UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RED LAKE BAND OF CHIPPEWA INDIANS Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.* Defendants.	)	Civil Action No. 23-0063 (RCL)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Red Lake Band of Chippewa Indians (the "Tribe") respectfully submits the following points and authorities in support of its motion for summary judgment and opposition to defendants' motion to dismiss.

INTRODUCTION

This case involves the amount of compensation to which the Tribe is entitled under a lease with the Indian Health Service ("IHS") pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 *et seq.* ("ISDEAA" or "Act"). The agency has unlawfully withheld from the Tribe a total of approximately $270,843 for the years 2020, 2021, and 2022, and this amount could grow into multiple millions of dollars in the coming years.

STATUTORY BACKGROUND

"Congress enacted the [ISDEAA] to help Indian tribes assume responsibility for programs or services that a federal agency would otherwise provide to the tribes' members." *Navajo Nation v. U.S. Dep't of the Interior* ("*Navajo Nation I*"), 852 F.3d 1124, 1126 (D.C. Cir.

2017). "The [agency] must, upon a tribe's request, enter a self-determination contract under which the tribe assumes control over federally funded programs formerly administered by the federal government." *Navajo Nation v. U.S. Dep't of the Interior* ("*Navajo Nation II*"), 57 F.4th 285, 289 (D.C. Cir. 2023). Contract funding is determined each year through annual funding agreements ("AFAs") negotiated by the parties, which are incorporated into the contract. *See id.*

Section 105(l) of the ISDEAA requires an agency to enter into a "lease" with the tribe for a tribal facility used by the tribe to administer or deliver services under a contract. *See* 25 U.S.C. § 5324(l). Section 105(l) leases are not traditional leases. Rather, they are facility cost agreements that compensate the tribal owner for expenses associated with using the facility to administer or deliver contracted services. The Department of Health and Human Services ("HHS") and the Department of the Interior ("DOI") jointly promulgated regulations to implement § 105(l), which appear at 25 C.F.R. Part 900, Subpart H (§§ 900.69 - 900.74).

FACTS

The Tribe operates various programs for tribal members pursuant to ISDEAA contracts with both the IHS and the Bureau of Indian Affairs ("BIA"). The Tribe's ISDEAA contracts with IHS include one for an alcohol program and one for a substance abuse/rehabilitation program ("Contracted Programs"). (Statement of Material Facts ("SOMF") ¶¶ 1, 2).

Between 2018-2020, the Tribe constructed the Obaashiing Chemical Health Treatment Center ("Treatment Center") to help support the operation of its Contracted Programs. The Tribe financed construction of the Treatment Center with $856,493 of its own funds and a secured loan of $4,950,000 it obtained from the U.S. Department of Agriculture ("USDA"). (SOMF ¶¶ 3,4).

Following completion of the Treatment Center, the Tribe submitted a proposal to IHS on August 31, 2020, to lease the facility to IHS pursuant to Section 105(l) of the ISDEAA and a companion proposal to amend one of its existing ISDEAA contracts to include the lease. (SOMF ¶ 5).

The Tribe began providing health care services at the Treatment Center in December 2020. The parties agreed to enter into two leases covering the facility: a pro-rated one-month lease for calendar year 2020 and a 12-month lease for calendar year 2021. The parties negotiated these two leases together. (SOMF ¶¶ 6, 7).

During lease negotiations, the parties eventually reached agreement on all but one of the elements of compensation to be provided under the leases. One element to which they agreed was depreciation based on the full acquisition cost of the facility, amounting to $148,884.41 annually. The disputed element was compensation for principal and interest payments on the USDA loan, which amounted to $136,186.29 annually. IHS refused to compensate the Tribe for these loan payments. It asserted that repayment of a construction loan from a federal agency is not allowable under § 105(l) and the implementing regulations. (SOMF ¶¶ 8-11).

IHS agreed to lease compensation of $763,770 for 2021 and one-twelfth of that amount, $63,648, for 2020. It partially declined the Tribe's compensation proposals for these leases, and the corresponding AFAs, to the extent that they sought greater amounts. The declined funding for principal and interest on the USDA loan amounted to $11,349 for 2020 and $136,186 for 2021. (SOMF ¶¶ 12, 13).

During lease negotiations between the parties for 2022, the USDA loan once again became the point of contention but IHS changed its position. The agency now agreed that the Tribe's payments of principal and interest on the USDA loan are properly compensable under § 105(l) and would be included in the lease compensation for 2022. But IHS asserted that the Tribe is not entitled to depreciation on the portion of the acquisition cost that was financed by the

USDA loan. The agency reasoned that this would contravene two provisions in 25 C.F.R. § 900.70: (1) a prohibition on cost elements that are duplicative, and (2) a requirement that depreciation must be based on acquisition costs not financed with Federal funds. (SOMF ¶¶ 14-16).

The Tribe had proposed 2022 lease compensation including $145,268.80 for depreciation of the facility (based on its full acquisition cost of $5,806,493.50 amortized over a 39-year useful life). IHS reduced this figure by $123,307.80 to account for the amount of the acquisition cost covered by the USDA loan. The agency agreed to lease compensation of $648,709 for 2022 and declined the Tribe's proposal for a greater amount. (SOMF ¶ 17).

IHS said that it was prepared to modify the lease for 2020-2021 "once an adjustment to the depreciation calculation has been agreed upon." This would involve adding the withheld funding for principal and interest of $11,349 for 2020 and $136,186 for 2021, but calculating corresponding reductions of the compensation for depreciation that IHS had provided for those years. To date, no additional funds have been provided to the Tribe for 2020-2021. (SOMF ¶¶ 18, 19).

Although IHS refused to compensate the Tribe for both (a) depreciation based on the full acquisition cost of the Treatment Center, and (b) principal and interest on the USDA loan, the BIA has taken the opposite approach with respect to a Section 105(l) lease that it has with the Tribe. The BIA entered into a lease with the Tribe covering two fire halls in October 2019. The Tribe constructed the fire halls with $46,000 of its own funds and two separate loans from the USDA totaling $5 million. Since the inception of this lease, the BIA has compensated the Tribe for both principal and interest on the federal construction loans and depreciation based on the full acquisition cost of these facilities. (SOMF ¶¶ 20-22).

ARGUMENT

I. Standard of Review

A court grants summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Judicial review of tribal claims under the ISDEAA is not deferential to the agency. *See Rancheria v. Hargan*, 296 F.Supp.3d 256, 264-65 (D.D.C. 2017). When a declination of a lease proposal is reviewed as to factual questions, the agency bears "the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer." 25 U.S.C. § 5387(d). As to legal questions, the court engages in de novo review and liberally construes statutory and regulatory provisions in favor of the tribe. *See Jamestown S'Klallam Tribe v. Azar*, 486 F.Supp.3d 83, 87-88 (D.D.C. 2020); 25 U.S.C. §§ 5321(g), 5392(f); 25 C.F.R. § 900.3(b)(11).

II. Compensation For Depreciation Does Not Duplicate Principal and Interest

IHS asserts that a regulation prohibiting duplicative lease compensation precludes the Tribe from receiving both (a) depreciation based on the full acquisition cost of the Treatment Center, and (b) principal and interest on the USDA loan. The statute provides that an agency "shall compensate" a tribe for lease expenses and adds that "[s]uch compensation may include rent, depreciation based on the useful life of the facility, principal and interest paid or accrued, operation and maintenance expenses, and such other reasonable expenses that the Secretary determines, by regulation, to be allowable." 25 U.S.C. § 5324(l). By regulation, 25 CFR § 900.70, IHS and the BIA added five other cost elements that may be included in the lease compensation and provided that none of the cost elements shall be duplicative.

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The cost elements at issue here, depreciation and principal and interest, are not duplicative of each other. That is why Congress listed both of them as reasonable expenses in § 105(l). Principal and interest – also known as debt service -- are part of the cost of acquiring a capital asset. In contrast, depreciation is "a decline in an asset's value because of use, wear, obsolescence, or age." Black's Law Dictionary (11th ed. 2019).

Congress has recognized in other statutes besides § 105(l) that depreciation and debt service are distinct costs, both of which must be taken into account. For example, the statute that governed the setting of postal rates from 1970 – 2006 provided that:

> Postal rates and fees shall provide sufficient revenues so that the total estimated income and appropriations to the Postal Service will equal as nearly as practicable total estimated costs of the Postal Service. For purposes of this section, "total estimated costs" shall include (without limitation) operating expenses, depreciation on capital facilities and equipment, debt service (including interest, amortization of debt discount and expense, and provision for sinking funds or other retirements of obligations to the extent that such provision exceeds applicable depreciation charges), and a reasonable provision for contingencies.

Pub. L. 91–375, 84 Stat. 719, 760 (Aug. 12, 1970), previously codified at 39 U.S.C. § 3621, repealed by Pub. L. 109–435, title II, § 201(a), 120 Stat. 3198, 3200 (Dec. 20, 2006) (emphasis added).[1]

Likewise, a statutory provision limiting the use of landing and parking fees at Dulles and Reagan airports provides that they may be used for "debt service, depreciation, and amortization." 49 U.S.C. § 49104(a)(9).

[1] The D.C. Circuit explained that this provision applied to the Postal Service the economic principle that "[t]he fiscally sound operation of any organization rests upon the maintenance of a balance between costs and income." *National Ass'n of Greeting Card Publishers v. U.S. Postal Service*, 607 F.2d 392, 425 (D.C. Cir. 1979).

Notably, an HHS Medicare regulation explicitly recognizes that depreciation is a distinct cost of providing services regardless of "the source of financing of an asset," i.e., how the asset was acquired:

> It is the function of payment of depreciation to provide funds that make it possible to maintain the assets and preserve the capital employed in the production of services. Therefore, <u>irrespective of the source of financing of an asset</u>, if it is used in the providing of services for beneficiaries of the program, <u>payment for depreciation of the asset is, in fact, a cost of the production of those services. Moreover, recognition of this cost is necessary to maintain productive capacity for the future.</u>

42 CFR § 413.149(b) (emphasis added). Regardless of whether the owner buys an asset with its own funds, or borrows some portion of the cost from a private or a federal lender, the owner incurs depreciation when the asset is used to provide services. As HHS acknowledges in this regulation, depreciation is a cost that is distinct from, and independent of, the cost of acquiring a capital asset. The agency cannot take the opposite position in implementing § 105(l).[2]

Further, the agency's argument to this Court about why depreciation and debt service are duplicative does not survive scrutiny. The agency invokes tax-accounting rules but they contradict its position. The Internal Revenue Service explicitly permits a taxpayer to take depreciation on property purchased with borrowed funds. *See* https://www.irs.gov/pub/irs-regs/depreciation_faqs_v2.pdf ("as long as you are responsible for making payments on the asset, you can take a depreciation deduction."). Here the Tribe is responsible for repaying the USDA loan regardless of whether it receives § 105(l) lease compensation for that purpose.

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[2] Not only must the agency be consistent; the regulatory prohibition of duplicative costs also must be construed in favor of the Tribe. *See* 25 C.F.R. § 900.3(b)(11) ("The Secretary's commitment to Indian self-determination requires that these regulations be liberally construed for the benefit of Indian tribes and … that any ambiguities herein be construed in favor of the Indian tribe …."); *United States v. Osage Wind LLC*, 871 F.3d 1078, 1090 (10th Cir. 2017) (Indian canon of construction applies to regulations).

It has long been established that a building owner bears the cost of construction, and so is entitled to take a depreciation deduction, where it paid for the money it used to construct the building, e.g., it borrowed and paid interest on those funds. *See C.I.R. v. Revere Land Co.*, 169 F.2d 469, 482-83 (3d Cir. 1948). Similarly, "a tenant who leases vacant land[,] and with his own or borrowed funds, even with funds borrowed from the lessor, erects a building on the land for rental … is the one who has made the investment in the building and as such is the one entitled to take depreciation." *Buzzell v. United States*, 326 F.2d 825, 826 (1st Cir. 1964). In contrast, the lender is a "mere creditor" who lacks a depreciable interest in the property acquired with its loan because it has not borne the cost of acquisition. *See Barnes v. United States*, 222 F. Supp. 960, 962 (D. Mass. 1963), *aff'd*, 326 F.2d 825 (1st Cir. 1964).

The agency cites the tax rules relating to discharge of indebtedness, which provide that income occurs where a debt is forgiven and is no longer an obligation of the taxpayer. But no such discharge has occurred here. The USDA has not cancelled the Tribe's indebtedness on the $4,950,000 construction loan, nor has it released its security interest in the Treatment Center. The Tribe remains fully liable on that loan. The Treatment Facility is not some gift to the Tribe from the USDA. Nor does it become a gift simply because another federal agency, IHS, leases it at a rate sufficient to cover the debt service. The Tribe is the party who has made the investment to build the Treatment Center and, like other landlords, it faces two distinct expenses: debt service and depreciation of its capital asset.

Accordingly, the agency's contention that depreciation and debt service are duplicative is simply wrong. Congress knew what it was doing when it listed <u>both</u> depreciation and principal and interest as reasonable expenses in § 105(l).

III. The "Federal Financing" Regulatory Limitation Is Inapplicable Here

IHS also invoked 25 C.F.R. § 900.70(b) -- which limits depreciation to "acquisition costs not financed with Federal funds" -- in refusing to compensate the Tribe for depreciation on the portion of the facility's construction cost that was covered by the USDA loan. However, this regulatory limitation is invalid and, even were it not, it does not apply to the loan.

A. The regulatory limitation is invalid

1. *The regulation rewrites the statute*

To start with, this regulatory limitation is void because it impermissibly rewrites the statute. In assessing a regulation's validity, the first question is whether "Congress has directly spoken to the precise question at issue" in the statutory text. *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If so, courts, as well as the agency, "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–843. It is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014).

Congress explicitly addressed depreciation in the statutory text of § 105(l). It provided that:

> The Secretary shall compensate each Indian tribe … that enters into a lease under paragraph (1) for the use of the facility leased for the purposes specified in such paragraph. Such compensation may include rent, <u>depreciation based on the useful life of the facility</u>, principal and interest paid or accrued, operation and maintenance expenses, <u>and such other reasonable expenses that the Secretary determines, by regulation, to be allowable</u>.

25 U.S.C. § 5324(l) (emphasis added). Congress specified that "depreciation based on the useful life of the facility" – along with rent, principal and interest, and operation and maintenance expenses -- are reasonable expenses, and it authorized the agencies to identify additional

reasonable expenses by regulation. But Congress did not authorize the agencies to modify or limit any of the four reasonable expenses that it spelled out.[3]

Congress imposed no limit on how a capital asset is financed in order for depreciation to constitute a reasonable lease expense. In other statutes, Congress sometimes has limited depreciation to items financed by non-Federal funds. *See* 43 U.S.C. § 1523(b)(2) ("the United States shall share … in the depreciation component of such costs only to the extent of provision for depreciation on replacements financed by the non-Federal interests."). But Congress did not do so here, although it did impose a different limitation, i.e., that depreciation must be based on the useful life of the facility, thus foreclosing accelerated depreciation.

In sum, Congress expressly provided that depreciation is a reasonable expense for a § 105(l) lease so long as it is prorated over the useful life of the facility. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). "[W]hen a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 295 (1995) (citation omitted). The language of § 105(l) is clear and unambiguous. Accordingly, HHS and DOI lack authority to limit depreciation in a way that Congress did not.

2. ***The regulatory limitation conflicts with another provision of the ISDEAA***

Limiting depreciation to "acquisition costs not financed with Federal funds" is also at odds with another provision of the ISDEAA. "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a

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[3] Indeed, HHS and DOI acknowledge in their regulations implementing § 105(l) that "[t]he lease is to include compensation as provided in the statute as well as 'such other reasonable expenses that the Secretary determines, by regulation, to be allowable.'" 25 C.F.R. § 900.69 (emphasis added).

particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) Rather, "a 'reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole.'" *NASDAQ Stock Market, LLC v. S.E.C.*, 961 F.3d 421, 426 (D.C. Cir. 2020) (quoting *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. at 321).

When Congress added § 105(l) to the ISDEAA in 1994, it also amended § 106 of the Act to enhance a tribe's ability to reimburse itself for depreciation from contract funds. Congress provided that:

> **Allowable uses of funds without approval of Secretary**
>
> Without intending any limitation, a tribal organization may, without the approval of the Secretary, expend funds provided under a self-determination contract for the following purposes, to the extent that the expenditure of the funds is supportive of a contracted program:
>
> (1) Depreciation and use allowances not otherwise specifically prohibited by law, including the depreciation of facilities owned by the tribe or tribal organization.

Pub. L. 103-413, § 102, 108 Stat. 4250, 4259 (Oct. 25, 1994), codified at 25 U.S.C. § 5325(k).

The legislative history of this provision, which first appeared in the proposed Indian Self-Determination and Education Assistance Act Amendments Act of 1992, explains that its purpose "is to remove those provisions of presently-applicable Office of Management and Budget circulars which impede, rather than foster, the administration of self-determination contracts." S. Rep. 102-444, at 13 (1992). One of those OMB provisions precluded depreciation on "[a]ny portion of the cost of buildings and equipment borne by or donated by the Federal Government irrespective of where title was originally vested or where it presently resides." OMB Circular A-87, *Cost Principles for State, Local, and Indian Tribal Governments*, Attachment B, § 11. Congress decided that the OMB cost principles were too restrictive, and amended the ISDEAA

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to make tribes presumptively entitled to compensation under the Act for depreciation of any facilities they own which are used in performing a self-determination contract.

This provision in § 106 of the Act confirms the conclusion that § 105(l) means what it says and precludes HHS and DOI from placing additional restrictions on depreciation. The limitation imposed in 25 C.F.R. § 900.70(b) is inconsistent with both statutory provisions.

3. *Section 105(l) must be liberally construed in favor of the Tribe*

Moreover, Congress has directed that "each provision of [the ISDEAA] … shall be liberally construed for the benefit of the Indian Tribe." 25 U.S.C. §§ 5321(g), 5392(f). Thus, "every provision—not only every ambiguous provision—must be liberally construed in favor of [the Tribe]." *Navajo Health Foundation-Sage Memorial Hosp., Inc. v. Burwell*, 263 F.Supp.3d 1083, 1105 (D.N.M. 2016). If the statute "can reasonably be construed as the Tribe would have it construed, it *must* be construed that way." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988) (emphasis in the original); *Southern Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1078 (10th Cir. 2011) ("[I]f the [ISDA] can reasonably be construed as the Tribe would have it construed, it must be construed that way."). Accordingly, the text of § 105(l) must be construed to prohibit additional regulatory limits on depreciation. *See Maniilaq Ass'n v. Burwell,* 170 F.Supp.3d 243, 249 (D.D.C. 2016).

B. The USDA loan does not constitute "federal financing"

Even were the regulation valid, the USDA loan does not come within its ambit. As discussed above, the regulation essentially reimposes the OMB cost principle which excludes from depreciation the portion of the cost of buildings "borne by or donated by the Federal Government." A similar limitation appears in the Federal Acquisition Regulation, which provides that "[d]epreciation, rental, or use charges are unallowable on property acquired from the Government at no cost by the contractor ….” FAR 31.205-11(d). These limitations preclude depreciation where the cost of capital assets was "borne by" the Government, as when the Government donated the asset or otherwise provided it at no cost to the contractor.

Here the Treatment Center was not donated to the Tribe by the Government, nor was its cost "borne by" the Government. Rather, the Tribe bore the cost of construction. The USDA, as a secured lender, did not bear that cost. Nor does the IHS, as a "tenant" of the Treatment Center, bear the cost of construction simply because its lease payments cover the Tribe's debt service.

The regulation's prohibition on depreciation for acquisition costs "financed with Federal funds" cannot be broadly construed, as IHS did, to include federal loans as well as federal grants and donations. There are three distinct reasons why not.

First, such a sweeping limitation on depreciation is unprecedented and would extend far beyond the OMB cost principle formerly applicable to the ISDEAA. There is no authority in the Act for HHS or DOI to promulgate any such novel restriction on depreciation. As discussed above, Congress amended the ISDEAA to loosen, not tighten, the restrictions on compensation for depreciation.

Second, IHS's construction of the regulation would arbitrarily deny depreciation for projects funded by federal loans but not for those funded by private loans, although HHS, itself, has recognized that depreciation is a legitimate cost of production "irrespective of the source of financing." 42 CFR § 413.149(b). This arbitrary distinction between federal and private loans would create an incentive for tribes to borrow from private lenders at interest rates that are likely to be higher than federal loans. Thus, it would end up increasing the cost of the § 105(l) lease or else -- if a tribe cannot find a private lender – it could stymie the tribal project altogether.

That is not all. IHS's interpretation of the financing limitation in 25 C.F.R. § 900.70 would also affect tribes that do use federal loans. It would cause them to base their lease compensation on the fair market rental of the property pursuant to 25 C.F.R. § 900.74, instead of the compensable expenses listed in § 900.70. The fair market rental will not vary depending on whether a property was financed with a private or a government loan. But use of the fair market rental approach would frequently create significant practical difficulties because many tribes (like the Tribe here) are located in rural areas where there are few comparable facilities in the vicinity from which a market rate can be determined.

Regulatory constructions that "lead to anomalous results are to be avoided if at all possible." *Frazier v. McDonough*, 66 F.4th 1353, 1358 (Fed. Cir. 2023) (citation omitted); *see also Athens Community Hosp., Inc. v. Schweiker*, 743 F.2d 1, 6 (D.C. Cir. 1984) (rejecting interpretation that produces "adverse practical consequences"). Courts also reject interpretations that "would frustrate Indian tribes' efforts to promote economic development and fiscal autonomy." *Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538, 554 (1st Cir. 1997). IHS's interpretation of 25 C.F.R. § 900.70(b) suffers from both of these vices.

Finally, IHS's interpretation of the regulation cannot stand because the BIA has adopted a contrary interpretation and permits depreciation based on construction costs funded with a federal loan. *See* BIA, *105(l) Facility Lease Program Technical Assistance Guidebook* (2022) at 15 ("The total amount of funding provided or borrowed by the Tribe" is taken into account in calculating depreciation).[4] The Tribe entered into a § 105(l) lease with the BIA in 2019 covering two fire halls that were constructed with USDA loans. The BIA compensates the Tribe for <u>both</u>

[4] Available at https://www.bia.gov/sites/default/files/dup/inline-files/105_l_technical_assistance_guide.pdf.

principal and interest on the USDA loans and for depreciation based on the cost of the facilities that was funded by the USDA loans.

It would be "an intolerable situation" if different agencies could adopt inconsistent interpretations of the same law. *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1287 (D.C. Cir. 1983). "No one should face 'multiple and perhaps conflicting interpretations of the same requirement.'" *DeNaples v. Office of Comptroller of Currency*, 706 F.3d 481, 488 (D.C. Cir. 2013) (citation omitted). The need for "interpretive uniformity across agencies" outweighs any "deference to one agency's interpretation." *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1253 (D.C. Cir. 2003). The choice between the agencies' conflicting interpretations here is dictated by the requirement that all ISDEAA regulations shall "be liberally construed for the benefit of Indian tribes and … that any ambiguities herein be construed in favor of the Indian tribe". 25 C.F.R. § 900.3(b)(11). This rule of construction requires adoption of the BIA regulatory interpretation favorable to the Tribe. *See Maniilaq Ass'n v. Burwell*, 170 F.Supp.3d at 249.

For all of these reasons, 25 C.F.R. § 900.70(b) does not justify IHS's refusal to fully compensate the Tribe for depreciation on the Treatment Center in addition to principal and interest on the USDA loan. The regulation's limitation of depreciation to "acquisition costs not financed with Federal funds" is invalid. Alternatively, this limitation must be construed to cover only acquisitions made with federal grant funds, but not acquisitions funded through interest-bearing loans.

IV. The Agency Must Provide Full Funding For 2020 and 2021

There is an additional reason why IHS must provide all the lease funding the Tribe sought for 2020 and 2021. The ISDEAA precludes the agency from belatedly changing its rationale for declining a portion of that funding.

During the lease negotiations for 2020-2021, IHS refused to compensate the Tribe for payments of principal and interest on its USDA loan, but approved compensation for depreciation. The following year, the agency reversed course and acknowledged that the Tribe's loan payments are compensable, but asserted that depreciation on the construction cost financed by the loan is not compensable. However, rather than provide the Tribe with the withheld compensation for principal and interest, the agency asserted that it must offset most of the depreciation funding it had already provided for 2020-2021. This it cannot do.

The ISDEAA provides that "[w]hen a tribe submits a proposed annual funding agreement to [the agency], 'the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification' to the tribe that the proposal is declined for one of five reasons provided by the statute." *Navajo Nation I*, 852 F.3d at 1126 (quoting 25 U.S.C. § 5321(a)(2)). The written notification must set forth "a specific finding that clearly demonstrates that" at least one of five enumerated grounds for rejection applies. 25 U.S.C. § 5321(a)(2).

"[T]he ISDEAA places the burden on the agency, rather than the tribe …, to develop the record within the ninety-day window, *see* 25 U.S.C. § 5321(a)(2), and the agency bears the burden to 'clearly demonstrat[e] the validity of the grounds for declining the contract proposal (or portion thereof)[,]' *id.* § 5321(e)." *Cook Inlet Tribal Council v. Mandregan*, 2019 WL 3816573, at *10 (D.D.C. 2019). "Congress specifically assigned *to IHS*, and not to [the tribe] or to the Court, the role of making defensible 90-day funding determinations when assessing contract proposals." *Id.* (emphasis in the original; citation omitted). Therefore, "IHS doesn't get a second chance to make a fresh declination decision, to revise or add to a declination decision made [] years earlier, or to devise new reasons why the amounts should be declined …." *Id.* at *9.

In this case IHS had 90 days to decline the Tribe's § 105(l) funding proposal for 2020 and 2021. The agency approved funding for depreciation but declined funding for principal and interest on the USDA loan. A year later the agency attempted, in essence, to re-do its funding determination and adopt a different rationale for declining almost the same amount of funding. But the agency, having previously approved the funding for depreciation, had no authority to rescind that approval. And the agency has conceded that its grounds for declining to fund principal and interest was invalid. Thus, the agency must now provide the withheld funding, which amounts to $11,349 for 2020 and $136,186 for 2021.

CONCLUSION

The agency's position in this matter is simply untenable. It has no valid reason for declining to provide lease compensation for the Treatment Center that includes both (a) depreciation based on the full construction cost of the facility, and (b) principal and interest paid or accrued on the USDA loan. Under the ISDEAA, this Court can order appropriate relief including money damages and injunctive relief to reverse a funding declination. *See* 25 U.S.C. § 5331(a). Accordingly, the Court should deny defendants' motion to dismiss the complaint. Instead, the Court should grant summary judgment in favor of the Tribe declaring that lease compensation for the Treatment Center must include depreciation based on the full acquisition cost of the facility, and principal and interest paid or accrued on the USDA loan, compelling the

Secretary to provide compensation for such depreciation in addition to principal and interest, and awarding the Tribe money damages in the amount of $11,349 for 2020, $136,186 for 2021, and $123,308 for 2022.

Dated this 23rd day of June, 2023.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: /s/ Steven D. Gordon
Steven D. Gordon (D.C. Bar No. 219287)
Philip Baker-Shenk (D.C. Bar No. 386662)
800 17th Street, N.W., Suite 1100
Washington, D.C. 20006
Tel: (202) 955-3000
Fax: (202) 955-5564

Attorneys for Plaintiff