UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF, OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Secondary Sources

Defendants United States Department of Health and Human Services and Xavier Becerra, the Secretary of the United States Department of Health and Human Services, respectfully move for summary judgment under Federal Rule of Civil Procedure ("Rule") 56. The grounds for this motion are set forth below, which also serves as Defendants' opposition to Plaintiff's Motion for Summary Judgment ("SJ Br."), ECF No. 15-1, and reply in further support of Defendants' Motion to Dismiss ("MTD"), ECF No. 13-1.

INTRODUCTION

Plaintiff seeks judicial review of two leases for Plaintiff's use of the Obaashing Chemical Health Treatment Center (the "Treatment Center") entered into pursuant to section 25 U.S.C. § 5324(*l*) and the regulations promulgated thereunder, most notably 25 C.F.R. § 900.70. One lease covers December 2020 and all of 2021, and the other covers 2022. During negotiation of those leases, Plaintiff sought to recover its acquisition costs of the Treatment Center twice: once in the form of principal and interest on the construction loan from the United States Department of Agriculture that Plaintiff used to pay for most of the acquisition cost, and the second time in the form of "depreciation" based on the entire acquisition cost. However, the law does not entitle Plaintiff to double compensation. Rather, the relevant statutory and regulatory provisions require lease compensation to be "reasonable," prohibit "duplicative" compensation, and specify that depreciation be calculated "based on acquisition costs not financed with Federal funds." Because Plaintiff is not entitled to the double compensation that it seeks, Defendants are entitled to judgment as a matter of law.

LEGAL FRAMEWORK

This matter arises under the Indian Self-Determination and Education Assistance Act, which creates a comprehensive contracting scheme through which Tribes assume the operation of the many federal healthcare programs for the benefit of certain beneficiaries. Defendants are required to enter into special leases with a contracting Tribe under 25 U.S.C. § 5324(*l*). Under that statute, Defendants may pay "reasonable expenses," with allowable expenses "determine[d] by regulation." In turn, 25 C.F.R. § 900.70 identifies elements of compensation that may be available to Tribes requesting leases. A tribe may receive compensation for elements under a Section 5324(*l*) lease, including rent, depreciation, contributions to a reserve, principal and interest paid or accrued, operation and maintenance expenses, alterations, other reasonable expenses, and fair market rent. *See* 25 C.F.R. § 900.70(a)–(i). Critically, the statute and its implementing regulations do not establish an entitlement to any particular element. Instead, the regulations provide guidance and limits. For instance, 25 C.F.R. § 900.70 expressly prohibits "duplicative" elements from being included in lease compensation. One potentially duplicative expense is deprecation based on "acquisition costs" already paid for by the Government: "Depreciation and use allowance based on the useful life of the facility based on acquisition costs not financed with Federal funds." 25 C.F.R. § 900.70(b).

BACKGROUND

In 1975, Congress passed the Indian Self-Determination and Education Assistance Act, which allows Tribes and Tribal Organizations to contract with the Secretary of HHS, through the Indian Health Service (the "Service"), to operate many of the programs that the Service previously operated for the benefit of Indians. Under the Act, the self-determination contracting and self-governance compacting processes begin when a Tribe or Tribal Organization submits a proposal, approved by Tribal Resolution, to the Service.

Between 2018 and 2020, Plaintiff constructed the Treatment Center using $856,493 of its own funds and a loan of $4,500,000 from the U.S. Department of Agriculture. *See* Pl.'s SJ Ex. 3 at 3–4, ECF No. 15-2 at 30–31. On August 31, 2020, Plaintiff submitted an initial lease proposal to the Service notwithstanding the fact that it had not yet begun offering services at the Treatment

Center. Pl.'s SJ Ex. 1 at 1, 5, ECF No. 15-2 at 7, 11. Subsequently, on February 14, 2022, Plaintiff submitted another lease proposal for 2022. Pl.'s SJ Ex. 3 at, ECF No. 15-2 at 28.

In each of its two lease proposals, Plaintiff requested that it recover its acquisition costs twice. First, Plaintiff ultimately requested that Defendants pay the entirety of its annual principal and interest payments associated with the Department of Agriculture loan. *See* Pl.'s SJ Ex. 1 at 6, ECF No. 15-2 at 12 (disagreement over principal and interest); Pl.'s SJ Ex. 2 at 5, ECF No. 15-2 at 26 (awarding depreciation); Pl.'s SJ Ex. 3 at 4–5, ECF No. 15-2 at 30–31. The principal of the loan constitutes more than 85% of the total acquisition cost. *See* Pl.'s SJ Ex. 3 at 3–4, ECF No. 15-2 at 30–31. Second, Plaintiff ultimately requested that Defendants pay it the entire acquisition cost again spread out over thirty-nine annual payments. Pl.'s SJ Ex. 3 at 6–7, ECF No. 15-2 at 33 ("[T]he Nation has proposed a beginning book value of $5,737,056.79, which it has calculated by subtracting the principal amount due under its construction loan for that year from the total construction cost of $5,806,493.50."); *id.* ("[B]y asking the [Indian Health Service] to pay depreciation, which is the allocation of construction cost across the useful life of the facility, as well as principal and interest on the construction loan, the Nation is asking the [Indian Health Service] to buy the building twice."); *id.*; *see also* Compl. ¶¶ 13, 21 ("straight-line depreciation of the facility based on its 'book value,' i.e., the acquisition cost of $5,806,493.50, amortized over a 39-year useful life"). Under Plaintiff's proposal it would recover more than 185% of the acquisition cost from the lease.

Plaintiff acknowledges that it cannot receive duplicative compensation. Defendant's Statement of Facts ("Def. Stmt.") ¶ 30 ("It is our understanding that the Tribe is in agreement with the Service that duplication between elements is prohibited[.]"). Nevertheless, Plaintiff insisted on receiving (i) principal and interest and (ii) depreciation based on the entire acquisition cost. As a result, Defendants timely declined the 2020/2021 and 2022 proposals on January 15, 2021, and June 21, 2022, respectively, to the extent the proposals sought double recoveries for acquisition costs. *See* Compl. ¶¶ 15, 18; *id.* Ex. A at 12–13; Pl.'s SJ Ex. at 7, ECF No. 15-2 at 34 ("The [Plaintiff] is not entitled to depreciation based on acquisition costs that will be almost entirely financed by the federal government.").

Both the 2020/2021 and 2022 leases include funding for replacement construction as well as for maintenance. Specifically, the 2021 lease includes, among other things, $150,907.07 in "contributions to a reserve," and $339,164.67 in "operations and maintenance expenses." Def. Stmt. ¶ 25.

The 2022 lease includes funding for, among other things, $21,961.37 in depreciation (based on the acquisition costs that Plaintiff paid directly), $150,584.59 in "contributions to a reserve," $205,623 in "principal and interest," and $316,423.75 in "operations and maintenance." Def. Stmt. ¶ 31.

Plaintiff's 2022 lease proposal noted that the Plaintiff had failed to spend $153,733.35 (or 18.6%) of the $827,418 that it received from the 2020/2021 leases—more than it seeks in this case for 2020 and 2021. *See* Def. Stmt. ¶ 29; Compl. ¶ 31. The final lease kept that Unspent Carryover Offset. Def. Stmt. ¶ 32.

STANDARD OF REVIEW

Summary judgment is appropriate when "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); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). A genuine issue of material fact is one that would change the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248.

While the Indian Self-Determination and Education Assistance Act ("Indian Assistance Act") does not identify any applicable standard of review, the recent trend in this Court is to apply a *de novo* standard of review to cases brought solely pursuant to the Indian Self-Determination and Education Assistance Act or that only present questions of law. *See e.g., Pyramid Lake Pauite Tribe v. Burwell*, 70 F. Supp. 3d 534, 542 (D.D.C. 2014). Because this case has been filed pursuant only to Indian Self-Determination and Education Assistance Act, Defendants acquiesce to *de novo* review.

With respect to Defendants' motion to dismiss, Plaintiff did not challenge the standard set forth in Defendants' opening brief. *See* MTD at 3.

ARGUMENT

Plaintiff cannot explain why Congress would have wanted to allow double recovery here. It makes no sense to compensate Plaintiff for the acquisition costs twice: first for the cost of the principal and interest being paid on the federal loan used to acquire the facility (Plaintiff's Statement of Facts ("Pl. Stmt.") ¶ 4, ECF No. 15-2; Compl. ¶ 9); and second for the "straight-line depreciation of the facility based on its 'book value,' i.e., the acquisition cost of $5,806,493.50, amortized over a 39-year useful life." Pl. Stmt. ¶ 15 (insisting on "depreciation on the portion of the acquisition cost that was financed by the [Department of Agriculture] loan"); Compl. ¶ 21 ("The Tribe had proposed that the 2022 lease compensation include $145,268.80 for straight-line depreciation of the facility based on its 'book value,' i.e., the acquisition cost of $5,806,493.50, amortized over a 39-year useful life."). This is especially true because Plaintiff also is receiving a reserve to replace certain elements of the Treatment Center as well as funding for operations and maintenance.

Moreover, Plaintiff's argument is contrary to law. The applicable statute and regulations focus on ensuring that only reasonable, non-duplicative expenses are paid. Section 5324(*l*) helps define reasonableness. It provides a list of "reasonable expenses" that "may" be included in compensation, further explaining that allowable expenses "determine[d] by regulation." In turn, 25 C.F.R. § 900.70 explains, "To the extent that no element is duplicative, the following elements may be included in the lease compensation: . . . (b) Depreciation and use allowance based on the useful life of the facility based on acquisition costs not financed with Federal funds[.]" *See also* 25 C.F.R. § 900.74(b) (specifying that the lease can "be based on a combination of fair market rental and paragraphs (a) through (h) of §900.70, provided that no element of expense is duplicated in fair market rental"). The reason why a "[d]epreciation and use allowance" must be "based on acquisition costs not financed with Federal funds" is obvious.

As shown in the motion to dismiss (ECF No. 13), courts in this district have explained that the Defendants "need not grant lease compensation requests that are duplicative of funding already provided by the government . . . or are not reasonable." *Jamestown S'Klallam Tribe v. Azar*, 486 F. Supp. 3d 83, 85 (D.D.C. 2020) (quoting *Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243, 255 (D.D.C. 2016)) (internal quotation marks and brackets omitted); *see also id.* at 88 (stating that the Government "may decline to pay such compensation if the proposed amount is 'not reasonable'" (citing *Maniilaq*, 170 F. Supp. 3d at 251)); *id.* at 85 ("Although the statute states only that compensation 'may' include such items, applicable regulations further specify the 'elements . . . included in the compensation for a lease.'" (citing 25 C.F.R. §§ 900.70, 900.74)).

Because Plaintiff's argument is contrary to common sense and the plain text of the law, Plaintiff responds with strained readings of statutes, regulations, and secondary sources, and attempts to find faults in the administrative process. These arguments all fail.

I. <u>Depreciation Here is Duplicative of Principal and Interest.</u>

In its Complaint and Statement of Facts, Plaintiff stated that it sought depreciation "based on its . . . acquisition cost." Pl. Stmt. ¶ 15; Compl. ¶ 21. Plaintiff purchased the Facility largely with a federal loan. Thus, both the requested depreciation and the requested principal and interest seek to recover the same acquisition cost. Plaintiff initially recognized this in part, when it was willing to reduce the base for depreciation based on the amount of principal that Defendants paid. *See* Def. Stmt. ¶ 8. But for this litigation, Plaintiff now contends that principal, interest, and depreciation, are not duplicative at all. *See* SJ Br. 6 ("The cost elements at issue here, depreciation and principal and interest, are not duplicative of each other."). Plaintiff is wrong.

A. Depreciation is Another Way of Recovering the Acquisition Costs Here.

Even while Plaintiff recognizes that both the loan and the depreciation are based on the purchase price, Plaintiff asserts that the two are not duplicative because depreciation recognizes "a decline in an asset's value." SJ Br. 6. That decline, however, is not a real-world cost; it is an accounting fiction that, under accounting rules, is directly based on the purchase price. "The purpose of depreciation is to assist a person in regaining their expenditures[.]" *Stewart v. Stewart*, 793 P.2d 813, 815 (Mont. 1990). To do so, a business "allocate[s] the entire historic cost of an asset." *Gen. Elec. Co. v. Delaney*, 251 F.3d 976, 980 (Fed. Cir. 2001).

When a business purchases capital (like a facility), it debits its cash on hand and credits its capital. Then, over time, the business debits capital and credits depreciation. The depreciation is the purchase price two steps removed. They are different but only in the sense that ground beef and a cooked hamburger patty are different. McDonald's would never ask its customers to pay for both the raw meat and then for the patty because it would be asking for double compensation.

Because Plaintiff must disguise depreciation as something else to receive compensation for it, Plaintiff attempts to conflate depreciation with maintenance costs in two ways. First, Plaintiff quotes a Medicare regulation for the proposition that "[i]t 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." SJ Br. 7 (quoting 42 C.F.R. § 413.149(b)). Second, Plaintiff asserts that "the owner incurs depreciation when the asset is used to provide services." SJ Br. 7. Here, the assets are "maintain[ed]" by $339,164.67 in "operations and maintenance expenses" in 2021 and more in subsequent years. ECF 15-2 at 26. Recovery of full depreciation literally would preserve the Plaintiff's "capital"—it would restore the entire purchase price a second time. Additionally, the latter statement is false. Straight-line depreciation, as here, occurs over time whether or not the asset is used and is generally unrelated to actual wear and tear. *Cf. Mertens Law of Federal Income Taxation* § 59:21 ("depreciation on the books [may] not accurately represent actual wear and tear").

Plaintiff's misunderstanding of the role of depreciation here can be seen in its inapt analogies to other statutes and regulations. *See, e.g.*, SJ Br. 6–8. Here, the lease funds the operation of the Treatment Center on an annual basis, just as though the Treatment Center were a line item in HHS's budget.

The "section 105(*l*) lease" (or "Section 5324(*l*) lease") is not a traditional lease but, instead, a creation of the Indian Assistance Act, which directs the Indian Health Service to pay lease compensation to a tribe or tribal organization (tribe) furnishing a facility for the administration and delivery of health services under an Indian Assistance Act contract. By contrast with a standard lease, the Indian Health Service does not directly use or occupy the facility under a Section 5324(*l*) lease. Instead, the Indian Health Service compensates the tribe for the use of its own facility. A tribe may receive compensation for elements under a Section 5324(*l*) lease, including rent, depreciation, contributions to a reserve, principal and interest paid or accrued, operation and maintenance expenses, alterations, other reasonable expenses, and fair market rent. *See* 25 C.F.R. §§ 900.70(a)–(i). The statute and its implementing regulations do not establish an entitlement to any specific element that may be compensated for in a lease if determined to be reasonable.

Plaintiff points to statutes and regulations where, unlike for Section 5324(*l*) leases, the compensation at issue treated the recipient like a for-profit entity that would use the compensation to fund future operating expenses and possibly expand its footprint. For instance, Plaintiff cites the repealed Postal Reorganization Act of 1970 and notes that Congress expressly allowed the United States Postal Service to fix postal rates and fees to fund "total estimated costs," which included "[o]perating 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." SJ Br. 6 (quoting Pub. L. 91–375, 84 Stat. 719, 760 (Aug. 12, 1970)). But there were two reasons that the Postal Service was allowed to recover depreciation and debt service and a rainy-day fund. First, "the 'central purpose of the (Act) [was] to place the Postal Service on a self-sufficient basis.'" *Nat'l Ass'n of Greeting Card Publishers v. U.S. Postal Serv.*, 607 F.2d 392, 431 (D.C. Cir. 1979) (quoting *Direct Mail Advertising Ass'n v. U.S. Postal Serv.*, 458 F.2d 813, 817 (1972)). Unlike the Tribe, which is expected to enter into a new lease every year, the Postal Service was meant to be "a financially stable enterprise" that would not seek annual appropriations. *Id.* at 430 n.95, 431. Second, the Postal Service was not seeking Government funds to repay capital outlays to be made by the Government, as Plaintiff does here.

Second, Plaintiff looks to a Medicare reimbursement regulation under which service providers could depreciate assets "irrespective of the source of the financing of an asset." 42 C.F.R. § 413.149(b). First, that language alone distinguishes it from the statute at issue here, which does not contain such a disclaimer. Second, as with the Postal Service, the entity receiving payment is meant to be self-sufficient. The very language highlighted by Plaintiff shows that service providers were recovering depreciation for profit and for future capital investment: "[R]ecognition of this cost is necessary to maintain productive capacity for the future." 42 C.F.R. § 413.149. This is confirmed by 42 C.F.R. § 413.130(a), which explains that the "[n]et depreciation expense as determined under §§ 413.134, 413.144, and 413.149" were included among "[c]apital-related costs and an allowance for return on equity."

Finally, Plaintiff looks to a statutory provision that authorizes the Department of Transportation to enter into a lease in which the Metropolitan Washington Airports Authority could use parking fees from one airport for "debt service, depreciation, and amortization" at another. 49 U.S.C. § 49104(a)(9); SJ Br. 6. The context there is unlike here in numerous ways. Among other things, under that statute, the parties would enter a lease in which the Metropolitan Washington Airports Authority would pay the Department of Transportation unlike how the Defendant is paying the Plaintiff. *See* 49 U.S.C. § 49104(b). Nor was the Metropolitan Washington Airports Authority receiving the parking fees from the Government to pay for capital outlays made by the Government as Plaintiff does here. And, as with the Postal Service, the Metropolitan Washington Airports Authority was not like a standard federal program. In this case, the Authority was a creature of state law and could use funding in a future-oriented manner to build more capital projects independent of federal authorization. *See Kerpen v. Metro. Wash. Airports Auth.*, 907 F.3d 152 (4th Cir. 2018) (using toll roads to fund expansion of metro service). Moreover, just as in 25 U.S.C. § 5324(*l*), the use of "debt service" and "depreciation" in the list does not prove, as Plaintiff contends, that those expenses always represent different investments. There is no indication anywhere in the statute that the "debt service" and "depreciation" were for the same acquisition costs as here. It might well be that the debt service was for a parking lot and the depreciation was for the runways.

Thus, Plaintiff's analogies make sense only if Congress had wanted tribes to double-recover acquisition costs so that tribes could profit and expand their services from that double-recovery. Here, however, nothing suggests that Congress wanted to allow Plaintiff to spend profits on expanding its operating costs in the future—because there is no expectation that Plaintiff would earn a profit at all and every expectation that the Plaintiff would seek funding from the Defendants each year for services it would provide. Nor has Plaintiff shown that the examples that it cites involve the same double recovery in which a party obtains Government funding for capital outlays and then seeks Government funding to recover the value of those same outlays.

B. Section 5324(*l*) Does Not Show That Depreciation is Different From Acquisition Costs in This Case.

Plaintiff insists that depreciation must be different from the acquisition cost (loan), and therefore not redundant, because "Congress listed both of them as reasonable expenses" in 25 U.S.C. § 5324(*l*). Plaintiff misreads that statute in two ways. First, there is an obvious reason why both depreciation and acquisition costs might be listed in Section 5324(*l*): a tribe might seek to recover either under different circumstances. For instance, one tribe might acquire a facility entirely using its money and then seek to recover depreciation. Another tribe might pay for a facility and operate a facility using a loan and then seek recovery for "principal or interest." Omitting depreciation from the statute would bar the first tribe from recovering any of its acquisition costs. Omitting interest would not allow the second tribe to recover the costs of financing the acquisition or operations. Thus, including both is meant to ensure that tribes' costs can be compensated once no matter how they are financed—not to require costs be covered twice, as Plaintiff insists.

Put another way, if Plaintiff's reading were correct, it would treat tribes differently if they funded acquisition costs of a facility with loans or they did not. Under Plaintiff's theory, tribes that fund acquisitions with loans can recover principal, interest, and depreciation. But a tribe that self-funds its acquisition is entitled only to depreciation. This is an absurd result that cannot stand under the statute. *Jamestown*, 486 F. Supp. 3d at 91 ("That . . . reading of the . . . statutes at issue . . . cannot be accepted because it would lead to absurd results.").

Second, Plaintiff's argument relies on an insistence that tribes are always entitled to every item listed in 25 U.S.C. § 5324(*l*) list. However, the list in that statute is exemplary and not all-inclusive. It plainly states that the elements listed "may" be part of reasonable compensation: "Such 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*)(2). The permissive "may" is necessary because the goal is to compensate tribes for their reasonable expenses, which is better done on a case-by-case basis than through rigid adherence to accounting categories, which would encourage gamesmanship like Plaintiff engages in here.

The relevant regulations support this plain reading, although no such support is necessary. The statute delegates power to the Secretary to determine what are "reasonable expenses." 25 U.S.C.A. § 5324(*l*)(2). 25 C.F.R. § 900.70 looks to the elements included in Section 5324(*l*) and emphasizes that compensation should be made "[t]o the extent that no element is duplicative."

C. Plaintiff Misunderstands the Tax Analogy in Defendants' Motion to Dismiss.

Defendants' motion to dismiss explained that even though tax laws would allow Plaintiff to deduct depreciation for the full acquisition cost (MTD at 6–7 ("True, under tax-accounting rules, the Government's assumption of the loan would not directly affect the basis in the Treatment Center.")), they would also require Plaintiff to recognize forgiveness of debt. Moreover, under unusual circumstances, when a party does not recognize "[c]ancellation of indebtedness" as "taxable income" and then "adjust[s] . . . the basis of assets." *Id.* at 6 (quoting Debt Cancellations

That May Require Basis Adjustments, *Federal Tax Coordinator* ¶ P-3002, 1997 WL 504370 (last updated Apr. 2023)). Both situations make the same point: a party's tax base increases through income (including someone else's repayment of debt) and deducts the tax base through depreciation. Thus, when a business acquires capital with a loan and gets its loan paid off, the debt forgiveness and the depreciation can cancel each other out for tax purposes. Although the analogy is a little loose, Defendants pointed to the tax treatment of depreciation because it is one of the more common legal situations in which depreciation is considered.

Plaintiff misapprehends the lesson from this situation, noting, as Defendants already stated, that a party can take tax depreciation on capital acquired from borrowed funds. SJ Br. 7–8. But Plaintiff cannot explain why Defendants' repayment of the loan is not analogous to a discharge of indebtedness. First, Plaintiff claims it is still "fully liable on th[e] loan" because Defendants have not assumed the entire loan. SJ Br. 8. But the Government would not need to erase the entire loan to create what-would-be taxable income. Third-party repayment of part of a business's debt still would be taxable income. *See* Empl. Benefits Mgmt. ¶ 110,580 ("If the employer makes its portion of the mortgage payment to an unrelated third-party lender in order to buy down the executive's mortgage loan, the employer's payment generally must be included in the executive's income as taxable wages[.]"); Federal Tax Coordinator ¶ J-7008 (2d ed.) ("Where the third-party guarantors of the taxpayer's bank loan paid $900,000 to the bank in partial satisfaction of the loan, the taxpayer had COD income of $900,000 as of the pay-off date."). Moreover, under the law, it can be expected that Defendants would continue to pay off the loan one year at a time through the lease. *See* 25 C.F.R. § 900.32 ("If [annual funding agreement] is substantially the same as the prior annual funding agreement (except for funding increases included in appropriations acts or funding reductions as provided in section 106(b) of the Act) and the contract is with [the

Department of Health and Human Services] or the [Bureau of Indian Affairs], the Secretary shall approve"). Thus, under the tax analogy, the depreciation attributed to the Department of Agriculture loan would offset the income received to repay the loan.

Next, Plaintiff explains that the Government is not actually forgiving the debt: it is leasing the Treatment Center "at a rate sufficient to cover the debt service." *Id.* This, too, would yield identical results under the taxation analogy: the lease income would be taxable income that would be offset by the depreciation. Despite this, Plaintiff does not seek to offset anything here and instead seeks a double recovery.

II. <u>Plaintiff's Attack on the Regulations Fails</u>

A. The Regulation is Valid

The applicable regulations plainly bar Plaintiff from double recovery here. To avoid that result, Plaintiff argues that 25 C.F.R. § 900.70(b) "impermissibly rewrites the statute," citing *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984). SJ Br. 9. To the extent *Chevron* applies here, to succeed in this argument, Plaintiff must show that (1) Congress did not delegate the power to interpret the statute to Defendant, *see Corbett v. Transp. Sec. Admin.*, 19 F.4th 478, 485 (D.C. Cir. 2021) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority." (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990))); (2) "Congress has directly spoken to the precise question at issue," *Lissack v. Comm'r*, 68 F.4th 1312, 1322 (D.C. Cir. 2023) (quoting *Nat'l Env't Dev. Ass'n's Clean Air Proj. v. EPA*, 891 F.3d 1041, 1047 (D.C. Cir. 2018)); or (3) the agency's interpretation is impermissible, *see id.* Plaintiff could not meet its "heavy burden" to overcome deference to the agency. *Nat'l Cable & Telecomms Ass'n v. FCC*, 567 F.3d 659, 666 (D.C. 2009). But even without any deference and even with the application of the "Indian canon" (discussed below), § 900.70(b) is valid under Section 5324(*l*).

That statute plainly delegates authority to Defendants to determine what costs are reasonable and the rule at issue, created through negotiated rulemaking, 25 U.S.C. § 5328(d), makes sense.

The statute requires that Defendants not pay more than "reasonable" lease compensation, *Jamestown*, 486 F. Supp. 3d at 85, and further delegates authority to Defendants to determine what is reasonable, *Maniilaq*, 170 F. Supp. 3d at 250 ("Section [5324(*l*)] leaves it to the Secretary to determine, by regulation, which 'reasonable expenses' are 'allowable.'").[1] Obviously, duplicative compensation is unreasonable. *Cf. Wash. Alliance of Tech. Works v. Dep't of Homeland Sec.*, 857 F.3d 907, 910 (D.C. Cir 2017) ("'reasonable' fees" do not include those that are "excessive, redundant, or otherwise unnecessary" (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433–34 (1983))). Plaintiff recognized as much when it initially offered to remove at least the principal from the depreciation base. *See* Def. Stmt. ¶ 8.

In response, Plaintiff argues that Congress expressly stated that all depreciation is always reasonable, as long as it was not accelerated. SJ Br. 9–10. But Plaintiff's argument here relies on the same incorrect assumption permeating its brief: while the word "depreciation" is included in Section 5324(*l*) as a potentially recoverable cost, Congress never said that all depreciation was always compensable or always reasonable under all circumstances, such as here where Defendant is already paying most of the acquisition cost by paying off Plaintiff's Department of Agriculture loan.

Plaintiff has no support for its argument. Courts have already held that the Section 5324(*l*) is permissive: "The Secretary is correct that section 105(*l*) itself deals only with what

---

[1] Plaintiff does not argue—and therefore concedes—that Defendants have been delegated the power to interpret Section 5324(*l*).

compensation *may* include." *Maniilaq*, 170 F. Supp. 3d at 252 (emphasis in original); *see also Jamestown*, 486 F. Supp. 3d at 85.

Because the text does not show an express command to pay for all depreciation (including, as here, redundant depreciation), Plaintiff tries to draw an inference from a negative: "In other statutes, Congress sometimes has limited depreciation to items financed by non-Federal funds." SJ Br. 9 (citing 43 U.S.C. § 1523(b)(2)). To the extent any inference can be drawn, such inference is extraordinarily weak here where there is no reason to believe that Congress was considering the Indian Self–Determination Act Amendments of 1994 to the 1975 Indian Self-Determination and Education Assistance Act, Pub. L. No. 103-413, 108 Stat. 4250, 4255–56 (Oct. 25, 1994), alongside the Colorado River Basin Project Act of 1968, Pub. L. No. 90-537, § 303(b)(2), 82 Stat. 885, 890 (Sept. 30, 1968). *See Coal. for Common Sense in Gov't Procurement v. United States*, 821 F. Supp. 2d 275, 286 (D.D.C. 2011) ("[T]he Court has already rejected the argument that because Congress constructed a policy regime in other statutes, it must necessarily have adopted that same scheme in NDAA–08." (quoting *Coal. for Common Sense in Gov't Procurement v. United States*, 671 F. Supp. 2d 48, 57–58 (D.D.C. 2009))), *aff'd*, 707 F.3d 311 (D.C. Cir. 2013); *cf. Sec. Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 468 U.S. 137, 175 (1984) ("In this case, the argument from other statutes has little or no weight. Petitioners, who make this argument entirely in the abstract, offer no reason to think that Congress specifically intended 'security' to have the same meaning in the Glass–Steagall Act and the securities laws, and the first part of this opinion shows that there are many reasons to think otherwise."); *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that

Congress intended that text to have the same meaning in both statutes."). This weak inference fails to show that Congress clearly intended that depreciation would always be reasonable.

Finally, Plaintiff argues that the 25 C.F.R. § 900.70(b) conflicts with another part of the Indian Self–Determination Act Amendments of 1994, codified as 25 U.S.C. § 5325(k). But there is no conflict. Section 5325(k) describes "allowable uses" of "the baseline 'Secretarial amount' for 'direct program costs.'" *Jamestown*, 486 F. Supp. 3d at 84 (quoting 25 U.S.C. §5388(c)). By contrast, Section 5324(*l*) refers to the terms of specific leases. *See id.* at 84–85 (distinguishing between the Secretarial amount and the leases as different "types of funding available"). It is hardly surprising that there are fewer restrictions on the more block-grant-like Secretarial amount.

The legislative history (to the extent that the legislative history may be helpful here)[2] cited by Plaintiff makes the same point. The Senate report that Plaintiff cites refers expressly to "the administration of self-determination contracts"—not leases. S. Rep. 102-444, at 13 (1992). As *Jamestown* held, Section 5324(*l*) did not require the Indian Health Service always pay any request for depreciation because of concerns about "cost principles issued by" the Office of Management and Budget. *Jamestown*, 486 F. Supp. 3d at 89. Instead, the statute delegated to the Indian Health Service "the authority to 'determine, by regulation,' exactly which 'reasonable expenses' would be "allowable," 25 U.S.C. § 5324(l)(2), rather than leaving the recovery of use- and depreciation-related expenses to general government-contracting principles." *Id.*

---

[2] *Cf. Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 616 (D.C. Cir. 2013) ("Thus, 'this case does not present the very rare situation where the legislative history of a statute is more probative of congressional intent than the plain text.'" (quoting *Va. Dep't of Med. Assistance Servs. v. Dep't of Health & Human Servs.*, 678 F.3d 918, 923 (D.C. Cir. 2012))) (internal quotation marks omitted).

Further, it is worth noting that Defendant has offered to pay non-redundant depreciation—the depreciation attributable to acquisition cost for which the Defendant is not reimbursing Plaintiff.

B. The Regulation Makes Sense

The regulation allows Defendants to pay for depreciation "based on acquisition costs not financed with Federal funds." 25 C.F.R. § 900.70(b). Plaintiff here seeks depreciation based on acquisition costs financed with a federal loan for which it would separately be reimbursed for by Defendants. If that regulation did not apply to a federal loan repaid by a federal program, it is hard to imagine where it would apply.

Plaintiff misunderstands the scope of Defendants' argument. Defendants declined to repay the loan because it was funded by the Department of Agriculture and because such repayment would be redundant with depreciation. *See* Ex. C at 2 ("[T]he regulations make clear that depreciation is only allowable for 'acquisition costs not financed with Federal funds.' . . . . The federally financed portion, totaling $5,806,493, may not be claimed by the Nation as part of the depreciable base for purposes of its proposed lease."); *id.* at 3–4 (citing 25 C.F.R. § 900.70 and explaining that the repayment for the loan and the depreciation are redundant); Compl. Ex. B at 7–8, ECF No. 1-2 (explaining that government repayment of "an annual principal and interest payment of $205,623" must be subtracted from depreciation because "25 C.F.R. § 900. 70 . . . explicitly requires that the depreciation amount reflect federal funding").

Here, Defendants advance only one of the arguments raised during the administrative process—that the regulation applies because Plaintiff will have its Department of Agriculture loan repaid by HHS—not solely because the loan came from the USDA. Starting from that misunderstanding and the belief that all tribes must always receive depreciation, Plaintiff argues that the regulation does not make sense. Plaintiff is wrong.

First, Plaintiff contends that "[t]here is no authority in the Act for HHS or DOI to promulgate any such novel restriction on depreciation." SJ Br. 13. Of course there is.[3] The statute plainly allows the Department to determine what expenses are reasonable: "Section [5324(*l*)] leaves it to the Secretary to determine, by regulation, which 'reasonable expenses' are 'allowable.'" *Maniilaq*, 170 F. Supp. 3d at 250. As this case shows, it would be unreasonable to pay for depreciation based on acquisition costs financed by the Government—that would be double compensation.

Second, Plaintiff argues that the regulation "would arbitrarily deny depreciation for projects funded by federal loans but not for those funded by private loans." SJ Br. 13. This proceeds from the mistaken assumption that a tribe is always entitled to depreciation no matter the circumstances of acquisition or what other compensation a tribe is receiving from the Department of Health and Human Services.[4] Again, that assumption is baseless. Whether a tribe uses private loans or government loans, the regulation ensures that both tribes are compensated (once) for the cost of acquiring the facility.

Third, Plaintiff complains that 25 C.F.R. § 900.70(d) might cause tribes to exercise choices given to them by 25 C.F.R. § 900.74. Section 900.74 give tribes a choice about how they want to

---

[3] Moreover, the restriction is not "novel." There are plenty of examples of similar regulations. *See, e.g.*, 2 C.F.R. § 200.436(c)(2); 48 C.F.R. § 31.205-11(d).

[4] Here, too, Plaintiff relies on an irrelevant Medicare regulation about "preserv[ing] the capital employed in the production of services" and "maintain[ing] productive capacity for the future." 42 C.F.R. § 413.419(b). Those are not goals of the loan program at issue.

"propose a lease based on the elements set out in the regulations." Specifically, there are three options available:

> (a) The lease may be based on fair market rental.
>
> (b) The lease may be based on a combination of fair market rental and paragraphs (a) through (h) of § 900.70, provided that no element of expense is duplicated in fair market rental.
>
> (c) The lease may be based on paragraphs (a) through (h) of § 900.70 only.

Maniilaq, 170 F. Supp. 3d at 253; 25 C.F.R. § 900.74. Plaintiff claims that if tribes are not guaranteed duplicative depreciation, they might "base their lease compensation on the fair market rental of the property pursuant to 25 C.F.R. § 900.74." SJ Br. 14. There is nothing unlawful or even unfair about allowing tribes to choose among proposals "pursuant to 25 C.F.R. § 900.74" (SJ Br. 14), another valid regulation that is not challenged here. Plaintiff claims that fair market value might be more difficult to calculate. But the regulations are not required to make the estimation of costs as easy as possible. There is nothing arbitrary, capricious, or "anomalous" about giving parties the choice about how to calculate a lease and offering to pay tribes the "fair market rental" if they so request it. SJ Br. 14 (quoting *Frazier v. McDonough*, 66 F.4th 1353, 1358 (Fed. Cir. 2023)).[5]

Moreover, Plaintiff's premise—that a tribe could use fair market rental to capture unreasonable lease compensation untethered to the cost of providing services—is contrary to the statute. Defendants "need not grant lease compensation requests that are duplicative of funding already provided by the government . . . or are not reasonable." *Jamestown*, 486 F. Supp. 3d at 85; *accord* Ex. G at 2 ("The Nation has the option under 25 C.F.R. § 900.74 to enter into a fair market

5 In *Frazier*, 66 F.4th at 1358, by contrast, the "anomalous" interpretation was obviously illogical: "'[A]n individual with only slight pain and occasional stiffness' in a finger 'would be rated on par with an individual whose finger was amputated.'"

rental lease with the Indian Health Service that is more akin to a private-sector lease, but even those leases require that any federal contribution to the acquisition or construction cost be reflected in the level of compensation due to the Tribe." (citing 25 C.F.R. § 900.70(i)); *id.* ("The Nation's proposal shifts every single expense associated with the operation of the property to the lessee, and also seeks to compel the lessee to pay for the construction of the facility and depreciation of the facility (an expense an ordinary landlord would recoup through the tax depreciation deduction).").

Fourth, Plaintiff argues that it is determinative that it "bore the cost of construction," based on 48 C.F.R. § 31.205-11(d). SJ Br. 12–13. This is legally wrong and factually misleading. First, there is no reason to rely on § 31.205-11(d), a more general regulation about depreciation that does not claim to interpret the statutory provision at issue. *Cf. Gen. Dynamics Corp. v. Panetta*, 714 F.3d 1374, 1380 (Fed. Cir. 2013) ("[T]o the extent CAS and FAR conflict as to the allocability of costs, the more specific CAS provisions control."); *Nasdaq Stock Mkt. LLC v. Sec. & Exch. Comm'n*, 38 F.4th 1126, 1137 (D.C. Cir. 2022) ("[T]he more specific provision controls." (quoting *Halverson v. Slater*, 129 F.3d 180, 186 (D.C. Cir. 1997))). Moreover, as a practical matter, Plaintiff may have initially bore the costs, but Defendants now do at Plaintiff's request.

Finally, Plaintiff mistakenly claims that "BIA has adopted a contrary interpretation" under which "[t]he BIA compensates the Tribe for <u>both</u> principal and interest on the USDA loans and for depreciation based on the cost of the facilities that was funded by the USDA loans." SJ Br. 14–15. As proof that the BIA has a different policy from the policy in Defendants' duly promulgated regulations, Plaintiff points to a nonbinding website: Bureau of Indian Affairs, *105(l) Facility Lease Program Technical Assistance Guidebook* (2022), https://www.bia.gov/sites/default/files/dup/inline-files/105_l_technical_assistance_guide.pdf. Even if that website were somehow on equal footing with 25 C.F.R. § 900.70(b), it appears to be fully consistent with the regulation. Specifically, Plaintiff notes that the BIA says that a tribe needs to know "[t]he total amount of funding provided or borrowed by the Tribe" to determine how much depreciation it should request. That very same list adds that a tribe also needs to know "[t]he amount of non-Federal funds used in the total cost of construction." Moreover, that website also points to "the cost elements in [§]900.70(b)," including "[d]epreciation and use allowance based on the useful life of the facility based on acquisition costs not financed with Federal funds." *Id.* at 13. By contrast with this clear language, Plaintiff points to a single instance in which Plaintiff contends that it has been compensated for principal and interest on federal construction loans as well as depreciation. SJ at 4, 14–15 (citing Pl. Stmt. ¶¶ 20–22). Even then, Plaintiff deducts its recovery for loan principal from book value when calculating depreciation there. Def. Stmt. ¶ 22. Plaintiff's argument that Defendants are bound to follow this purported mistake is unsupported and untenable.

Plaintiff points to a series of inapposite cases. In those cases, courts declined to afford *Chevron* deference to agency interpretations where the agency at issue was not delegated interpretative authority, *Pub. Citizen Health Rsch. Grp. v. FDA*, 704 F.2d 1280, 1287 (D.C. Cir. 1983) ("Congress has made clear both that the federal courts, and not the administrative agencies, are ultimately responsible for construing the language of the FOIA[.]"), or multiple agencies could enforce the same regulation simultaneously over the same conduct, *see DeNaples v. Off. of Comptroller of Currency*, 706 F.3d 481, 488 (D.C. Cir. 2013) ("[A] single individual may be subject to enforcement action by multiple agencies . . . . § 19 violations may trigger criminal penalties. There is therefore a compelling need for interpretive uniformity."). The most instructive of the cases cited by Plaintiff is *Collins v. NTSB*, 351 F.3d 1246, 1252–53 (D.C. Cir. 2003), which explains that deference is inappropriate (1) for "generic statutes" that are applied by "dozens of agencies, and for which no agency can claim any particular expertise" and (2) statutes "where the agencies have specialized enforcement responsibilities but their authority potentially overlaps—thus creating risks of inconsistency or uncertainty." By contrast, "where expert enforcement agencies have mutually exclusive authority over separate sets of regulated persons, the above concerns don't work against application of *Chevron* deference." *Id.* at 1253.

Thus, Plaintiff's analogy is mistaken in two respects. First, Defendants here do not seek *Chevron* deference unlike the agencies in those precedents. Second, and more importantly, Plaintiff has not—and cannot—point to any possibility that any given project would be subject to inconsistent regulations. Plaintiff knows that it must negotiate with Bureau of Indian Affairs for the leases for the Fire Halls and with Defendants with respect to the Treatment Center.

III. <u>The Agency's Position is Consistent</u>

Plaintiff accuses Defendants of "belatedly changing its rationale for declining a portion of that funding" because Defendants offered to pay for depreciation in 2020–2021, but then subsequently sought to pay for the loan instead of reimbursement. SJ Br. 16. This is false. In an October 29, 2020 letter, Defendants explained that it was impermissible to seek recovery for principal and interest and depreciation: "

> [T]he depreciation element of compensation provides the Nation with compensation for the total cost of the Obaashing [Chemical Health Treatment Center]. Yet, the Nation seeks also to charge [the Indian Health Service] under the principal and interest element for each and every principal and interest payment made by the Nation on its construction loan. These elements, therefore, provide compensation for the exact same thing—the cost of the Obaashing CTHC (plus interest).

Def. Stmt. ¶ 11.

Even if Plaintiff could somehow ignore this letter, Plaintiff mistakes a change in label for a change in position. In both instances, Defendants offered to pay for the acquisition costs for the given year. Defendants agreed to pay for depreciation when they determined that they would not pay for the principal and interest on the loan. *See* SJ Ex. 1 at 5–9, ECF No. 15-2 at 11–15 (declining to pay principal and interest); SJ Ex. 2 at 5, ECF No. 15-2 at 26 (awarding depreciation and not principal and interest). Subsequently, in 2022, Defendants concluded that they could pay the principal on the interest on the loan "subject to any necessary corresponding changes to the depreciation element caused by the inclusion of principal and interest." PL.'s SJ Ex. 3 at 4, ECF No. 15-2 at 31.

Defendants explained its position in their October 29, 2020 letter. And the final leases reflect this position. It simply does not matter to the Defendants what label Plaintiff wants to put on their reimbursable acquisition costs as long as Plaintiff's costs are reasonable and not duplicative.

IV. <u>Plaintiff Has Suffered No Damages for the Years 2020 and 2021</u>

When drafting their 2022 lease proposal, Plaintiff indicated that it had $153,733.35 in funds unspent from its 2020/2021 lease. *See* Def. Stmt. ¶ 29. The final 2022 lease included a 2020/2021 Unspent Carryover Offset in that same amount. *Id.* ¶ 32. The amount of unspent funds from the 2020 and 2021 leases exceeds the $147,535 in funds that Plaintiff claims it was owed. *See* Compl. ¶ 31. By Plaintiff's admission, Plaintiff was not undercompensated for the cost of providing services in 2020 and 2021. Had Plaintiff received an additional $147,535 in 2020 and 2021, that balance, too, would have been applied to the 2022 lease.

V. <u>The "Indian Law Canon of Statutory Construction" Does Not Save Plaintiff Here</u>

In their motion to dismiss, Defendants cited *Jamestown S'Klallam Tribe v. Azar*, 486 F. Supp. 3d 83 (D.D.C. 2020), a case that relied on *Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243, 255 (D.D.C. 2016), for two principles drawn from section 105(*l*) and the implementing rules, namely that the Indian Health Service "need not grant lease compensation requests that are duplicative of funding already provided by the government or are not reasonable." *Jamestown*, 486 F. Supp. 3d at 85 (quoting *Maniilaq*, 170 F. Supp. 3d at 255) (cleaned up).

Plaintiff has nothing to say about these controlling principles and instead cites those cases for the propositions that Section 5324(*l*) and regulations promulgated thereunder should be construed in favor of the Tribe where possible under the "Indian law canon." SJ Br. 12, 15; *Jamestown*, 486 F. Supp. 3d at 88. This is true as far as it goes. *See* 25 C.F.R.§ 900.3(b)(11). But it only goes so far. "[T]hat canon must be given its due, like others, it 'need not be conclusive,' and 'other circumstances evidencing congressional intent can overcome [its] force.'" *Jamestown*, 486 F. Supp. 3d at 88 (quoting *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001)). The canon operates only where there is an ambiguity on which a tribe can rely. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.").

Here, by contrast, Congress's intent is clear: "the statute 'tethers the concept of compensation to 'reasonable expenses.'" *Jamestown*, 486 F. Supp. 3d at 92 (quoting *Maniilaq*, 170 F. Supp. 3d at 250) (cleaned up). Requiring Defendants to pay the acquisition costs twice is unreasonable. Thus, it "would push the Indian law canon past its breaking point" to hold that Section 5324(*l*) "compels the agency to pay an unreasonable amount of lease compensation." *Id.* at 92.

Finally, despite the "Indian canon," the court will nevertheless apply "careful consideration" to the Agency's interpretation of the Indian Assistance Act. *See Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 108 (D.D.C. 2019) (quoting *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001)).

CONCLUSION

For the reasons stated above, the Court should deny Plaintiff's Motion for Summary Judgment, and grant Defendants' motion for summary judgment, and enter judgment in favor of the Government.

Dated: August 2, 2023
Washington, DC

Respectfully submitted,

MATTHEW M. GRAVES, D.C. Bar #481052
United States Attorney

BRIAN P. HUDAK
Chief, Civil Division

By: *Brian J. Levy*
BRIAN J. LEVY
Assistant United States Attorney
601 D Street, NW
Washington, DC 20530
(202) 252-6734

Attorneys for the United States of America