[NOT YET SCHEDULED FOR ORAL ARGUMENT]

NO. 24-5098

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RED LAKE BAND OF CHIPPEWA INDIANS,

Appellant,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al*.,

Appellees.

BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CASE NO. 23-cv-0063
JUDGE ROYCE C. LAMBERTH

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties:

The following parties appeared in the district court:

- Red Lake Band of Chippewa Indians — Plaintiff/Appellant
- U.S. Department of Health and Human Services — Defendant/Appellee
- Xavier Becerra — Defendant/Appellee

Rulings Under Review:

Appellant seeks review of the February 26, 2024 opinion and order of the Honorable Royce C. Lamberth which denied Appellant's motion for summary judgment and granted Appellees' cross-motion for summary judgment.

Related Cases:

This case has not previously been before this Court or any court other than the district court below.

Dated: July 23, 2024

Respectfully submitted,

/s/
Steven D. Gordon
Attorney for Appellant

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 25 U.S.C. § 5331(a) and 28 U.S.C. § 1331. On February 26, 2024, the district court issued a Memorandum Opinion and Order denying the motion for summary judgment filed by appellant Red Lake Band of Chippewa Indians (the "Tribe") and granting appellees' cross-motion for summary judgment. The Tribe filed a timely notice of appeal on April 16, 2024. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Tribe constructed a health care facility and leased it to the Indian Health Service ("IHS") pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 *et seq.* ("ISDA"). ISDA provides that the agency "shall compensate" a tribe and 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) (emphasis added). A regulation prohibits payment of cost elements that are duplicative. 25 C.F.R. § 900.70.

ISDA further provides that the agency must approve or decline a lease funding proposal within 90 days after a tribe submits it. 25 U.S.C. § 5321(a)(2). A tribal

proposal that is not declined within 90 days is deemed approved. *See* 25 C.F.R. § 900.18.

The issues presented here are as follows:

1. Whether IHS can decline to compensate the Tribe for principal and interest on a loan used to construct the facility as well as for depreciation of the facility, based on the contention that they are duplicative costs.

2. Whether IHS, having incorrectly declined to compensate the Tribe for principal and interest on the construction loan for 2020 and 2021, and admitting its error a year later, can refuse to provide that funding by interjecting a different rationale for declining it.

STATUTES AND REGULATIONS

Pursuant to Circuit Rule 28(a)(5), pertinent statutes and regulations are set forth in an addendum to this brief.

STATEMENT OF FACTS

The Tribe operates various federal programs for tribal members pursuant to ISDA contracts with IHS and the Bureau of Indian Affairs ("BIA").[1] The Tribe's

[1] "Congress enacted [ISDA] 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. Dept. of Interior*, 852 F.3d 1124, 1126 (D.C. Cir. 2017) ("*Navajo Nation I*"). ISDA applies to the Department of Health and Human Services ("HHS") and the Department of the Interior. *See* 25 U.S.C. § 5304(i). IHS and BIA are the main entities within those departments that contract under ISDA. In this brief, references to "HHS," "IHS," or "the agency" encompass both appellees.

contracts with IHS include one for an alcohol program and one for a substance abuse/rehabilitation program ("Contracted Programs"). (Joint Appendix at JA095).

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 from the U.S. Department of Agriculture ("USDA"). (JA096).

A. The Leases For 2020 And 2021

Following completion of the Treatment Center, the Tribe submitted a proposal to lease the facility to IHS pursuant to section 105(l) of ISDA, 25 U.S.C. § 5324(l), together with a companion proposal to amend one of its existing ISDA contracts to include the lease pursuant to 25 U.S.C. § 5321. (JA096). The Tribe began providing health care services at the Treatment Center in December 2020. The Tribe and IHS negotiated leases for 2020 and 2021 together, agreeing that the lease for 2020 would be pro-rated from the 2021 lease. (JA096).

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 compensation for depreciation based on the full acquisition cost of the facility, amounting to $148,884.41 annually. (JA097). The disputed

element was compensation for principal and interest payments on the USDA loan, which amounted to $136,186.29 annually.

In a letter of January 15, 2021, IHS partially declined the Tribe's proposals for 2020 and 2021, pursuant to 25 U.S.C. § 5321(a)(2)(D), to the extent that they sought funding for principal and interest on the USDA loan. The agency asserted that "Congress's authorization to provide principal and interest [in section 105(l)] does not go so far as to require repayment of a Federal loan." (JA 048). The declined funding amounted to $11,349 for 2020 and $136,186 for 2021. (JA098).

B. The Lease For 2022 And IHS's Change In Position

During lease negotiations for 2022, the USDA loan once again became a point of contention. However, in its final decision of June 21, 2022, IHS announced that it had "revisited its position" on the issue. (JA066). The agency now agreed that the Tribe's payments of principal and interest on the USDA loan are properly compensable under ISDA and approved that compensation as part of the 2022 lease. But IHS declined to compensate the Tribe for depreciation on the portion of the facility 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. This declined compensation amounted to $123,307.80. (JA099).

IHS added that it was prepared to modify the previous leases for 2020 and 2021 "once an adjustment to the depreciation calculation has been agreed upon." (JA066). The agency proposed to apply its new position retroactively to those years, and offset a portion of the compensation for depreciation that it had already provided against the funding for principal and interest it would now provide. To date, no adjustment has been made and no additional funds have been provided to the Tribe for 2020-2021. (JA099-JA100).

C. BIA's Contrary Position On Lease Compensation

The Tribe also has a section 105(l) lease with BIA that covers two fire halls that were financed in the same way as the Treatment Center. 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 in October 2019, 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. (JA100).

D. The District Court's Decision

The Tribe brought this suit challenging IHS's decisions to partially decline the lease funding for 2020, 2021, and 2022. The agency filed a motion to dismiss and the Tribe responded with a motion for summary judgment, following which the agency cross-moved for summary judgment. On February 26, 2024, the district

court issued a decision granting the agency's motion for summary judgment and denying the Tribe's motion.

The court reasoned that case law "show[s] that the settled purpose of depreciation is to recover the original investment in an asset." (JA159). It concluded that "the Tribe's requests to be compensated for both the principal and interest on the USDA loan used to build the Treatment Center and depreciation based on the portion of the acquisition cost funded by that loan would twice compensate it for the same thing" and so were impermissibly duplicative. (JA147). The court upheld the agency's decision to decline funding for depreciation for 2022 on this basis.

The court also allowed IHS to assert this duplication argument to avoid paying the Tribe principal and interest for 2020 and 2021, although the agency had not asserted duplication as its rationale when it declined this funding in its January 15, 2021 decision. The court accepted the agency's argument that the ISDA declination requirements were satisfied because IHS had raised the duplication issue in an earlier October 29, 2020 letter to the Tribe. (JA148-JA149). The court added that, even if the basis for declining funding must be included in the agency's final decision, IHS's duplication argument could still be considered under an exception to *Chenery*[2] that

[2] *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), holds that an agency may not defend an administrative decision on new grounds not set forth by the agency in its original decision.

permits an agency to raise a purely legal argument for the first time in litigation if it is clearly correct and would render remand pointless. (JA150-JA152).[3]

This appeal followed.

SUMMARY OF APPELLANT'S ARGUMENT

1. IHS must provide the Tribe with the funding for depreciation that it declined for 2022 because depreciation is a distinct cost from principal and interest (debt service). Principal and interest is an expense incurred in acquiring a capital asset, while depreciation is a decline in an asset's value thereafter because of use, wear, obsolescence, or age. Congress listed both depreciation and principal and interest as distinct expenses that are eligible for compensation pursuant to an ISDA lease. *See* 25 U.S.C. § 5324(l). IHS's conclusion that they are duplicative effectively re-writes the statute to provide that a tribe can recover either depreciation or principal and interest but not both, thereby imposing a limitation that Congress did not provide for in the statute or authorize the agency to create by regulation.

The district court erred in ruling that the purpose of depreciation, in the context of an ISDA lease, is to enable a tribe to recover its acquisition cost of a leased facility. Instead, depreciation "recognizes that the physical consumption of a capital

[3] The Tribe also challenged the agency's reliance on a provision in 25 C.F.R. § 900.70(b) that depreciation must be based on acquisition costs not financed with Federal funds. The Tribe contends that this limitation exceeds the agency's authority under the statute and, in any event, is inapplicable here. The district court did not reach this issue. (JA146-JA147, n.2).

asset is a true cost, since the asset is being depleted." *Comm'r v. Idaho Power Co.*, 418 U.S. 1, 10 (1974). HHS has long acknowledged, in a Medicare regulation, that "irrespective of the source of financing of an asset, if it is used in the providing of services for beneficiaries of the program, payment for depreciation of the asset is, in fact, a cost of the production of those services." 42 C.F.R. § 413.149(b) (emphasis added). In other words, depreciation is an actual cost incurred during the useful life of an asset that is distinct from any cost incurred in acquiring that asset.

Because depreciation and principal and interest can reasonably be construed as nonduplicative costs, the Indian canon of construction mandates that they be interpreted in this fashion. Further, the ISDA leasing regulations themselves are ambiguous as to whether they proscribe compensation for both depreciation and debt service. Again, the Indian canon requires that they be construed to permit compensation of both costs. Moreover, IHS and BIA must construe ISDA and the regulations uniformly, and BIA already compensates the Tribe for both depreciation and principal and interest under a section 105(l) lease. IHS cannot adopt a contrary interpretation.

IHS's regulatory construction contravenes the purpose of ISDA, which is to assist "in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." 25 U.S.C. § 5302(b). Treating depreciation as duplicative of debt

service results in unrealistically low lease compensation that merely covers the tribal lessor's acquisition costs (its down payment and debt service expenses) and leaves it with nothing (apart from a worn out and useless facility) at the end of its useful life. No rational lessor would agree to build and lease a facility on those terms. Tribes would receive far less than private landlords from whom the federal government leases facilities -- who are compensated for all of their expenses, including depreciation, and receive a profit as well.

2. IHS must also provide the funding for principal and interest that it declined for 2020 and 2021 because it now admits that this is a compensable cost under an ISDA lease. The agency cannot assert a belated "duplication" objection to this funding that it did not timely articulate in its final decision. Not only is the agency's duplication argument flawed, but ISDA forbids belated justifications for funding declinations.

ISDA "circumscribe[s] as tightly as possible the discretion of the Secretary." *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996). It gives the agency 90 days to either approve a tribal proposal (or portions thereof) or to decline it for a valid reason. *See* 25 U.S.C. § 5321(a)(2). A tribal proposal that is not declined within 90 days is deemed approved. *See* 25 C.F.R. § 900.18. Congress tasked IHS with "making defensible 90-day funding determinations when assessing contract proposals." *Cook Inlet Tribal Council v. Mandregan*, 2019 WL 3816573,

at *10 (D.D.C. 2019). 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.

The agency cannot evade these strictures by relying on its earlier letter of October 2020 to "supplement" its final decision of January 2021. By law, whenever a tribal proposal is declined, the agency must (1) state its objections in writing; (2) provide assistance to the tribe to overcome the stated objections, and (3) advise the tribe of its appeal rights. *See* 25 U.S.C. § 5321(b); 25 C.F.R. § 900.29. The October letter did not comply with these requirements and did not purport to decline any part of the Tribe's proposal. Rather, it discussed a series of unresolved issues and invited further discussion with the Tribe. Thus, it cannot be relied on by the agency.

Nor can IHS's duplication argument be considered under an exception to the *Chenery* doctrine designed to avoid pointless remands. There is no basis for remanding this case to the agency. The Tribe seeks judicial relief in the form of money damages, declaratory relief, and injunctive relief. Moreover, IHS's 90-day window of authority to act on the Tribe's funding proposal for 2020 and 2021 has long since closed. It lacks authority to again address that funding. Because the agency's decision to decline funding for principal and interest was erroneous, it must now provide that funding to the Tribe.

ARGUMENT

I. Standard of Review

This Court reviews de novo the district court's grant of summary judgment, applying the same standards that governed the district court's decision. *Navajo Nation v. U.S. Dept. of Interior*, 57 F.4th 285, 291 (D.C. Cir. 2023) ("*Navajo Nation II*"). Judicial review of tribal claims under the ISDA 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 proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof)." 25 U.S.C. § 5321(e)(1). 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); 25 C.F.R. § 900.3(b)(11).

II. The Agency Must Provide The Declined Funding For 2022

The first issue presented is whether a regulation jointly promulgated by IHS and BIA which prohibits duplicative compensation for an ISDA lease, 25 U.S.C. § 900.70, 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 answer is no. Accordingly, the agency must provide the Tribe with the funding for 2022 that it declined on that basis.

A. Both depreciation and principal and interest are compensable expenses under ISDA

Congress listed both depreciation and principal and interest as reasonable expenses that are eligible for compensation pursuant to a section 105(l) lease. It provided that agencies "shall compensate" a tribe for lease expenses and 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) (emphasis added). Congress treated these two expenses as distinct and non-duplicative. It did not provide that a tribe can recover either depreciation or principal and interest; instead, the statutory language states that both expenses can be recovered.

The distinction between these two expenses is obvious. Principal and interest (or debt service) is an expense incurred in 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).[4] "The theory underlying … depreciation is that by using up the plant a gradual sale is made of it." *United States v. Ludey*, 274 U.S. 295, 301 (1927). "[T]he physical consumption of

[4] "Broadly speaking, depreciation is the loss not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence." *Lindheimer v. Illinois Bell Tel. Co.*, 292 U.S. 151, 167 (1934).

a capital asset is a true cost, since the asset is being depleted." *Comm'r v. Idaho Power Co.*, 418 U.S. at 10. Thus, depreciation and debt service are treated as distinct costs. *See, e.g., Louisiana Intrastate Gas Corp. v. FERC*, 962 F.2d 37, 40 (D.C. Cir. 1992) (describing how FERC calculated a utility's "costs, including operating expenses, depreciation, debt service and return on equity").

Congress has treated depreciation and debt service as distinct costs in other statutes besides ISDA. *See* Pub. L. 91–375, 84 Stat. 719, 760 (Aug. 12, 1970), previously codified at 39 U.S.C. § 3621 (repealed in 2006) (listing both debt service and depreciation as costs the Postal Service can consider in setting postage rates); 49 U.S.C. § 49104(a)(9) (providing that fees at Dulles and Reagan airports may be used for "debt service, depreciation, and amortization").

Significantly, Congress treated depreciation and principal and interest as distinct compensable costs in another tribal leasing provision that predates section 105(l) of ISDA. In 1988 Congress amended the Indian Health Care Improvements Act ("IHCIA") to authorize IHS to enter into leases with tribes to compensate them for costs associated with the use of tribal facilities to administer or deliver health services. It provided that "[s]uch costs include rent, depreciation based on the useful life of the building, principal and interest paid or accrued, operation and maintenance expenses, and other expenses determined by regulation to be allowable." Pub. L. 100-713 § 701, 102 Stat. 4826-4827 (1988), codified at 25 U.S.C. § 1674(b)

(emphasis added).[5] Congress used almost identical language six years later when it added the section 105(l) leasing provision to ISDA. *See* Pub. L. 103-413 § 102(13), 108 Stat. 4255-4256 (1994). Thus, Congress has twice specified, in two distinct statutes enacted at different times, that both depreciation and principal and interest are compensable costs to be covered by an IHS lease with a tribe.

While section 105(l) says lease compensation "may include" depreciation and principal and interest, this does not authorize the agencies to limit or preclude compensation for both expenses. "[T]he mere use of 'may' is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority." *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193, 198 (2000). "In other words, whether the word shall be treated as permissive or mandatory, depends upon what may be ascertained to be the general intent and purpose of the statute." *U.S. ex rel. Holzendorf v. Hay*, 20 App.D.C. 576, 579 (1902).

Congress provided unequivocally in IHCIA that both depreciation and principal and interest are compensable costs in leases between IHS and tribes. 25 U.S.C. § 1674(b). There is no reason to believe that Congress had changed its mind when it prefaced the same list of costs with "may" in authorizing leases under ISDA.

[5] IHS has not promulgated any regulation which purports to limit the compensable costs identified by Congress in this statute. *See* 42 C.F.R. § 136.360.

Because of their intertwined history, subject matter, and text, IHCIA and the ISDA generally should be construed *in pari materia*. *See Navajo Health Found. - Sage Mem'l Hosp., Inc. v. Burwell*, 263 F.Supp.3d 1083, 1165 (D.N.M. 2016), appeal dismissed, No. 18-2043, 2018 WL 4520349 (10th Cir. July 11, 2018). Here the leasing provisions of the two acts must be construed together because "statutes addressing the same subject matter generally should be read 'as if they were one law.'" *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006).

Moreover, Congress has mandated that every provision of ISDA shall be liberally construed for the benefit of the Indian tribe. *See* 25 U.S.C. § 5321(g). 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). Because section 105(l) can reasonably be construed to authorize compensation of both depreciation and debt service, it must be construed in that fashion.

B. IHS lacks authority to deny a tribe funding for both depreciation and principal and interest

IHS contends that ISDA delegates authority to it to determine what are "reasonable expenses" and that 25 C.F.R. § 900.70 provides that duplicative cost elements are not reasonable. However, the agency's determination that depreciation

is duplicative of principal and interest exceeds its authority under both ISDA and the implementing regulations.

The agency takes the position that depreciation and principal and interest are always duplicative costs with respect to a section 105(l) lease and that a tribe can never recover both costs. This effectively re-writes the statutory language to provide that a tribe can recover either depreciation or principal and interest but not both, thereby imposing a limitation that Congress did not provide. The statute lists both principal and interest and depreciation as distinct reasonable expenses, but the agency treats them as redundant. "An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity …." *Utility Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 325-26 (2014).

The agency's construction of the regulation exceeds its authority. ISDA provides that compensation for a lease may include certain enumerated expenses -- rent, depreciation based on the useful life of the facility, principal and interest paid or accrued, operation and maintenance expenses, -- plus "such other reasonable expenses that the Secretary [IHS and BIA] determines, by regulation, to be allowable." 25 U.S.C. § 5324(l) (emphasis added). "[A]n administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Here

Congress authorized the agencies to identify additional reasonable lease expenses by regulation; it did not authorize them to modify or limit the compensable expenses that Congress spelled out in the statute. *See Davis County Solid Waste Mgmt. v. EPA*, 101 F.3d 1395, 1410 (D.C. Cir. 1996) (agency cannot ignore or override the categories that Congress established).

Furthermore, the ISDA leasing regulations on which IHS relies are ambiguous about whether they limit compensation for both depreciation and principal and interest. 25 C.F.R. § 900.69 states in mandatory terms that a 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.'" (emphasis added). In other words, lease compensation shall include all the expenses identified by Congress. However, the next section (900.70) purports to impose a no-duplication limitation on the various expenses that "may" be compensated. "[T]here is no obvious way to reconcile this vacillation between permissive and mandatory language" in these two provisions. *Maniilaq Ass'n v. Burwell*, 170 F.Supp.3d 243, 250 (D.D.C. 2016). They create an ambiguity which, per the Indian canon of construction, must be resolved in favor of the Tribe. *See Stand Up for California! v. U.S. Dept. of Interior*, 959 F.3d 1154, 1162 (9th Cir. 2020).

"Under [ISDA], the Secretary has the burden to prove, by clear and convincing evidence, the validity of its grounds for rejecting [a tribe's lease]

proposal. The Court's role is to hold the Secretary to that burden, while construing the Act and regulations liberally in [the tribe's] favor." *Maniilaq Ass'n*, 170 F.Supp.3d at 255. Here, IHS has failed to meet that burden. The agency exceeds its authority under both the statute and the regulations by construing the no-duplication provision in 25 C.F.R. § 900.70 to circumscribe two compensation elements that Congress enumerated.

C. Depreciation does not duplicate principal and interest

Depreciation and principal and interest simply are not duplicative costs. The district court equated them by reasoning that "the purpose of compensating the Tribe for the Treatment Center's depreciation would be to enable the Tribe to recover the acquisition cost of that facility." (JA157). Therefore, the court found it duplicative for IHS to compensate the Tribe for principal and interest on the USDA loan and that same cost spread across the useful life of the Treatment Center (the amount of depreciation attributed to the portion of the acquisition cost funded by the USDA loan). (JA160). This reasoning is faulty because it starts from a flawed premise.

Contrary to the district court's assertion, the purpose of depreciation is not to reimburse the acquisition cost of the asset. Instead, "[d]epreciation is an accounting device which recognizes that the physical consumption of a capital asset is a true cost, since the asset is being depleted." *Comm'r v. Idaho Power Co.*, 418 U.S. at 10. "When hospitals are used to provide services, the equipment and facilities are

consumed and therefore costs are necessarily incurred." *Whitecliff, Inc. v. Shalala*, 20 F.3d 488, 492 (D.C. Cir. 1994). Depreciation is the cost entailed in using, not acquiring, a capital asset. *See Hertz Corp. v. United States*, 364 U.S. 122, 126 (1960) ("the purpose of depreciation accounting is to allocate the expense of using an asset to the various periods which are benefited by that asset.") (emphasis added); *Massey Motors, Inc. v. United States*, 364 U.S. 92, 104 (1960) ("[I]t is the primary purpose of depreciation accounting to … mak[e] a meaningful allocation of the cost entailed in the use (excluding maintenance expense) of the asset to the periods to which it contributes.") (emphasis added).

If a tribe constructs a facility for $5 million, the amount of depreciation it incurs each year will be the same regardless of how the construction was financed – whether with the tribe's own funds, or with borrowed funds, or with donated funds (e.g., a gift). Yet, under the district court's interpretation, the amount of depreciation that the tribe can recover via lease payments will vary depending on the source of funding and whether borrowed funds were used – it will be $5 million if tribal funds paid for the entire cost of construction; it will be a lesser amount to the extent that borrowed funds were used; and it will be zero if donated (costless) funds were used. This nonsensical result underscores the fact that depreciation is a distinct cost from the cost of acquiring a capital asset.

HHS, itself, has acknowledged for almost 60 years that depreciation is a distinct cost of producing services. Its Medicare regulations provide that both interest on capital indebtedness and depreciation are allowable costs. 42 C.F.R. §§ 413.134 (depreciation), 413.153 (interest). Moreover, HHS recognizes depreciation as an allowable cost even for assets financed with federal funds. One of its regulations explains:

> 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, irrespective of the source of financing of an asset, if it is used in the providing of services for beneficiaries of the program, 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.

42 C.F.R. § 413.149(b) (emphasis added).[6] Thus, the agency's "own regulation acknowledges the distinction" that it denies in this case. *Riggs Nat. Corp. & Subsidiaries v. CIR*, 163 F.3d 1363, 1369 (D.C. Cir. 1999).

The Tribe is not asking to be compensated for the same thing twice by seeking both principal and interest on the loan it used to construct the Treatment Center and depreciation for the use of that facility. No rational lessor would agree to build and lease a facility for an amount that will merely cover its down payment and mortgage

[6] This regulation, originally 42 C.F.R. § 405.418, was adopted in November 1966. 31 Fed. Reg. 14808, 14812 (Nov. 22, 1966). It was re-designated as 42 C.F.R. § 413.149 in 1986. 51 Fed. Reg. 34790 (Sept. 30, 1986).

expenses and leave it with nothing at the end of the lease term. Instead, lessors bargain for lease compensation that covers all of their costs, including both debt service and depreciation. Further, private landlords add a profit margin to compensate them for their efforts.

As the Supreme Court observed long ago, "[b]efore coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life." *City of Knoxville v. Knoxville Water Co.*, 212 U.S. 1, 13 (1909). "It is not only the right of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation, at least, its plain duty to the public." *Id.* at 14.

In sum, depreciation is a distinct expense incurred by the owner of an asset, for which the owner is entitled to compensation, separate and apart from any costs incurred in acquiring the asset.

D. IHS's determination that depreciation and debt service are duplicative expenses contravenes the Indian canon of construction

The district court also ignored the Indian canon of construction in ruling that IHS can treat debt service and depreciation as duplicative costs under 25 C.F.R. § 900.70. The Indian canon applies to the interpretation of ISDA regulations as well as the statutory text. *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, further, that any ambiguities herein be construed in favor of the Indian tribe"). The ISDA regulations "were promulgated against the backdrop understanding that each provision of [the ISDA] and each provision of a contract or funding agreement shall be liberally construed for the benefit of the Indian Tribe.'" *Navajo Nation II*, 57 F.4th at 291. Thus, if an ISDA regulation "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 at 1445 (emphasis in the original).[7]

Although HHS now insists that depreciation is duplicative of principal and interest under an ISDA lease, it has long taken the contrary position with respect to the Medicare program. There, the agency recognizes that "irrespective of the source of financing of an asset, if it is used in the providing of services for beneficiaries of the program, payment for depreciation of the asset is, in fact, a cost of the production of those services." 42 C.F.R. § 413.149(b) (emphasis added). HHS's longstanding position with respect to the Medicare program demonstrates that depreciation can reasonably be construed as a distinct cost from principal and interest, and hence outside the ambit of the non-duplication provision in 25 C.F.R. § 900.70. The Indian

[7] *See also United States v. Osage Wind LLC*, 871 F.3d 1078, 1090 (10th Cir. 2017) ("to the extent there is doubt concerning [a regulation's] scope, we adopt the interpretation that favors the [tribe].").

canon requires that the agency take the same approach with respect to tribal leases under ISDA.

The district court dismissed the significance of the Medicare regulation by asserting that, "even if the Tribe is correct that in other, quite different contexts, depreciation and loan payments may be distinct costs, that does not change the fact that in this case, they may be duplicative in violation of 25 C.F.R. § 900.70." (JA156). However, the court did not explain why the two contexts are different, and there is no relevant distinction between them. Tribal facilities leased under ISDA are eligible to receive reimbursement under Medicare.[8] The lease compensates the tribe for the use of the facility while Medicare compensates the tribe for services provided to eligible patients at that facility. Both ISDA lease compensation and Medicare reimbursements are based on the costs the tribe has incurred. Yet HHS compensates tribes for depreciation and debt service as distinct costs under Medicare while asserting that they are duplicative costs under ISDA. This contravenes the rules of logic as well as the Indian canon of construction.

HHS's position also conflicts with BIA's position on compensating tribes under ISDA leases. BIA treats depreciation as a distinct cost from principal and interest, and it compensates the Tribe for both costs pursuant to a lease entered into

[8] When Congress enacted IHCIA in 1976, it made IHS facilities, whether operated by IHS or by a tribal contractor, eligible to receive reimbursement under Medicare. *See* Pub. L. No. 94-437, § 401, 90 Stat. 1408-1409 (codified at 42 U.S.C. §§ 1395qq).

in March 2020. Unless BIA's construction of the ISDA regulations is unreasonable, both the Indian canon and ISDA require IHS to adopt the same interpretation.

The district court rejected the Tribe's argument that the two agencies cannot adopt inconsistent interpretations of the same regulatory requirement. The court did not find that BIA's construction was unreasonable, but ruled that IHS "may invoke the duplication argument despite BIA's contrary interpretation." (JA153). This was error.

Inconsistent regulatory interpretations are impermissible under ISDA. Congress required HHS and the Interior Department to promulgate joint ISDA regulations "to enable the agencies to award contracts and grants to Indian tribes without the unnecessary burden or confusion associated with having two sets of rules for the same legislation." S. Rep. 103-374 at 3 (1994). The regulations announce that they "codify uniform and consistent rules for contracts by the Department of Health and Human Services (DHHS) and the Department of the Interior (DOI) in implementing title I of [ISDA]." 25 C.F.R. § 900.2(a); *see also* § 900.3(b)(3) ("It is the policy of the Secretary to provide a uniform and consistent set of rules for contracts under the Act."). Toward that end, the regulations provide that internal appeals from both agencies go to the Interior Board of Indian Appeals, 25 CFR § 900.158, "so that the Act and these regulations are uniformly interpreted by both

Departments." 61 Fed. Reg. 32482, 32496 (June 24, 1996). Thus, the leasing regulations must be uniformly interpreted by both IHS and BIA.

HHS's own Medicare regulation, 42 C.F.R. § 413.149(b), and BIA's construction of the regulation at issue here, 25 C.F.R. § 900.70, both demonstrate that the ISDA regulation can be reasonably construed to permit compensation for depreciation as well as debt service (principal and interest). Therefore, the Indian canon requires that the regulation be construed that way. The district court erred in ruling otherwise.

E. IHS's determination that depreciation and debt service are duplicative expenses contravenes ISDA's purpose

IHS's position that depreciation duplicates debt service contravenes the purpose of ISDA because it disincentivizes tribes to build and lease facilities and treats them worse than private landlords from whom the federal government leases facilities. Congress has committed the federal government, through ISDA, "to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." 25 U.S.C. § 5302(b). IHS does the opposite here.

The Tribe planned the construction of the Treatment Center, obtained its financing, oversaw the construction, and then leased the facility to the IHS, presumably for the entirety of its useful life. Yet, according to IHS and the district

court, the Tribe is only to be reimbursed for its cost of acquiring the facility. The federal government will cover the principal and interest on the construction loan and will reimburse via depreciation (over 39 years) the portion of construction financed with the Tribe's own funds. This would leave the Tribe at the end of a decades-long lease with nothing more than it started with, and nothing to show for all of the effort it invested in, and the risk it bore for, the project. Meanwhile the Tribe will have lost the income it could otherwise have earned on its own funds that it invested in the project.[9]

In effect, IHS and the district court treat the Tribe's section 105(l) lease as a grant-in-aid program wherein the federal government will cover the cost of constructing and operating the facility, but nothing more. But that is not the program that Congress enacted. Instead, it created a leasing program that compensates tribes as lessors for providing facilities used in connection with ISDA contracts. 25 U.S.C. § 5324(l). The legislative history states that "subsection 105(l) overcomes existing impediments to the leasing of facilities owned by Indian tribes and tribal organizations and which are used in the operation of programs contracted under the Act." S. Rep. 103-374 at 8 (1994). "[A] lessor expects not only to receive profit on

[9] For example, the $856,493 that the Tribe invested in the construction of the Treatment Center would have grown to $5,742,572.43 if it had been invested at 5% interest for 39 years.

the lease but also to recoup the value of depreciable or exhaustible assets." *Royal Farms Dairy Co. v. C.I.R.*, 40 T.C. 172, 189-90 (1963).

Construing ISDA to preclude a tribe from receiving compensation for both depreciation and debt service creates a strong disincentive for tribes to construct new facilities and lease them to IHS under section 105(l). Further, it results in tribes being treated worse than the private landlords from whom the federal government leases facilities – who are compensated for all of their expenses and receive a profit as well. Plainly, this is not what Congress had in mind when it provided for ISDA leases; it is "totally inconsistent with the statutory purpose." *Raicovich v. U.S. Postal Service*, 675 F.2d 417, 424 (D.C. Cir. 1982).

Administrative constructions which are contrary to clear congressional intent must be rejected. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Thus, IHS's construction of section 105(l) should be rejected here, and the district court's decision should be reversed.

III. The Agency Must Provide The Declined Funding For 2020 and 2021

IHS is obliged to provide the Tribe with the funding for principal and interest that it declined for 2020 and 2021. The agency cannot reduce this obligation by now invoking a "duplication" argument and offsetting the funding it provided for depreciation for those years. There are two reasons why not: (1) because the Tribe is entitled to be compensated for both costs, as discussed above, and (2) because

ISDA forbids the agency from belatedly changing its rationale for declining a tribal funding proposal as IHS attempts to do here.

In its final decision on the Tribe's lease proposals for 2020-2021, IHS agreed to compensate the Tribe for depreciation but refused to compensate it for payments of principal and interest on the USDA loan. The agency reversed course the following year, in its final decision on 2022 lease funding; it provided compensation for principal and interest but disallowed depreciation. The agency also attempted to apply this new rationale to the previous funding for 2020 and 2021. But ISDA does not permit such belated changes.

ISDA "circumscribe[s] as tightly as possible the discretion of the Secretary." *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d at 1344. The statute gives the agency authority for 90 days to either approve a tribal proposal (or portions thereof) or to decline it by providing written notification to the tribe demonstrating that one of the statutory grounds for declining funding applies. *See* 25 U.S.C. § 5321(a)(2). A tribal proposal that is not declined within 90 days is deemed approved. *See* 25 C.F.R. § 900.18; *Navajo Nation I*, 854 F.3d at 1126 (discussing both provisions).

ISDA "places the burden on the agency, rather than the tribe …, to develop the record within the ninety-day window" and "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." *Cook Inlet Tribal*

Council v. Mandregan, 2019 WL 3816573, at *10 (emphasis in the original; citations 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. Yet that is exactly what the agency is doing here.

During its 90-day window of authority to approve or decline the proposed 2020 and 2021 leases, IHS approved funding for depreciation but declined to provide funding for principal and interest on the USDA loan on the ground that it was unauthorized. A year later the agency conceded that the Tribe is entitled to compensation for principal and interest, but attempted to offset the allegedly "duplicative" depreciation funding it had previously provided. In short, the agency belatedly asserted a new and different ground for withholding the funding at issue long after its authority to do so expired. But "[a]gencies may act only when and how Congress lets them." *Central Life Ins. Co. v. Burwell*, 827 F.3d 70, 73 (D.C. Cir. 2016).

The district court resisted this conclusion. First, it stated that the agency's October 29, 2020 letter to the Tribe satisfied the statutory requirements because "nothing in 25 U.S.C. § 5321(a)(2) requires the legal grounds for declination to be in the agency's final decision itself, as opposed to an earlier communication to the tribe." (JA148-JA149). However, the court ignored the very next subsection of the

statute, which does impose this requirement. Subsection 5321(b) mandates that whenever a tribal proposal is declined pursuant to subsection (a), the agency shall (1) state its objections in writing; (2) provide assistance to the tribe to overcome the stated objections, and (3) provide the tribe with appeal rights. Likewise, 25 C.F.R. § 900.29 provides that when an agency declines part or all of a tribal proposal, it must advise the tribe in writing of its objections "with a detailed explanation of the reason for the decision to decline the proposal" and advise the tribe of its appeal rights.

IHS's letter of January 15, 2021 complied with these requirements but its letter of October 29, 2020 did not. Indeed, the earlier letter did not purport to decline any part of the Tribe's lease proposal. Rather, it discussed a series of unresolved issues with respect to the 2021 lease,[10] and invited further dialog with the Tribe "to discuss these final cost elements and lease issues further and hopefully reach final agreement." (Doc. 22-5 at p. 4). Accordingly, the agency cannot rely on its earlier letter to "supplement" its actual declination decision. *See Cheyenne River Sioux Tribe v. Kempthorne*, 496 F.Supp.2d 1059, 1068 (2007) (rejecting agency's

[10] The lease discussions between the parties focused on the 2021 lease because it was unclear when the Treatment Center would begin operations. Ultimately, the Tribe began providing health care services there in December 2020, and so the parties entered into a 12-month lease for 2021 and a pro-rated one-month lease for 2020.

argument that its previous correspondence and meetings with a tribe provided adequate notice and explanation of its declination).

The district court also ruled that, even if IHS's basis for declining funding must be included in its final decision, the agency's duplication argument could still be considered under an exception to the *Chenery* principle that permits an agency to raise a purely legal argument for the first time in litigation if it is clearly correct and would render remand pointless. Once again, the court's reasoning is flawed.

The *Chenery* exception applies in cases where the applicable judicial remedy is a remand for the agency to revisit its decision, but the outcome of a remand is a foregone conclusion. That is not the situation here. The Tribe does not seek remand; rather, it seeks money damages, declaratory relief, and injunctive relief pursuant to ISDA, 25 U.S.C. § 5331(a). *See Maniilaq Ass'n v. Burwell*, 72 F.Supp.3d 227, 239-40 (D.D.C. 2014) (concluding that remand to the agency would be inconsistent with ISDA). Furthermore, IHS lacks authority to revisit its decision now. The 90-day window during which it had authority to pass on the Tribe's funding proposals for 2020 and 2021 has long since expired. Thus, even if the duplication argument were valid (which it is not), the agency cannot invoke that argument now. "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 …." *Cook Inlet Tribal Council*, 2019 WL 3816573, at *9.

Because IHS has conceded that the Tribe is entitled to be compensated for principal and interest for 2020 and 2021, the agency must now provide that funding to the Tribe.

CONCLUSION

The district court erred in ruling that the duplicative funding limitation in 25 C.F.R. § 900.70 precludes the Tribe from receiving lease compensation for both depreciation based on the full acquisition cost of the Treatment Center, and principal and interest on the USDA loan. It also erred in ruling that IHS can invoke the duplicative funding limitation to offset the compensation for principal and interest on the USDA loan that the agency owes the Tribe for 2020 and 2021. These rulings should be reversed.

Dated: July 23, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(a). Excluding the Table of Contents, Table of Authorities, the Glossary, the Addendum of Pertinent Statutes and Regulations, and counsel's Certificates, this Brief contains 7700 **words**, including footnotes. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface in **Microsoft Word 2003** using **Times New Roman, 14-point font**.

Dated: July 23, 2024

Respectfully submitted,

/s/ Steven D. Gordon
Steven D. Gordon

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2024, copies of the foregoing Appellant's Brief were served by electronic means using the Court's CM/ECF system.

/s/ Steven D. Gordon
Steven D. Gordon

Attorney for Appellant Navajo Nation

ADDENDUM OF PERTINENT STATUTES AND REGULATIONS

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25 U.S.C. § §1674. Leases with Indian tribes

(a) Notwithstanding any other provision of law, the Secretary is authorized, in carrying out the purposes of this chapter, to enter into leases with Indian tribes for periods not in excess of twenty years. Property leased by the Secretary from an Indian tribe may be reconstructed or renovated by the Secretary pursuant to an agreement with such Indian tribe.

(b) The Secretary may enter into leases, contracts, and other legal agreements with Indian tribes or tribal organizations which hold—
(1) title to;
(2) a leasehold interest in; or
(3) a beneficial interest in (where title is held by the United States in trust for the benefit of a tribe);

facilities used for the administration and delivery of health services by the Service or by programs operated by Indian tribes or tribal organizations to compensate such Indian tribes or tribal organizations for costs associated with the use of such facilities for such purposes. Such costs include rent, depreciation based on the useful life of the building, principal and interest paid or accrued, operation and maintenance expenses, and other expenses determined by regulation to be allowable.

25 U.S.C. § 5302. Congressional declaration of policy

(a) Recognition of obligation of United States

The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) Declaration of commitment

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to,

Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

(c) Declaration of national goal

The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

25 U.S.C. § 5321. Self-determination contracts

(a) Request by tribe; authorized programs

(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C. 5342 et seq.];

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) [25 U.S.C. 13], and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C. 2001 et seq.];

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4), 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 applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that—

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 5325(a) of this title; or

(E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

Notwithstanding any other provision of law, the Secretary may extend or otherwise alter the 90-day period specified in the second sentence of this subsection,1 if before the expiration of such period, the Secretary obtains the voluntary and express written consent of the tribe or tribal organization to extend or otherwise alter such period. The contractor shall include in the proposal of the contractor the standards under which the tribal organization will operate the contracted program, service, function, or activity, including in the area of construction, provisions regarding the use of licensed and qualified architects, applicable health and safety standards, adherence to applicable Federal, State, local, or tribal building codes and engineering standards. The standards referred to in the preceding sentence shall ensure structural integrity, accountability of funds, adequate competition for subcontracting under tribal or other applicable law, the commencement, performance, and completion of the contract, adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals), the use of proper materials and workmanship, necessary inspection and testing, and changes, modifications, stop work, and termination of the work when warranted.

(3) Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract.

(4) The Secretary shall approve any severable portion of a contract proposal that does not support a declination finding described in paragraph (2). If the Secretary determines under such paragraph that a contract proposal—

> (A) proposes in part to plan, conduct, or administer a program, function, service, or activity that is beyond the scope of programs covered under paragraph (1), or
>
> (B) proposes a level of funding that is in excess of the applicable level determined under section 5325(a) of this title,

subject to any alteration in the scope of the proposal that the Secretary and the tribal organization agree to, the Secretary shall, as appropriate, approve such portion of the program, function, service, or activity as is authorized under paragraph (1) or approve a level of funding authorized under section 5325(a) of this title. If a tribal organization elects to carry out a severable portion of a contract proposal pursuant to this paragraph, subsection (b) of this section shall only apply

to the portion of the contract that is declined by the Secretary pursuant to this subsection.

(b) Procedure upon refusal of request to contract

Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—

(1) state any objections in writing to the tribal organization,

(2) provide assistance to the tribal organization to overcome the stated objections, and

(3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 5331(a) of this title.

(c) Liability insurance; waiver of defense

(1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this chapter. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act.

(2) In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned economic enterprises (as defined in section 1452 of this title), except that, for the purposes of this subsection, such enterprises may include non-profit corporations.

(3) (A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only

to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

(B) No waiver of the sovereign immunity of an Indian tribe pursuant to this paragraph shall include a waiver to the extent of any potential liability for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the State in which the alleged injury occurs.

(d) Tribal organizations and Indian contractors deemed part of Public Health Service

For purposes of section 233 of title 42, with respect to claims by any person, initially filed on or after December 22, 1987, whether or not such person is an Indian or Alaska Native or is served on a fee basis or under other circumstances as permitted by Federal law or regulations for personal injury, including death, resulting from the performance prior to, including, or after December 22, 1987, of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, or for purposes of section 2679, title 28, with respect to claims by any such person, on or after November 29, 1990, for personal injury, including death, resulting from the operation of an emergency motor vehicle, an Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under sections 2 5321 or 5322 of this title is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of title 28 and including an individual who provides health care services pursuant to a personal services contract with a tribal organization for the provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement: Provided, That such employees shall be deemed to be acting within the scope of their employment in carrying out such contract or agreement when they are required, by reason of such employment, to perform medical, surgical, dental or related functions at a facility other than the facility operated pursuant to such contract or agreement, but only if such employees are not compensated for the performance of such functions by a person or entity other than such Indian tribe, tribal organization or Indian contractor.

(e) Burden of proof at hearing or appeal declining contract; final agency action

(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3) of this section or any civil action conducted pursuant to section 5331(a) of this title, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

(2) Notwithstanding any other provision of law, a decision by an official of the Department of the Interior or the Department of Health and Human Services, as appropriate (referred to in this paragraph as the "Department") that constitutes final agency action and that relates to an appeal within the Department that is conducted under subsection (b)(3) of this section shall be made either—

(A) by an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency (such as the Indian Health Service or the Bureau of Indian Affairs) in which the decision that is the subject of the appeal was made; or

(B) by an administrative judge.

(f) Good faith requirement

In the negotiation of contracts and funding agreements, the Secretary shall—

(1) at all times negotiate in good faith to maximize implementation of the self-determination policy; and

(2) carry out this chapter in a manner that maximizes the policy of Tribal self-determination, in a manner consistent with—

(A) the purposes specified in section 5302 of this title; and

(B) the PROGRESS for Indian Tribes Act.

(g) Rule of construction

Subject to section 101(a) of the PROGRESS for Indian Tribes Act, each provision of this chapter and each provision of a contract or funding agreement shall be

liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe.

25 U.S.C. § 5324 Contract or grant provisions and administration

* * *

(l) Lease of facility used for administration and delivery of services

(1) Upon the request of an Indian tribe or tribal organization, the Secretary shall enter into a lease with the Indian tribe or tribal organization that holds title to, a leasehold interest in, or a trust interest in, a facility used by the Indian tribe or tribal organization for the administration and delivery of services under this chapter.

(2) The Secretary shall compensate each Indian tribe or tribal organization 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, 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. §5331. Contract disputes and claims

(a) Civil actions; concurrent jurisdiction; relief

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this chapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this chapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this chapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this chapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 5321(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

25 C.F.R. § § 900.2 Purpose and scope.

(a) General. These regulations codify uniform and consistent rules for contracts by the Department of Health and Human Services (DHHS) and the Department of the Interior (DOI) in implementing title I of the Indian Self-Determination and Education Assistance Act, Public Law 93-638, 25 U.S.C. 450 et seq., as amended and sections 1 through 9 preceding that title.

25 C.F.R. § 900.3 Policy statements.

* * *

(b) Secretarial policy.

* * *

(11) The Secretary's commitment to Indian self-determination requires that these regulations be liberally construed for the benefit of Indian tribes and tribal organizations to effectuate the strong Federal policy of self-determination and, further, that any ambiguities herein be construed in favor of the Indian tribe or tribal organization so as to facilitate and enable the transfer of services, programs, functions, and activities, or portions thereof, authorized by the Act.

25 C.F.R. § 900.18 What happens if a proposal is not declined within 90 days after it is received by the Secretary?

A proposal that is not declined within 90 days (or within any agreed extension under § 900.17) is deemed approved and the Secretary shall award the contract or any amendment or renewal within that 90-day period and add to the contract the full amount of funds pursuant to section 106(a) of the Act.

25 C.F.R. § 900.29 What is the Secretary required to do if the Secretary decides to decline all or a portion of a proposal?

If the Secretary decides to decline all or a severable portion of a proposal, the Secretary is required:

(a) To advise the Indian tribe or tribal organization in writing of the Secretary's objections, including a specific finding that clearly demonstrates that (or that is supported by a controlling legal authority that) one of the conditions set forth in § 900.22 exists, together with a detailed explanation of the reason for the decision to decline the proposal and, within 20 days, any documents relied on in making the decision; and

(b) To advise the Indian tribe or tribal organization in writing of the rights described in § 900.31.

25 C.F.R. § 900.70 What elements are included in the compensation for a lease entered into between the Secretary and an Indian tribe or tribal organization for a building owned or leased by the Indian tribe or tribal organization that is used for administration or delivery of services under the Act?

To the extent that no element is duplicative, the following elements may be included in the lease compensation:

(a) Rent (sublease);

(b) Depreciation and use allowance based on the useful life of the facility based on acquisition costs not financed with Federal funds;

(c) Contributions to a reserve for replacement of facilities;

(d) Principal and interest paid or accrued;

(e) Operation and maintenance expenses, to the extent not otherwise included in rent or use allowances, including, but not limited to, the following:

(1) Water, sewage;
(2) Utilities;
(3) Fuel;
(4) Insurance;
(5) Building management supervision and custodial services;
(6) Custodial and maintenance supplies;

(7) Pest control;
(8) Site maintenance (including snow and mud removal);
(9) Trash and waste removal and disposal;
(10) Fire protection/fire fighting services and equipment;
(11) Monitoring and preventive maintenance of building structures and systems, including but not limited to:

(i) Heating/ventilation/air conditioning;
(ii) Plumbing;
(iii) Electrical;
(iv) Elevators;
(v) Boilers;
(vi) Fire safety system;
(vii) Security system; and
(viii) Roof, foundation, walls, floors.

(12) Unscheduled maintenance;
(13) Scheduled maintenance (including replacement of floor coverings, lighting fixtures, repainting);
(14) Security services;
(15) Management fees; and
(16) Other reasonable and necessary operation or maintenance costs justified by the contractor;

(f) Repairs to buildings and equipment;

(g) Alterations needed to meet contract requirements;

(h) Other reasonable expenses; and

(i) The fair market rental for buildings or portions of buildings and land, exclusive of the Federal share of building construction or acquisition costs, or the fair market rental for buildings constructed with Federal funds exclusive of fee or profit, and for land.

42 C.F.R. § 413.149 Depreciation: Allowance for depreciation on assets financed with Federal or public funds.

(a) Principle. Depreciation is allowed on assets financed with Hill-Burton or other Federal or public funds.

(b) Application. Like other assets (including other donated depreciable assets), assets financed with Hill-Burton or other Federal or public funds become a part of the provider institution's plant and equipment to be used in furnishing services. 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, irrespective of the source of financing of an asset, if it is used in the providing of services for beneficiaries of the program, 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. An incentive for funding of depreciation is provided in these principles by the provision that investment income on funded depreciation is not treated as a reduction of allowable interest expense under § 413.153(a).