UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COOK INLET TRIBAL COUNCIL, INC., 3600 San Jeronimo Drive Anchorage, Alaska 99508 Plaintiff, v. CHRISTOPHER MANDREGAN, JR., Director, Alaska Area Office, Indian Health Service and SYLVIA MATHEWS BURWELL, Secretary, U.S. Department of Health and Human Services and UNITED STATES OF AMERICA, Defendants.	)	Civil Action No. 1:14-cv-01835-EGS (ECF) Honorable Judge Sullivan

REPLY IN SUPPORT OF DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

The Indian Health Service, United States Department of Health and Human Services ("IHS" or "Agency") properly denied the proposal by Plaintiff, Cook Inlet Tribal Council, Inc., ("Plaintiff" or "CITC"), for contract support costs ("CSC") funding in the amount of $479,040 for facility costs. The Indian Self-Determination and Education Assistance Act ("ISDEAA") precludes payment of CSC funding for such costs, which are related to an activity normally carried on by the IHS and funded in Plaintiff's Secretarial amount. Therefore, the costs cannot

also be funded as direct CSC under the ISDEAA, and the IHS properly declined Plaintiff's proposal because it exceeds the applicable funding level. 25 U.S.C. § 450f(a)-(b).

ARGUMENT

1. CSC Funding is Not Authorized for Activities Normally Carried on by the IHS (on Behalf of the Secretary) because Such Activities are Funded through the Secretarial Amount

When Congress amended the ISDEAA in 1988 to authorize CSC funding for the first time, it plainly defined CSC funding as available only for those activities required for contract compliance and prudent management that normally are not carried on by the IHS.[1] The only exception, which is also set out in the same provision, is for those instances where an activity normally is carried on by the IHS but the IHS did not transfer any of the related funding as part of the Secretarial amount.[2] The statute clearly distinguishes *activities* funded through the Secretarial amount from *activities* that may be eligible for CSC. Without providing any other interpretation, Plaintiff dismisses the plain language of the ISDEAA as a "categorical duplication" and argues that the IHS is limited to a dollar-for-dollar offset of CITC's alleged facility costs against the specific amount included for such costs in the Secretarial amount.[3] Yet, Plaintiff clearly bases its claim on an assertion that the Secretarial amount is "insufficient" and

[1] 25 U.S.C § 450j-1(a)(2) (authorizing an amount of CSC for "*activities* which must be carried on by a tribal organization . . . to ensure compliance with the terms of the contract and prudent management, *but which*—(A) *normally* are not carried on by the respective Secretary . . .; or (B) are provided by the Secretary . . . from resources other than those under contract" (emphases added)). The ISDEAA further provides that the costs for such activities must be reasonable. *Id.*

[2] *Id.* Legal fees are an example of an activity for which related funding was not transferred in the Secretarial amount because the Agency covers such activities from resources other than those under contract. Indian Health Manual (IHM), pt. 6, ch. 3, ex. 6-3-H, at 20. Although available at http://www.ihs.gov/ihm/index.cfm?module=dsp_ihm_pc_p6c3, the IHM is attached here as Exhibit 1 in order to allow for more specific references to particular sections and page numbers.

[3] Docket 18 (Pl.'s Reply), at n.2, 4-11.

also concedes that it cannot demand IHS supplement the Secretarial amount with CSC.[4] This concession recognizes the plain language of the ISDEAA, which does not authorize CSC for activities normally carried on by the IHS and funded through the Secretarial amount. Nevertheless, Plaintiff asks the Court to find that the ISDEAA authorizes CSC funding to expand its Federal program. Even if the Court were to consider other factors, such as legislative history and the IHS CSC Policy, they only serve to further support Defendants' longstanding position that CSC funding is not authorized for activities normally carried on by the IHS.

a. The Court Need Look No Further than the Plain Language of 25 U.S.C. § 450j-1(a)(2) to Determine that the ISDEAA Does not Authorize CSC to Supplement Funding for Activities Normally Carried on by the IHS

The plain language of the ISDEAA is clear: CSC funding is authorized only for "*activities which* must be carried on by a tribal organization . . . to ensure compliance with the terms of the contract and prudent management, *but which*—(A) *normally* are not carried on by the respective Secretary . . .; or (B) are provided by the Secretary . . . from resources other than those under contract."[5] While Plaintiff concedes this limitation for some programs, functions, services, and activities (PFSA),[6] it nonetheless contests the plain meaning of § 450j-1(a)(2) to avoid its application in this case. Plaintiff cites only to legislative history and the IHS CSC Policy for what it characterizes as supporting a contrary interpretation. But where, as here, the

[4] *See* Compl. ¶ 34 ("the $11,838.50 included as part of the Secretarial amount in 1992 is wholly insufficient"); Pl.'s Reply, at 15 ("CITC could not demand more program dollars as direct CSC . . . because that would be an expansion of the Federal program").

[5] 25 U.S.C § 450j-1(a)(2) (emphases added).

[6] Pl.'s Reply, at 15 (acknowledging this limitation would preclude CSC funding for hiring additional counselors). Plaintiff's seemingly arbitrary distinction between what it would consider a PFSA (counselors) and what it apparently does not (facility costs associated with a residential treatment program) is puzzling and unsupported by the law.

language of the statute is clear, courts are bound by the statute and need look no further.[7] The language in § 450j-1(a)(2) is open to only one interpretation: activities normally carried on by the IHS are not eligible for CSC funding, unless the IHS did not transfer any of the related funds as part of the Secretarial amount.

To avoid that conclusion, Plaintiff argues that the authority in § 450j-1(a)(2), if read consistently with its plain meaning, would render superfluous the later-enacted prohibition against duplication that was codified at § 450j-1(a)(3).[8] To the contrary, the later-enacted provision can be read together with § 450j-1(a)(2) to affirm the importance of the ISDEAA's prohibition against funding activities through both the Secretarial amount and CSC funding.[9] Moreover, it is Plaintiff's interpretation of § 450j-1(a)(3) that would render § 450j-1(a)(2) superfluous. Indeed, Plaintiff fails to cite to subparagraphs (A) and (B) of § 450j-1(a)(2) throughout its pleadings in this case, let alone to offer any alternative interpretation of the language authorizing CSC only for activities normally not carried on by the IHS.[10] By completely omitting any discussion of nearly half of § 450j-1(a)(2) and instead relying entirely on § 450j-1(a)(3) for its position, Plaintiff would have this Court render the plain language of §

[7] *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (explaining that the Indian "canons do not determine how to read this statute"); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (*quoting Rubin v. United States*, 449 U.S. 424, 430 (1981)); *Avco Corp. v. United States Dep't of Justice*, 884 F.2d 621, 623 (D.C. Cir. 1989). Consistent with *Chickasaw Nation*, the Indian canon does not compel a different result. 534 U.S. at 94 ("[T]hese canons do not determine how to read this statute. For one thing, canons are not mandatory rules. They are guides that 'need not be conclusive.'" (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001))); *see also Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2199 (Roberts, C.J., dissenting) ("[A] provision can be construed 'liberally' as opposed to 'strictly' only when there is some ambiguity to construe.").

[8] Pl.'s Reply, at 8-9.

[9] *Conn. Nat'l Bank*, 503 U.S. at 253 ("[r]edundancies across statutes are not unusual events in drafting") (*citing Wood v. United States*, 41 U.S. 342, 363 (1842) (instructing that enactments which are repetitive of previously adopted legislation "may be merely affirmative, or cumulative or auxiliary")).

[10] *See* Compl. ¶ 23; Docket 13-1 (Pl.'s Motion), at 4, 5, 11, 12, 15; Pl.'s Reply, at 2, 10 n.36, 15.

450j-1(a)(2) *wholly* superfluous and perhaps even meaningless given its interpretation of the duplication provision in § 450j-1(a)(3).[11] Under Plaintiff's interpretation, not only would § 450j-1(a)(2) be unnecessary and conflict with § 450j-1(a)(3), but CSC funding itself would be unnecessary if tribes could compel additional funding for PFSA funded under § 450j-1(a)(1). If Congress meant to simply increase funding for the activities already funded under § 450j-1(a)(1), it would have amended the former section instead of creating an entirely new, restricted category of funding. Rather than render § 450j-1(a)(2) meaningless, the later-enacted provision is best read as affirmation that Congress intended to fund costs for activities normally carried on by the IHS through the Secretarial amount and did not intend for CSC to cover the same activities or to serve as a supplemental source of funds to expand the Secretarial amount or the Federal program. Indeed, Plaintiff ultimately concedes this interpretation is correct.[12]

b. Legislative History Further Supports the Plain Reading that the ISDEAA Does not Authorize CSC Funding for Activities Normally Carried on by the IHS

Contrary to Plaintiff's assertion, the legislative history only serves to support the conclusion that activities normally carried on by the IHS and funded in the Secretarial amount are not activities that can also be funded with CSC. This becomes apparent when one considers discussions in the legislative history regarding: (a) the purpose of CSC funding; (b) examples of activities that gave rise to the concerns underlying the enactment of § 450j-1(a)(2); and (c) concerns that all activities carried on by the IHS must be funded through the Secretarial amount rather than as CSC.

[11] *See Conn. Nat'l Bank*, 503 U.S. at 253.

[12] Pl.'s Reply, at 15 ("CITC could not demand more program dollars as direct CSC . . . because that would be an expansion of the Federal program").

First, the purpose of CSC funding is clear: to prevent tribes from having to divert funding used by the IHS to fund PFSA in order for the tribe to fund activities not performed by the IHS but required of the tribe for contract administration and prudent management.[13] An underlying concern was that self-determination would be hindered if, upon transfer of the PFSA from the IHS to a tribe, the PFSA was necessarily diminished because of such diversion.[14] Such concern is wholly inapplicable to the situation here where, after more than 20 years of tribal administration of the PFSA under self-determination, a tribe asserts the Secretarial amount awarded has become insufficient to maintain some aspect of the PFSA at the level chosen by the tribe during its administration of the PFSA. Plaintiff exercised its self-determination rights in 1992, received (and continues to receive) the Secretarial amount (including increases) for activities normally carried on by the IHS, including facility costs, and cannot compel the IHS to award additional funding to supplement that Secretarial amount 22 years later. Any concern that the Secretarial funding, which has increased from $150,000 to $1.9 million,[15] will somehow be diverted for contract administration or that the PFSA will diminish as compared to the Federal PFSA cannot hold water given that the program has been under tribal administration for 22 years.

[13] S. REP. NO. 100-274, at 8-9, 13 (1987) (discussing federally-mandated requirements and liability insurance as examples of administrative requirements that tribes were being required to fund by diverting funds from the programs); *see also* 140 CONG. REC. H11140-01, H11144 (daily ed. Oct. 6, 1994) ("[T]he Committee's objective has been to assure that there is no diminution in programs resources *when [PFSA] are transferred to tribal operation*." (emphasis added)); S. REP. NO. 103-374, at 9 (1994) (providing similar background for a Senate bill that was not ultimately passed).

[14] S. REP. NO. 100-274, at 8 (characterizing underfunding as "[p]erhaps the single most serious problem with implementation of the Indian self-determination policy").

[15] *See, e.g.*, Compl. ¶ 18; Docket 13-2 (Pl.'s Statement of Facts), ¶¶ 3, 6; Docket 19-1 (Pl.'s Response to Defendants' Statement of Facts), ¶ 13. As indicated in Plaintiff's Response to Defendants' Statement of Facts, ¶ 13 contained an error, identifying the Secretarial funding as $1,943,226 instead of $1,929,415. *Id.* The parties agree that the Secretarial amount awarded was $1,929,415.

Second, when one considers the types of costs that caused concern for Congress, it becomes even more evident that CSC funding is not authorized for the facility costs proposed by Plaintiff. Congress expressed concern with administrative activities such as "federally-mandated" audits, as well as liability insurance that tribes were required to obtain prior to extension of the Federal Tort Claims Act to activities performed under ISDEAA agreements.[16] In addition, agencies operating under the ISDEAA initially required contract and program reporting that Congress thought "require[d] sophisticated and costly management systems" that should not be funded at the expense of the health care PFSA transferred in the ISDEAA agreement.[17] Such contract administration requirements are entirely distinct from facility costs for a residential treatment program that, if carried on by the IHS, the Agency would also be required to carry on and fund. Plaintiff attempts to characterize the costs as part of "contract administration," rather than part of the PFSA transferred and funded through the Secretarial amount. Plaintiff likely attempts this argument because, by its own admission, funding costs that are part of the "program" would be an impermissible expansion of the Federal program, *i.e.*, an impermissible supplement to the Secretarial amount.[18] In doing so, Plaintiff attempts to apply § 450j-1(a)(2) to select activities in order to obtain CSC funding for other activities, thereby expanding the program. Plaintiff's position is not internally consistent, nor is it consistent with the ISDEAA or legislative history, which discusses unique contract administration requirements such as audits and systems necessary for contract reporting requirements, not activities like

[16] S. REP. NO. 100-274, at 8-9.

[17] S. REP. NO. 100-274, at 8-9. *See also Indian Self-Determination and Education Assistance Act: Oversight Hearing Before the Subcomm. on Native American Affairs of the H. Comm. on Natural Resources*, 103d Cong. 91 (1994) (testimony of Lloyd Benton Miller) ("tribal contractors see their contract support costs driven up to pay for the preparation of often mindless reports that serve no essential tribal purpose").

[18] Pl.'s Reply, at 15 (referencing counselors as an example of a "program" cost).

facility costs that are among the PFSA normally carried on by the IHS and transferred to the tribe with related funding in the Secretarial amount.[19]

Finally, Congress and others expressed concern that PFSA carried on by the IHS must be funded through the Secretarial amount and not as CSC.[20] Indeed, Congress recognized the concern that CSC "created an open-ended uncontrollable, entitlement fund, the size and distribution of which depended solely on the initiative and ingenuity of each tribe."[21] Plaintiff's argument would likely make this concern a reality. While recognizing the Agency's necessary discretion in determining Secretarial funding, Plaintiff argues that the IHS has no discretion regarding CSC[22]—a position that would render meaningless any discretion about the Secretarial amount by allowing tribes to determine what costs are funded as CSC, regardless of whether the activities are normally carried on by the IHS and the related funding is transferred through the Secretarial amount. Congress resolved this concern by amending the ISDEAA: (1) to ensure that the Secretarial amount included all of the funding used by the IHS for activities it normally carried on when such activities transfer to tribes; and (2) to authorize CSC for activities that must be carried on by tribes but are not normally carried on by the agencies, or for unique instances in which the IHS did not transfer the related funding.[23]

[19] 25 U.S.C. § 450j-1(a)(1)-(2); S. REP. NO. 100-274, at 8-9.

[20] *See, e.g., Indian Self-Determination and Education Assistance Act: Oversight Hearing Before the Subcomm. on Native American Affairs of the H. Comm. on Natural Resources*, 103d Cong. 88 (1994) (testimony of Lloyd Benton Miller) (discussing how failure to transfer funding for activities normally carried on by the agencies would "lead[ ] to a higher tribal need for 'contract support costs' to perform these functions").

[21] S. REP. NO. 100-274, n.10 (citing a report by the American Indian Law Center).

[22] Pl.'s Reply, at 18.

[23] 25 U.S.C. § 450j-1(a)(1)-(2), as amended by Pub. L. No. 100-472, 102 Stat. 2292 (1988).

c. The IHS CSC Policy is Consistent with and Provides Further Support for Defendants' Interpretation of 25 U.S.C. § 450j-1(a)(2)

The IHS CSC Policy is replete with guidance identifying activities that are excluded from eligibility for CSC funding because the activities are part of the costs funded in the Secretarial amount. Indeed, guidance on which costs can be funded as direct CSC includes a table identifying numerous examples that are categorically ineligible for CSC funding because they are funded through the Secretarial amount.[24] The IHS CSC Policy explains that several categories, e.g., mail, phone, and printing costs, may have been historically funded as CSC "because the IHS centrally managed the costs" and initially did not transfer the related funding as part of the Secretarial amount; therefore, CSC funding was authorized for such costs under § 450j-1(a)(2)(B).[25] Once the IHS transferred the activities to the Area Offices and the related funding became available for inclusion in the Secretarial amount, however, the IHS determined such activities could no longer be funded as CSC.[26]

The IHS CSC Policy lists many examples of activities that are treated in the same manner when determining direct CSC, including: salaries, travel/vehicle lease, supplies and drugs, postage, printing and duplication, communications, training, equipment purchase and maintenance, and rent/utilities.[27] Indeed, of the thirteen specific activities identified in the

[24] IHM ex. 6-3-H, at 18-27 (explaining, for example, that rent/utilities have been allowed only "in extremely rare circumstances when the awardee did not receive the funds in the [Secretarial] amount because the facility in question continued to be used to operate IHS or other Tribally operated programs"). The IHS CSC Policy does provide exceptions for an activity not carried on by the IHS or not transferred as part of a particular tribe's Secretarial amount, *e.g.*, discipline-specific training a tribe must provide to comply with requirements not applicable to the Federal government. *Id.* ex. 6-3-H, at 26.

[25] *Id.* ex. 6-3-H, at 20. Contrary to Plaintiff's suggestion that Defendants' position in this case is "new," Pl.'s Reply at 8, the IHS CSC Policy first took effect in 1992 and has been amended periodically, through consultation with tribes, and most recently in 2007. *Id.* § 6-3.1B.

[26] *Id.* ex. 6-3-H, at 20.

[27] *Id.* ex. 6-3-H, at 18-27.

guidance on direct CSC funding, ten are categorically excluded because the activities (identified as "line items" in the IHS CSC Policy) are funded through the Secretarial amount.[28] Notably, one of those activities is facility costs, specifically rent/utilities, which the IHS CSC Policy provides "is generally not included" as direct CSC.[29] The IHS CSC Policy further explains that such costs have "been allowed *in extremely rare circumstances* when the awardee did not receive the funds in the [Secretarial] amount *because the facility in question continued to be used to operate IHS or other Tribally operated programs*."[30] Of the remaining three specific activities, the IHS CSC Policy makes clear that two—insurance (general) and malpractice liability insurance—may be considered for CSC funding *if* the coverage does not duplicate the Federal Tort Claims Act coverage that is now extended to ISDEAA contractors.[31] The final activity, "fringe benefits," is admittedly treated differently than the other twelve. Contrary to Plaintiff's assertion,[32] however, the treatment of fringe benefits is the exception rather than the rule. Fringe benefits actually include a group of costs, only some of which represent activities not carried on by the IHS or not provided as part of the Secretarial amount.[33] In this instance, the IHS CSC Policy identifies an approach for determining the amount of all fringe benefits, comparing the total of the IHS fringe benefits to the tribal fringe benefits, and providing CSC funding for the

[28] *Id.* ex. 6-3-H, at 21-27 (allowing, however, that exceptions may apply upon a showing that the IHS did not actually transfer any funding to the tribe for the related activity).

[29] *Id.* ex. 6-3-H, at 27.

[30] *Id.* (further explaining that such costs are allowed as direct CSC only when space is being divided) (emphases added).

[31] *Id.* ex. 6-3-H, at 21-27.

[32] Pl.'s Reply, at 5-7.

[33] IHM ex. 6-3-H, at 22-23 (listing five components of fringe benefits and explaining that two elements, workers compensation insurance and unemployment insurance, are "not provided as part of the [Secretarial] amount").

difference.[34] Through this calculation, the IHS applies a dollar-for-dollar offset for the entire activity, only part of which represents activities transferred and funded through the Secretarial amount. Contrary to Plaintiff's assertion, however, this is the lone exception to the general rule for every other activity identified by the IHS, which is that activities normally carried on by the IHS are considered ineligible for direct CSC funding.[35]

Plaintiff mischaracterizes other provisions in the IHS CSC Policy that discuss determining an appropriate amount that represents duplicative activities, primarily with regard to indirect CSC (which is not at issue here). The provisions are consistent with the general rule that the ISDEAA does not authorize CSC funding for activities normally carried on by the IHS and funded through the Secretarial amount. For example, guidance on determining duplication in the Area and Headquarters PFSA (or "tribal shares") is clear that, under Alternative A, the shares are "reviewed to identify *types costs* [sic] that are duplicative" and that "the review will consider . . . the *cost category labels* (travel, supplies, etc.)."[36] Plaintiff is correct that Alternative B does not perform this categorical analysis and instead allows a numerical calculation called the "80/20" split, whereby twenty percent of the amount of Area and Headquarters PFSA awarded is considered to represent "duplicative" activities and is credited to the Agency as payment for administrative costs, thereby reducing the amount of the tribe's costs that are eligible for CSC funding.[37] Again, though, this does not establish the general rule that Plaintiff alleges. To the contrary, Alternative B is based on a cost study of Area and Headquarters PFSA, in which the IHS determined that the 80/20 split was an acceptable alternative to performing the categorical

[34] *Id.*

[35] *Id.* at ex. 6-3-H, at18-27.

[36] *Id.* § 6-3.2F(1) (emphases added).

[37] *Id.* § 6-3.2F(2); ex. 6-3-C.

analysis in every case because it represented the typical split between program costs and those that are eligible for CSC.[38]

Thus, based on the plain language of the ISDEAA, as well as legislative history and the IHS CSC Policy, it is clear that CSC funding is not authorized for activities carried on by the IHS and that, therefore, are funded through the Secretarial amount. CSC was not authorized to supplement the Secretarial funding and enlarge the Federal program. Indeed, despite all arguments to the contrary, Plaintiff ultimately agrees with this interpretation of § 450j-1(a), conceding that "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."[39]

2. Plaintiff's PFSA and, Accordingly, the Secretarial Amount Includes Funding for Facilities, and the Federal Program Cannot Be Expanded with CSC

Plaintiff ultimately concedes that it cannot use the CSC funding authority to expand the Federal program.[40] Plaintiff also concedes that facility costs are funded through the Secretarial

[38] *Id.* § 6-3.2F(2). Similarly, the IHS will identify a dollar amount that represents duplicative activities when negotiating indirect CSC (which is not at issue in this case). As discussed above, the IHS has developed guidance that identifies particular activities as not eligible for CSC because those activities are normally carried on by the IHS and funded through the Secretarial amount; this is the general approach for direct CSC. In the case of indirect CSC, such a straight-forward approach may be more difficult because any potentially duplicative activities are typically in an indirect cost pool and incorporated into an indirect cost rate that is negotiated between the tribe and its cognizant agency (not the IHS); because the costs related to the IHS program are pooled with costs related to other, non-IHS programs, identifying and removing the activities already funded in the Secretarial amount is more challenging. The IHS CSC Policy addresses the principle of duplication in this context by calculating the amount of Secretarial funding for activities in the tribe's indirect cost pool and crediting such amounts as indirect cost payments made through the Secretarial amount; any additional indirect costs above that amount are then eligible for indirect CSC funding. *See* IHM § 6-3.2B. For example, Plaintiff has included activities such as utilities, postage, and telephone in its indirect cost pool, *see, e.g.*, Administrative Record (AR) at 000240, and the IHS CSC Policy would anticipate an appropriate adjustment if the costs are related to activities normally carried on by the IHS and already funded in the Secretarial amount. The analysis is not as straight-forward as for the direct costs at issue in this case, however, for the indirect costs are pooled because the activities support not only the IHS PFSA but all of the programs listed at AR 000237-00238.

[39] Pl.'s Reply, at 15.

[40] *Id.*

amount.[41] And yet, Plaintiff proceeds through myriad arguments that the IHS must still fund a potentially unlimited amount of facility costs as direct CSC and that IHS cannot decline to award the direct CSC as proposed.[42] Plaintiff's inconsistent, circular arguments, which ultimately attempt to compel the IHS to award direct CSC in order to supplement its Secretarial amount, cannot be supported.

Plaintiff attempts to suggest that the facility costs are not "program" costs to which the limitation of § 450j-1(a)(2) applies and instead are "administrative cost[s] in support of the program."[43] Such a claim is inconsistent with Plaintiff's own pleadings, as well as the contract between the parties. As already discussed, Plaintiff concedes that IHS funded facility costs as part of the Secretarial amount.[44] The Secretarial amount is for PFSA, all of which are part of the program for which a tribe assumes operation. In addition, the contract is clear that the PFSA includes a *residential* treatment program,[45] which necessarily requires a facility in which clients will reside during their treatment. Moreover, the IHS CSC Policy makes clear that in nearly all circumstances, such facility costs are transferred in the Secretarial amount and not eligible for direct CSC funding.[46] There seems to be little, if any, valid dispute that the facility costs proposed are part of the PFSA the IHS would be required to carry on if it operated such a program. Similarly, there is no comparison between such facility costs and the "contract

[41] Compl. ¶¶ 18, 34; Pl.'s Statement of Facts, ¶¶ 4, 6.

[42] Pl.'s Reply, at 16-21.

[43] *Id.* at 15.

[44] Compl. ¶¶ 18, 34; Pl.'s Statement of Facts, ¶¶ 4, 6.

[45] Administrative Record (AR), at 000032-000036.

[46] IHM ex. 6-3-H, at 27 (explaining that the rare exception in which direct CSC was authorized involved a scenario in which the IHS continued to operate the facility in support of other PFSA and, therefore, was not able to transfer any funds for lease/utility costs in the Secretarial amount because the IHS continued to need those funds for its continued operation of the facility).

administration" requirements, such as audits and contractual reporting requirements, that Congress discussed when expressing its concern that the Secretarial amount not be diverted to fund such requirements.[47]

Despite the record supporting Defendants' position, Plaintiff makes an unprecedented argument that the IHS has no discretion to determine CSC or to decline a CSC proposal pursuant to 25 U.S.C. § 450f because the amount of CSC proposed by the tribe exceeds the applicable funding level, *i.e.*, the amount authorized by the ISDEAA.[48] Plaintiff cites to *Ramah Navajo School Board, Inc. v. Babbitt* to suggest that the courts have considered and resolved the issue in this case.[49] *Ramah Navajo School Board* is inapplicable here because the issue in that case related to allocation of a limited appropriation for CSC amongst tribal contractors by the Department of the Interior, not the calculation of the amount of a tribe's CSC under § 450j-1(a)(2).[50] This case does not involve an allocation decision comparable to the one at issue in *Ramah Navajo School Board* and, even if it did, the ruling is no longer valid given the Supreme Court's affirmation that "the ability to direct [CSC] funds was 'committed to agency discretion by law.'"[51] This case raises a unique issue, yet to be resolved by any court, regarding whether activities carried on by the IHS and transferred with the related funding in the Secretarial amount can also be funded as CSC under § 450j-1(a)(2). Moreover, it is incomprehensible that the IHS

[47] *Supra*.

[48] Pl.'s Reply, at 10-11.

[49] *Id.* (citing *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir 1996), for the proposition that "Congress left the Secretary with as little discretion as feasible in the allocation of [CSC].").

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

[51] *Ramah Navajo Chapter*, 132 S. Ct. at 2190 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993)).

is authorized "to distribute its *program* funds as it pleases," as Plaintiff concedes,[52] but has no discretion to apply that determination to the calculation of CSC. Finally, nothing in the ISDEAA suggests that the calculation of CSC funding is exempt from the declination provision of the ISDEAA. To the contrary, the ISDEAA specifically authorizes a declination on the ground that the amount proposed "is in excess of the applicable funding level for the contract, as determined under section 450j-1(a)"—there can be no dispute that this applies to § 450j-1(a)(2).[53]

Plaintiff points to other irrelevant factors, including: that Plaintiff's particular programs were never operated by the IHS and were first operated by Plaintiff, the allegation that the IHS cannot show how much facility funding has been provided beyond the amount initially awarded, the 2004 earmark that accounts for much of the increase in Plaintiff's Secretarial amount, and the existence of two appropriations accounts for the IHS.[54] Many of Plaintiffs arguments are misleading, and all of these points are irrelevant to the issue before the Court. For example, when calculating CSC and determining duplication, the IHS CSC Policy addresses the situation where the Agency did not previously operate the PFSA to ensure that new programs being carried on by tribes are treated consistently with those transferred to tribes from Federal operation; in fact, this supports Defendants' position that the "activities" are not eligible as CSC because the Secretarial amount provides funding for those activities in any case.[55] In addition,

[52] Pl.'s Reply, at 10 (emphasis in original).

[53] 25 U.S.C. § 450f(a)(2)(D). In addition, legislative history makes clear that CSC was to be negotiated and is not an amount dictated by tribes. 140 Cong. Rec. H11140-01, H11144 ("The amendment also mandates *the negotiation* of [CSC] funding needs with the Secretary. . . ." (emphasis added)).

[54] *See, e.g.*, Pl.'s Reply, at 16-18. Interestingly, Plaintiff also contends that the ISDEAA authorizes tribal contractors to compel the IHS to award a lease and to provide facilities compensation through another provision, 25 U.S.C. § 450j(*l*). The meaning of that provision is at issue in another case before the District Court, *Maniilaq Assoc. v. Burwell*, Case No. 15-152, but Plaintiff's assertion is relevant here because it appears to suggest such costs can be funded three times—through §§ 450j(*l*), 450j-1(a)(1), and 450j-1(a)(2). Certainly, the ISDEAA is clear that such duplication is not permissible.

[55] IHM § 6-3.2B; ex. 6-3-H, at 18.

Plaintiff's argument regarding the specific amount included in the Secretarial amount for facility costs is not a material fact because the tribal contractor is required to operate all PFSA from within the Secretarial amount awarded and cannot compel the IHS to supplement the amount for any PFSA with CSC funding; in Plaintiff's case, its Secretarial amount includes substantial increases since 1992, much of which was made possible by an earmarked appropriation in 2004,[56] and all of which Plaintiff, through self-determination, must decide how to administer amongst the various PFSA of its residential treatment center.[57] Finally, Plaintiff mischaracterizes the separate facilities appropriation, which generally is authorized specifically for purposes such as facilities construction and is awarded pursuant to separate agreements under the ISDEAA;[58] facility costs of the nature sought by Plaintiff are funded through the services appropriation and, typically, the "H&C" line of the IHS budget.[59] Thus, neither the "new" nature of Plaintiff's program when it first contracted in 1992, the specific amount included in the

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[56] *See* Dep't of the Interior & Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241, 1294 (2003) (providing a total of $15 million "for alcohol control, enforcement, prevention, treatment, sobriety and wellness, and education in Alaska to be distributed as direct lump sum payments as follows: . . . (c) $6,000,000 to be divided as follows among the following Alaska Native regional organizations to provide substance abuse treatment and prevention programs . . . (2) $1,500,000 for Cook Inlet Tribal Council's substance abuse prevention and treatment programs").

[57] *See* 25 U.S.C. § 450f(a) (authorizing self-determination contracts for tribes "to plan, conduct, and administer programs or portions thereof" and identifying the "programs, functions, services, or activities" that can be contracted); *see also, e.g.*, AR at 000032-000038 (describing various goals and objectives of Plaintiff's residential treatment facility).

[58] *Cf.* Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 329 (2014) (authorizing the facilities appropriation "[f]or construction, repair, maintenance, improvement, and equipment of health and related auxiliary facilities"); 25 C.F.R. pt. 900, subpt. J (establishing requirements for construction contracts awarded under the ISDEAA).

[59] *See, e.g.*, INDIAN HEALTH SERV., DEP'T OF HEALTH & HUMAN SERV., FISCAL YEAR 2015 JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES (2014), *available at* http://www.ihs.gov/budgetformulation/includes/themes/newihstheme/documents/FY2015CongressionalJustification.pdf. *See id.* at 32 (identifying "rents, communications, and utilities" on line 10 as activities funded under the Services account), 33 (identifying the same items on line 10 as activities funded from "Clinical" in the Services account), 34 (identifying the same items on line 10 as activities funded from "Hospital & Health Clinics" in the Services account) (page references are to the page number of the .pdf document); *cf. id.* at 50 (identifying $0 for such activities under CSC).

Secretarial amount for facility costs, the 2004 earmark, nor the separate appropriations accounts, changes the fact that Plaintiff's proposed facility costs represent an activity that would be normally carried on by the IHS and that has been funded in Plaintiff's Secretarial amount.

Yet Plaintiff continues its thinly-veiled attempt to mask a request to supplement its Secretarial amount by requesting direct CSC funding for the facility costs at issue. Indeed, in its own complaint, Plaintiff characterizes the matter as follows: "the $11,838.50 included as part of the Secretarial amount in 1992 is wholly insufficient."[60] While Plaintiff also attempts to inconsistently characterize the increased need in 2014 as related to "prudently manag[ing] its contract,"[61] such a characterization is entirely unsupported. To the contrary, the record is clear that activities related to the facility costs are part of the PFSA transferred and funded in the Secretarial amount; accordingly, the ISDEAA does not authorize CSC funding for these costs. Instead, Plaintiff must exercise its discretion under self-determination to administer its PFSA with the Secretarial funding it receives, which has increased from $150,000 to $1.9 million.

3. Plaintiff Does Not Dispute that the IHS is Responsible only for Facility Costs Used in Support of the IHS Program; Funding for Facilities Used in Support of Other Programs is in Excess of the Applicable Funding Level

The IHS put Plaintiff on notice of its concern that other programs must pay for their own space and that the IHS cannot be charged for such costs.[62] Plaintiff does not challenge that the parties discussed this issue during contract negotiations.[63] Indeed, while attempting to distinguish part of the record, Plaintiff concedes that it explained to the IHS during negotiations

[60] Compl. ¶ 34.

[61] *Id.*

[62] AR at 000002. *See also* S. Rep. No. 100-274, at 24 (explaining that the purpose of the declination is to provide a tribe with notice of the declination and an opportunity for an appeal).

[63] Pl.'s Reply, at 21-23.

that "CITC requires each program to pay for its space separately."[64] Thus, Plaintiff acknowledges that the parties had discussions about the requirement that each program pay for its own space costs. To put Plaintiff on notice of the continued concern, Defendant referenced a relevant prior communication between the parties in the declination letter.[65] Defendant continues to question whether all of the facility costs claimed are for space supporting the IHS program and believes that further inquiry is necessary to ensure that each program is paying for its respective space. Therefore, regardless of the source of funds, further review of the claimed facility costs would be necessary to ensure that the costs are prudent, reasonable, and related entirely to the IHS program.[66]

CONCLUSION

Defendant respectfully requests that this Court uphold the IHS decision declining Plaintiff's proposal for direct CSC for its facility costs because, as Plaintiff concedes, the costs represent an activity normally carried on by the IHS and funded in Plaintiff's Secretarial amount. The proposal amounts to a request to supplement Plaintiff's Secretarial with CSC funding, which Plaintiff admits is not authorized under the ISDEAA, and therefore is a proposal for funds in excess of the applicable funding level. 25 U.S.C. § 450f(a)-(b).

[64] *Id.* at 22.

[65] AR at 000002; Docket 20-4 (Pl.'s ex. F).

[66] 25 U.S.C. § 450j-2 (prohibiting the IHS from funding costs not associated with the IHS program).