis added). All further citations to Docket 16 are abbreviated as "IHS Opp'n" and all numbers provided refer to the page numbers assigned by the CM/ECF system.

[10] IHS Opp'n 6-7.

[11] *See* Indian Health Manual (IHM) Exh. 6-3-H.

[12] 25 U.S.C. § 450j-1(a)(3). IHS largely ignores § 450j-1(a)(3), enacted in 1994 to expressly define "eligible" contract support costs. It instead quotes the earlier-enacted subsection § 450j-1(a)(2). But, subsection (3) was added purposely to "more fully define the meaning of the term 'contract support costs' as presently used in the Act." S. REP. NO. 103-374, at 8-9 (1994).

[13] 25 U.S.C. § 450j-1(a)(3).

contrary, this subsection recognizes that many such costs are partly funded by the Secretarial amount. This is why the section concludes with the statement that CSC funding "shall not duplicate any funding provided under subsection (a)(1) [defining the Secretarial program funding amount]."[14]

For instance, when IHS is administering a program, it routinely pays for various human resource and personnel services for agency employees, such as payroll and accounting. When that IHS program is contracted to a Tribe, typically those personnel management dollars will be transferred to the Tribe as part of the Secretarial program funding amount. However, the Tribe's personnel services may be (and typically are) more costly than the agency's own personnel expenses. Similarly, a Tribe's payroll costs may be (and usually are) higher than the agency's, especially for costs like health insurance, retirement and other fringe benefits. So long as the Tribe's costs in each of these areas are "reasonable and allowable," subsection 450j-1(a)(3) states that those costs are "eligible" to be paid as contract support costs. Specifically, the amount for personnel costs the agency incurred when it was running the program is transferred to the Tribe as part of the Secretarial amount, and any amount for personnel costs incurred by the Tribe that is in excess of the agency's comparable costs is paid as contract support costs.[15] This is routine practice, and it is therefore routine for a tribal contractor's personnel, procurement, financial management and other administrative services, as well as program employee fringe benefits, to

[14] *Id.*

[15] *See, e.g.*, IHM Exh. 6-3-H ("Fringe benefits have historically constituted the majority of all DCSC [direct contract support costs]. The Agency reviews the documented amounts requested by the awardee and deducts the amount provided as part of the Section 106(a)(1) amount to the awardee.").

be funded partly by the Secretarial amount and partly with contract support cost dollars, precisely as § 450j-1(a)(3) contemplates.[16]

Thus, it is simply untrue, as the agency asserts, that CSC only "cover(s) those costs of contract administration that are unique to Indian tribes and are not part of the PFSA initially operated by the IHS and transferred to a tribe."[17] That view would not only eliminate direct contract support costs that are partially (but not completely) borne by the agency, such as rent or personnel costs where IHS is subsidized by other agencies, but it would also eliminate the need for additional fringe benefits and for <u>any</u> indirect contract support costs—after all, both IHS and Tribes incur fringe benefits and overhead costs and there is nothing uniquely tribal about them.[18]

IHS's position is also flatly contradicted by its own Manual. As the agency points out, "[a] tribe can choose to contract for any portion of a PFSA administered at any level by the IHS, including the HQ level, the Area level, and the local or service unit level."[19] The IHS Manual recognizes that the contractible Secretarial program funding coming from an Area Office or from Headquarters includes a portion of overhead funding because these offices provide some administrative support to the local service units and clinics. But the fact that the Secretarial amount from HQ and Area Offices includes some overhead costs does not disqualify a Tribe from seeking additional CSC for the same types of overhead costs. Instead, the Manual offers a shorthand calculation to determine how much of the HQ and Area level funds are to be classified

[16] *See, e.g.*, IHM § 6-3.2E(2) (showing indirect contract support costs often include financial management, personnel management, records management, office services, etc.).

[17] IHS Opp'n 28.

[18] *See* 25 U.S.C. § 450j-1(a)(3)(A)(ii) (costs eligible for CSC include "any <u>additional</u> administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program . . ." (emphasis added)).

[19] IHS Opp'n 9-10.

as (and considered duplicative of) contract support costs. In this shorthand method, 20% of the HQ and Area Office funds are deemed to cover these types of overhead costs and therefore "[are] considered available for CSC."[20] This 20% portion is then credited to the agency as a dollar-for-dollar offset against the Tribe's total contract support cost need.[21] In short, the IHS Manual, just like the statute, makes perfectly clear that it is not only permissible, but routine, for there to be overlapping categories of costs in payments of both the Secretarial amount and contract support costs. When such overlap occurs, it calls for a dollar-for-dollar credit adjustment to eliminate any duplication in funding; it certainly does not disqualify a whole category of costs from being eligible for CSC funding.

So the core proposition IHS offers here—that the inclusion of a cost item in the Secretarial amount disqualifies that whole category of costs for any contract support cost funding[22]—is new, radical, and contrary to the statute and the agency's own Manual. Indeed, under the agency's logic, the cited Manual provisions must be illegal.

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[20] IHM § 6-3.2F(2).

[21] IHM Exh. 6-3-C. This offset is applied in a similar manner if a Tribe does not wish to use the 80-20 shorthand formula for calculating the credit adjustment amount. In that case, the Manual specifies an alternative procedure for determining duplication: "[Area Office and Headquarters] Tribal shares will be reviewed to identify types of costs that are duplicative of costs that are already included in the awardee's IDC [indirect cost] pool, or are proposed to be funded as DCSC. The costs already in the awardee's IDC pool or DCSC budget will be considered as duplicative of the Tribal shares for purposes of funding IDC for administrative or 'overhead' purposes (Section 106(a)(3)(A)(ii))." IHM § 6-3.2F(1). *See also* IHM Exh. 6-3-B (noting "assumption" in item 2 that an amount of "Tribal shares is similar in nature to costs included in Tribe B's indirect cost pool," and making a corresponding credit adjustment). This language again makes clear that overhead costs can appear both in the Secretarial amount for a Tribe's tribal share of the regional Area Office, and also in the Tribe's contract support cost requirement, subject to a credit adjustment to eliminate any double payment.

[22] IHS Opp'n 4, 26.

Of course, this is not the case. Instead, the agency reviews the Tribe's contract support cost requirement to ensure there is no duplication of funding amounts and it applies an offset or credit for any portion of that administrative funding that is already being paid in the Secretarial amount. This point is made crystal clear in the Manual's discussion of employee fringe benefit costs:

> The Agency totals the amount provided in the Section 106(a)(1) amount [the Secretarial amount] for FICA, health, life and disability insurance, and retirement. To the extent the budgeted Tribal costs are determined to be reasonable and necessary and these costs exceed the amounts the Agency provides for these costs in the Section 106(a)(1) amount, the difference is allowed as a DCSC requirement for the PFSAs transferred.[23]

For purposes relevant here, the same is true for additional facilities funding (though the Manual anticipates that facility funding is usually paid as indirect contract support rather than as direct contact support).[24] All this belies the agency's assertion here that under the Act "PFSA carried on by the Secretary and funded in the Secretarial amount are not also eligible for CSC funding."[25]

Another problem with IHS's new assertion is that it would render superfluous the duplication provision in section 450j-1(a)(3): "except that such [CSC] funding shall not duplicate any funding provided under subsection (a)(1) of this section."[26] Were it the case, as IHS now

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[23] IHM Exh. 6-3-H (emphasis added).

[24] *See, e.g.*, IHM § 6-3.2E(2) ("Categories of costs often considered 'overhead' or 'indirect-type' are generally in the categories of: Management and Administration; Facilities and Facilities Equipment; and General Services and Expenses." (emphasis added)).

[25] IHS Opp'n 11 (discussing 25 U.S.C. § 450j-1(a)(2)).

[26] Notably, 25 U.S.C. § 450j-1(a)(3) speaks to duplication of funding, not to duplication of programs, functions, services, or activities. The Manual likewise provides: "The procedures below are intended to ensure that CSC requirements are accurately identified while avoiding any duplication of funding between CSC and PFSA funding amounts." IHM § 6-3.2B (emphasis added).

asserts, that a category funded with Secretarial program dollars is "not also eligible for CSC funding,"[27] then CSC funding categories could never duplicate Secretarial PFSA funding categories, and subsection (a)(3) would never come in to play. Courts go to great pains to avoid an interpretation that renders a statutory provision superfluous, recognizing that Congress drafts legislation precisely to avoid such redundancies.[28] Although IHS complains that CITC misconstrues the statutory duplication provision,[29] IHS's only answer is to make that language meaningless.

The agency also tries to dodge the perfectly clear legislative history that explains the subsection (a)(3) duplication provision.[30] IHS claims the plain language of the duplication provision is clear, so resorting to the legislative history should not be necessary. But then it quotes § 450j-1(a)(2) and not the subsection (a)(3) duplication provision that is actually at issue.[31] Why? Because to prevail the agency must read the subsection (a)(3) duplication provision to refer to categorical duplication, even though the provision actually says nothing of the kind. The most natural reading of the provision, the one supported by its legislative history, and the one reflected in IHS's own Manual, is that subsection (a)(3) simply calls for a dollar-for-

[27] IHS Opp'n 11.

[28] *U.S. ex rel. Schweizer v. OCÉ N.V.*, 677 F.3d 1228, 1234 (D.C. Cir. 2012) (Court must avoid an interpretation that would render statutory provision "a nullity and thus contravene 'the longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous.'" (quoting *Beck v. Prupis*, 529 U.S. 494 (2000))); IHS Opp'n 25 (Even Defendants acknowledge that "maximum possible effect should be afforded to all statutory provisions" such that "none of those provisions [are] rendered null or void." (citation omitted)).

[29] *See* IHS Opp'n 20.

[30] IHS Opp'n 25-26.

[31] IHS Opp'n 25.

dollar offset, not for disqualifying from CSC funding whole categories of costs, like all facilities costs or all fringe benefits. Contrary to the agency's statement, CITC is not asking "this Court . . . to undo the plain provisions of the ISDEAA,"[32] but rather to apply subsection (a)(3) as written in order to fulfill Congress's clearly stated intent in enacting it—to "assure against any inadvertent double payment of contract support costs which duplicate the Secretarial amount already included in the contract."[33] At a minimum, IHS has not "demonstrate[d] that its reading [of the Act] is clearly required by the statutory language."[34]

Finally, the agency claims that "CITC asks the Court to ignore the funding scheme of the ISDEAA and impermissibly limit agency discretion by compelling IHS to award direct CSC funding to supplement the Secretarial amount."[35] But CITC's request for additional CSC funding in no way limits the agency's discretion to distribute its program funds as it pleases, and accords precisely with the statutory funding scheme. After all, CSC funding is separate and apart from the Secretarial amount.[36] But when it comes to CSC funding, the Secretary possesses no "discretion" to refuse to "award direct CSC funding"—something this Circuit made

[32] IHS Opp'n 26.

[33] 140 CONG. REC. 28,326 (1994) (comments of Sen. McCain regarding proposed amendment of S. 2036) (emphasis added); *see also* 140 CONG. REC. 28,629 (1994) (notes to Committee amendment of H.R. 4842 including similar language).

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

[35] IHS Opp'n 14, *see also id.* at 19 ("[T]he ISDEAA does not support supplementing the Secretarial amount with CSC funding.").

[36] 25 U.S.C. § 450j-1(a)(2) (CSC funding "shall be added" to the Secretarial amount); IHM Exh. 6-3-H(2)(B) ("Section 106(a)(2) requires the Secretary to add CSC to the amount of the program funds the Secretary provides." (emphasis added)).

abundantly clear in *Ramah Navajo School Board, Inc. v. Babbitt.*[37] In adding the requirement for CSC funding, Congress squarely recognized that the funds provided in the Secretarial amount are insufficient for tribal contractors to operate contracted programs—which is precisely why Congress added the contract support cost provisions in the first place.[38] As the relevant Senate Report notes, when 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."[39] And while IHS now complains about being "compel[led] to award direct CSC funding," that is precisely the statutory remedy Congress established—an action "for immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract."[40]

In short, Congress denied IHS all discretion over CSC funding matters and granted this Court remedial jurisdiction to force the agency to fund all contract support cost requirements. That carefully crafted scheme leaves no door open for the agency's claimed discretion to deny CITC direct contract support costs.

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[37] 87 F.3d 1338, 1344 (D.C. Cir. 1996) ("The statute itself reveals that not only did Congress *not* intend to commit allocation decisions to agency discretion, it intended quite the opposite; Congress left the Secretary with as little discretion as feasible in the allocation of CSF [contract support funds].").

[38] S. REP. NO. 103-374, at 9 (1994) ("In the absence of section 106(a)(2) as amended, a tribe would be compelled to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid.").

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

[40] 25 U.S.C. § 450m-1(a) (emphasis added).

II. THERE IS NOTHING UNIQUE ABOUT FACILITY COSTS THAT SUPPORTS NOT AWARDING SUCH COSTS AS CONTRACT SUPPORT COSTS.

IHS asserts that "because providing health services requires facility space for the IHS as well as tribes, the facility costs proposed by CITC, with very rare exception, are always considered part of the PFSA transferred to tribes and funded in the Secretarial amount rather than CSC."[41] The assertion is contrary to the established fact, reflected in the Manual, that facility costs are typically one of the costs covered by a Tribe's indirect contract support costs.[42] So facility costs are funded by contract support costs.[43]

Facility costs are commonly included as part of the Secretarial amount added to a contract because IHS often transfers an actual physical facility to the Tribe for the Tribe's use (or else agrees to lease a facility for the contract).[44] In cases where "the awardee did not receive the funds in the Section 106(a)(1) amount because the facility in question continued to be used to operate IHS or other Tribally operated programs,"— *i.e.* in cases where the Tribe does not receive the physical facility IHS used to provide services—then Tribes are entitled to receive

[41] IHS Opp'n 17; *see also* IHS Opp'n 12 ("[F]acilities costs such as rent/utilities are 'generally not included' and are duplicative because funding for this purpose is provided in the Secretarial amount." (citing IHM Exh. 6-3-H)) .

[42] IHM § 6-3.2E(2) ("Categories of costs often considered 'overhead' or 'indirect-type' are generally in the categories of: Management and Administration; Facilities and Facilities Equipment; and General Services and Expenses." (emphasis added)).

[43] *See* IHM Exh. 6-3-H(2)(F).

[44] *See* 25 U.S.C. § 450j(*l*) (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.).

facilities funding as CSC.[45] Here, IHS never ran this program so it had no facility funding to transfer to CITC.

Section 6-3.2B of the IHS Manual anticipates this less-typical situation and provides that when (as here) the Secretary did not previously operate the program being contracted to a Tribe, duplication is based on the budget the Tribe and IHS negotiate as part of the initial ISDA contract.[46]

> When the [programs] to be contracted have not previously been operated by the IHS, the identification of the duplicative costs will be negotiated based on the program budget submitted by the awardee and a budget from the IHS reflecting the expenditure patterns of how the Secretary would have otherwise operated the [program].[47]

That is exactly what happened here. In 1992, CITC and IHS negotiated the amount of facilities funding that would be included in the Secretarial amount and thus considered duplicative—$11,838.50 to be exact. No one disagrees with that fact, and it does not preclude the agency from adding additional facilities funding as CSC in excess of this amount in future years as the Tribe's facilities costs grow.

IHS tries to assert that Section 6-3.2B means something else entirely—that "[w]here as here, the IHS never operated the PFSA that CITC assumed, it is impossible to have the reduction in PFSA that concerned Congress in the early years of self-determination and resulted in the creation of CSC funding."[48] The agency essentially asserts that when it never operated a program previously, there is no need for a tribal contractor that operates the program to receive

[45] IHM Exh. 6-3-H.

[46] IHM § 6-3.2B.

[47] IHM § 6-3.2B (emphasis added).

[48] IHS Opp'n 22.

any CSC funding at all.[49] But the controlling statute does not define the Secretarial amount differently based on whether or not the Secretary was actually running a program—in either case, the Secretarial amount consists of the funds "the appropriate Secretary would have otherwise provided for the operation of the programs . . . ."[50] Likewise, whether or not the Secretary was running a program at the time of transfer, a Tribe will have additional administrative costs the Secretary would not have to pay from within the program amounts, and these additional costs are by law "eligible" for CSC funding.[51]

III. IHS HAS FAILED TO CLEARLY DEMONSTRATE THAT CITC'S FACILITY FUNDING EVER INCREASED ABOVE THE ORIGINAL $11,838.50, MUCH LESS BY HOW MUCH IT SUPPOSEDLY INCREASED.

IHS asserts that CITC is not entitled to CSC funding for facilities costs because it has received facilities funding in the form of a Secretarial amount that has grown over time.[52] The agency also maintains that "CITC has no entitlement to funds in excess of the Secretarial amount already awarded because, ultimately, allocation of funds to particular programs is committed to agency discretion."[53] But, the agency mischaracterizes CITC's request. CITC is not requesting

[49] IHS Opp'n 22, 26.

[50] 25 U.S.C. § 450j-1(a)(1).

[51] 25 U.S.C. § 450j-1(a)(3).

[52] *See* IHS Opp'n 13 ("CITC denies that it has received any increase in funding for these particular facility costs, beyond what was transferred in 1992, despite admitting that: (a) this activity was among the PFSA transferred and funded in the Secretarial amount in 1992; and (b) the Secretarial amount for the PFSA transferred in 1992 has since increased by 16 times."); IHS Opp'n 16 ("CITC cannot seriously maintain that the Secretarial amount for facilities has been stagnant over a period where the Secretarial amount has been anything but stagnant."); *see also* IHS Opp'n 18, 26.

[53] IHS Opp'n 13; *see also* IHS Opp'n 16 ("Nothing in the ISDEAA can be read to mean that the Agency must provide extra funds for the tribal contractor to increase its program . . . .").

an increase in its Secretarial amount; it is requesting CSC funding which "shall be added" to the Secretarial amount.[54] For this same reason, the *Quechan Tribe* decision, involving a claim for additional Secretarial amount funding, is irrelevant.[55]

IHS also asserts that CITC's position "would presumably result in tribes proposing that the Agency is liable to pay CSC for all PFSA for which the tribe deems the Secretarial amount to be insufficient—a clearly untenable result."[56] But that result is simply not possible—it is contradicted by the statute and by the agency's definition of CSC. After all, CSC is for additional administrative or overhead expenses related directly to the operation of the Federal program, and additional eligible direct program expenses that fall within the statutory definition at section 450j-1(a)(3)(A)(i).[57] Therefore, CITC could not demand more program dollars as direct CSC—*i.e.*, funding to add more counselors to its program—because that would be an expansion of the Federal program, not an administrative cost in support of the program. What CITC is entitled to is reimbursement for the expenses it incurs to house the Federal program that it is operating under the contract—and that is all CITC seeks here.

If the agency takes the position that some of the requested funding duplicates funding already provided in the Secretarial amount,[58] by law the burden squarely falls on the agency to

[54] 25 U.S.C. § 450j-1(a)(2).

[55] IHS Opp'n 13 (citing *Quechan Tribe of the Ft. Yuma Indian Res. v. United States*, Case No. 11-16334, slip op. at 3 (9th Cir. Apr. 1, 2015)).

[56] IHS Opp'n at 20.

[57] IHM § 6.3-2A.

[58] IHS Opp'n at 16 ("As a PFSA funded in the Secretarial amount, the funding for facilities increases with any increase in the Secretarial amount.").

establish just how much facilities funding it has already provided in the Secretarial amount.[59] Here, the agency repeatedly asserts that CITC has already received funding for facilities as part of its Secretarial amount, yet it never establishes the amount of the funding that it claims was paid in addition to the stipulated amount of $11,838.50. In fact, it fails to support its assertion with evidence that IHS has ever provided anything for facilities funding over the original $11,838.50.[60] Instead, the agency claims that it has paid, and continues to pay, whatever CITC needs in the way of facilities costs, even though the agency has no idea what CITC's actual facilities costs are and has no idea how much it has supposedly paid CITC for those costs.[61] That hardly carries the agency's burden of proof to "clearly demonstrate" that all claimed facility costs have already been paid in full.

The agency's assertion that the Secretarial amount has grown over time, and therefore that CITC's facilities funding has automatically grown inside the Secretarial amount, is particularly specious. The agency asserts:

> The amount of Secretarial funding has increased over the years to $1,943,226, as the IHS received Congressional funding increases and transferred increases to contracting tribes (including CITC) for behavioral health programs and inflation. These increases are meant to account for inflation and rising costs of operating all PFSA transferred to CITC. In fact, the costs for all PFSA, including facility costs, continued to be part of the justification for the PFSA funding that CITC received in its Secretarial amount for FY 2014.[62]

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[59] 25 U.S.C. § 450f(e)(1) ("[T]he Secretary [has] the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal . . . .").

[60] *See, e.g.*, IHS Opp'n 5, 11.

[61] Docket 7 (Answer) at 4 ¶ 20 ("Defendant has no knowledge of Plaintiff's actual, total facility costs.").

[62] IHS Opp'n 6. Defendants incorrectly state the Secretarial amount has grown to $1,943,226. That figure is actually the "FY 2014 recurring base" total as shown in the funding document Defendants refer to in their declination letter. *See* R. 1 (Docket 11-1 at 2) (citing Exh. D, FY 2014 Operating Resources Detail #02, dated April 24, 2014). That recurring base includes

IHS provides no basis for this assertion, nor does it point to any "justification" of the amount it claims CITC received for facilities in 2014. In fact, the bulk of the increase in CITC's program funding—approximately $1.5 million of the $1.9 million that CITC receives today—was not a result of any discretionary IHS decision to increase CITC's program funding, but came directly from Congress, which targeted these funds specifically for Alaska substance abuse prevention and treatment programs.[63]

And contrary to its suggestion, IHS does not support all line items within the Secretarial amount equally with across-the-board proportional increases. Instead, when IHS issues modifications to an ISDA contract, it states what each line item increase is for—whether it is "purchased and referred care" funds, "hospital and clinics," "dental," "alcohol," "maintenance and improvement," or "facilities" funding.[64] These specific line item increases align with the agency's budget justifications that are submitted to Congress and that justify IHS's annual appropriation.[65] IHS even separates its congressional budget requests into separate activities, including one for services and a separate one for facilities, and the appropriated funds it receives

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$13,811 of direct "recurring" CSC funding. Exh. D. Thus, the actual FY 2014 Secretarial amount is only $1,929,415. *Id.*

[63] *See* Department of the Interior, Environment, and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241, 1293-94 (2003).

[64] *See, e.g.*, R. 26, 29 (Docket 11-1 at 27, 30) (modifications listing specific sub-sub activities that funds are added to).

[65] *See, e.g.*, INDIAN HEALTH SERV., DEP'T OF HEALTH & HUMAN SERVS., FY 2015 JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES 16 (2014), *available at* http://www.ihs.gov/budgetformulation/includes/themes/newihstheme/documents/FY2015CongressionalJustification.pdf (2015 Budget Justification).

for each activity are maintained in separate accounts.[66] The IHS "Facilities" account includes a specific line item for "Facilities Support," which "provides funding for related Area and Service Unit operating costs, such as utilities, building operation supplies, facilities-related personal property, and biomedical equipment repair and maintenance."[67] This line item also provides "funding for Area and Service Unit staff for facilities-related management activities, operation and maintenance of real property and building systems . . . ."[68] If IHS truly had provided CITC increased funding for facilities support as part of the increases in the Secretarial amount, the funding would appear under this specific line item in CITC's contract documents. Notably, CITC's funding documents show zero funding for this line item.[69]

Even if this were not so, and one indulges the fiction that CITC's facilities funding increased proportionately over time with the growth of the Secretarial amount, simple arithmetic would defeat the assertion that CITC's facilities costs are now fully funded. In 1992, CITC's facilities funding constituted approximately 7.8% ($11,838.50/$150,000) of the budgeted "Secretarial amount" as the agency characterizes it. Today, those facilities support costs account for nearly 25% ($479,040/$1,929,415) of the total Secretarial amount.[70] If all of that increased

[66] *E.g.*, Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 328-29 (2014); *see* 2015 Budget Justification at 61 (showing "Services" account number—75-0390-0-1-551), 149 (showing "Facilities" account number—75-0391-0-1-551).

[67] *Id.* at 164.

[68] *Id.* at 163.

[69] *See* Exh. E (CITC FY 2014 Notice of Payment) (showing $0 for Facilities Support funding). Thus, contrary to Defendants' assertions at paragraphs 6, 7, and 8 in its Response to Plaintiff's Statement of Facts, Docket 16-1 at 2, the only evidence in the record supports CITC's assertion that the agency has never provided more than the stipulated $11,838.50 in facilities support cost funding. No record evidence even suggests (much less clearly demonstrates) otherwise.

[70] *See* IHS Opp. at 16; Exh. D (FY 2014 Operating Resources Detail #02, dated April 24, 2014).

facilities need is to now be covered within the Secretarial amount, it means there has been more than a 17% reduction in program funding over time—exactly the diversion of program funding that Congress intentionally sought to avoid by enacting the contract support cost provisions in the first place.[71]

There can be no doubt that the agency's failure to provide facilities support cost funding 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 on program activities and thereby reducing its program services.[72] IHS dismisses this impact, stating CITC has "opted to expand certain PFSA to the exclusion of other PFSA . . . ."[73] It asserts that a Tribe must make do with the Secretarial amount it receives and that if a "tribal contractor chooses to increase services and expand those services to new locations over the years, the Agency is not required by the statute to pay more than it would use to operate the PFSA itself . . . ."[74] Similarly, IHS claims that "[a]ny 'gap' or 'diversion' within the various PFSA[s that] CITC operates under its

[71] Even taking IHS's proportionality argument at face value, CITC would still be entitled to CSC for its facilities costs that exceed the original 7.8% of today's Secretarial amount—in monetary terms that amounts to over $300,000 per year in additional facilities funding.

[72] Docket 13-2 (Pl. Statement of Facts) at 3 ¶ 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)).

[73] IHS Opp'n 14 (emphasis added). The agency also dismisses Congress's concern that Tribes would have to divert program funds to cover overhead costs, as a concern unique to the "early years of self-determination," and therefore not relevant to CITC now. IHS Opp'n 22. However, the agency fails to acknowledge that it cites a 1994 Committee Report for this proposition, and that CITC began contracting in 1992—at a time when Congress was still very much concerned about the diversion of program funds to pay overhead costs. *See, e.g.*, S. REP. NO. 100-274, at 9 (1987) ("[T]he Committee believes strongly that Indian tribes should not be forced to use their own financial resources to subsidize federal programs.").

[74] IHS Opp'n 15.

ISDEAA agreement results entirely from budgeting decisions that CITC makes as an ISDEAA contractor and does not create additional funding requirements for the IHS."[75]

But all this could be said for any contract support cost—a contractor could always use program funds to pay for all of its administrative costs instead of seeking CSC to pay them—and that is the exact result that Congress sought to avoid, as the Supreme Court recognized.[76] The agency's interpretation clearly goes against Congress's expressed intent in adding the CSC provisions in 1988 and 1994—to protect the program funds so a tribal contractor does not have to reduce its program to pay for its increased administrative costs.[77]

Alternatively, IHS claims that its interpretation is correct because if the funds provided are insufficient, CITC is protected by the "limitation of costs" clause in its contract. Indeed, IHS argues that "the ISDEAA allows CITC to limit the health program it is operating in order to cover all costs of the PFSA, including its facility costs, with the Secretarial amount awarded by the IHS."[78] This is just another way of saying CITC could reduce its program in order to fund its

[75] IHS Opp'n 21; *see also* IHS Opp'n 23.

[76] S. REP. NO. 100-274, at 8 (1987) ("Perhaps the single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts."); *Ramah Navajo Chapter*, 132 S. Ct. at 2186 ("Because of 'concern with Government's past failure adequately to reimburse tribes' indirect administrative costs,' . . . Congress amended ISDA to require the Secretary to contract to pay the 'full amount' of 'contract support costs' related to each self-determination contract, § 450j-1(a)(2), (g)." (internal citation omitted)).

[77] S. REP. NO. 103-374, at 9 (1994) ("Throughout this section the Committee's objective has been 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 section 106(a)(2) as amended, a tribe would be compelled to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid."); *see also Ramah Navajo Chapter*, 132 S. Ct. at 2186.

[78] IHS Opp'n 22.

facility support costs. This is exactly the opposite of the statutory scheme Congress contemplated, and IHS's reliance on the limitation of cost clause for this purpose was long ago rejected by the Supreme Court in the *Cherokee Nation* litigation.[79]

IV. DEFENDANTS CANNOT RELY ON A MISCONSTRUED STATEMENT TAKEN OUT OF CONTEXT AS AN ALTERNATIVE GROUND FOR DECISION WHEN IT NEVER INCLUDED THIS AS A JUSTIFICATION FOR ITS ORIGINAL DECLINATION.

Lastly, the agency argues that an alternate reason for the declination decision, although "not the primary reason for the Agency's decision to decline CITC's proposed direct CSC," was that "the Agency had reason to believe that not all of the requested facility costs were related to its operation of the IHS programs because other non-IHS programs were being run out of the same facilities."[80] Contrary to the agency's assertion, the *Pyramid Lake* case is exactly on point here because the Secretary never raised this argument as a reason for the declination and thus cannot raise it now.[81]

The agency claims that it should not be faulted "[s]imply because the Agency made the decision concise and to the point but did not use the vocabulary the Plaintiff uses and did not feel compelled to draft a lengthy decision letter that amounts to a legal brief[.]"[82] But that is exactly the point—the Secretary failed to include any assertion that indicated she believed the amounts

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[79] *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 639-40 (2005) ("The Act also reflects a congressional concern with Government's past failure adequately to reimburse tribes' indirect administrative costs and a congressional decision to require payment of those costs in the future. *See, e. g.*, § 450j-1(g); see also §§ 450j-1(a), (d)(2). The specific statutory language to which the Government points—stating that tribes need not spend funds 'in excess of the amount of funds awarded,' § 450*l*(c) (Model Agreement § 1(b)(5))—does not help the Government.").

[80] IHS Opp'n 7; *see also* IHS Opp'n 19.

[81] *Pyramid Lake Paiute Tribe v. Burwell*, No. 1:13-cv-1771, at *13 (D.D.C. Oct. 7, 2014).

[82] IHS Opp'n 24.

requested by CITC related to non-IHS programs that were being run out of the same facilities. Not only does the Secretary fail to adequately "explain the reasons for a declination"[83] and thereby fail to meet her burden to "clearly demonstrat[e] the validity of the grounds for declining the contract proposal,"[84] but she failed to articulate this argument at all.

The agency claims it properly made this argument because of this one sentence in the decision letter: "CITC acknowledged in a December 21, 2012 email to Burton Humphrey, AANHS Senior Contracting Officer, (copy enclosed) that '...each program pays for their space respectively.'"[85] The declination letter did not elaborate on this sentence or in any way explain it, nor was a copy of the email quoted in the sentence included in the administrative record.

The agency's reference to one sentence in the "Discussion" section (but notably not the "Decision" section) of the declination letter that quotes from a separate email (that was not provided) and that says nothing about non-IHS programs is insufficient as an explanation for the declination. Moreover, the email is not the acknowledgment the agency claims it to be; when read in context, it is actually a simple explanation of why CITC requests facilities support costs as part of its direct CSC requirement, instead of part of its indirect CSC requirement.[86] That is, unlike many other tribal contractors that pool all of their facilities costs for all operations into a single indirect cost pool, and therefore receive funding for these costs as part of their indirect cost requirement, CITC requires each program to pay for its space separately. Since these costs can be tied directly to each program, CITC classifies them as direct contract support costs, rather

[83] *Pyramid Lake Paiute Tribe*, No. 1:13-cv-1771, at *9.

[84] 25 U.S.C. § 450f(e)(1).

[85] IHS Opp'n 7; *see also* R. 2 (Docket 11-1 at 3).

[86] *See* Exh. F (December 21, 2012 email from Amy Fredeen to Burton Humphrey).

than indirect costs.[87] Accordingly, CITC requested that the IHS program pay for the IHS facilities costs as direct CSC.

The sentence IHS now relies upon says nothing about non-IHS programs, despite the agency's assertion otherwise. If IHS had been truly concerned that the amount requested by CITC included funding for non-IHS programs, this issue should have been raised at the time and clearly explained in the declination letter. The quote that "each program pays for its space respectively" does not even come close to translating into an argument that the cost figure provided by CITC was too high or was otherwise impermissible. In any event, even if this concern could have impacted the amount in question and whether CITC would receive the full amount it seeks, it would not in any way impact CITC's underlying entitlement to direct CSC funding for facilities support costs.

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.

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[87] IHM § 6-3.2D.

Respectfully submitted this 24th day of April 2015.

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