[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.

REPLY 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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SUMMARY OF APPELLANT'S ARGUMENT

1. The Indian Health Service ("IHS") must provide appellant Red Lake Band of Chippewa Indians (the "Tribe") with the lease compensation for depreciation that it declined for 2022. Congress provided that tribes can be compensated for both depreciation and principal-and-interest incurred on facilities they lease under the Indian Self-Determination and Education Assistance Act ("ISDA"). Congress identified these two expenses as distinct, without any indication that they might duplicate each other. IHS effectively re-writes the statute by construing these two costs as duplicative and refusing to pay both. It contends that a tribe can recover either depreciation or principal-and-interest but not both, thereby imposing a limitation that Congress did not specify or authorize IHS to create. Moreover, the ISDA regulations on which IHS relies are ambiguous and cannot be construed to limit the compensable expenses Congress identified. IHS's regulatory construction is unlawful and must be set aside.

Furthermore, depreciation and principal-and-interest are not duplicative. They are distinct costs that arise from two different sources. Depreciation is a cost incurred during the useful life of an asset that is distinct from any cost incurred in acquiring that asset, such as principal-and-interest. IHS concedes that depreciation and principal-and-interest are distinct concepts. This must mean that they are distinct costs, however much the agency may gainsay that conclusion. Indeed, the

Department of Health and Human Services ("HHS") has long acknowledged that depreciation of a medical facility is a distinct cost of producing services "irrespective of the source of financing" of that facility. 42 C.F.R. § 413.149(b) (emphasis added).

In addition, the Indian canon of construction undermines all of IHS's arguments. Because section 105(l) of ISDA provides that lease compensation "may include … depreciation based on the useful life of the facility [and] principal and interest paid or accrued," the Indian canon requires that both expenses shall be included in lease compensation. Because the ISDA leasing regulations are ambiguous, the Indian canon prevents them from being construed to limit the compensable expenses specified by Congress. And because depreciation can reasonably be construed to be a distinct expense from principal-and-interest, the Indian canon prohibits IHS from construing them to be duplicative.

Finally, 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). Refusing to compensate a tribe for both depreciation and principal-and-interest leaves the tribe with nothing at the end of the lease to compensate the tribe for the time, effort and money that it has invested in the lease. 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 principal-and-interest, and receive a profit as well.

2. IHS must also provide the Tribe with the compensation 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 because, for the reasons just discussed, depreciation does not duplicate principal-and-interest.

Furthermore, since IHS did not raise a "duplication" objection when it issued a final decision declining to compensate the Tribe for principal-and-interest, it cannot do so now. ISDA requires an agency to approve a tribal proposal within 90 days unless it declines the proposal in writing for a valid reason. *See* 25 U.S.C. § 5321(a)(2). If a tribe appeals a declination, the agency must demonstrate "the validity of the grounds for declining the contract proposal (or portion thereof)." 25 U.S.C. § 5321(e)(1).

Thus, 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). "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.

IHS's 90-day window of authority to act on the Tribe's funding proposal for 2020 and 2021 has long since closed. Declinations are final actions, subject to appeal. 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. IHS Must Provide The Declined Lease Funding For 2022

A. ISDA provides that both depreciation and principal-and-interest are compensable expenses

Congress provided that tribes can be compensated for both "depreciation based on the useful life of the facility" and "principal and interest paid or accrued" on the facilities they lease under ISDA. 25 U.S.C. § 5324(l). Congress identified them as distinct expenses – one right after the other – without any indication that they might be duplicative.[1] Furthermore, this was the second time that Congress specified that tribes may recover both depreciation and principal-and-interest as compensable costs under a tribal lease with IHS. It had done so six years earlier in the leasing provision of the Indian Health Care Improvements Act ("IHCIA"). *See* 25 U.S.C. § 1674(b).

Nonetheless, IHS takes the position that Congress didn't really mean what it said (twice). Although IHS concedes that depreciation and principal-and-interest

[1] Indeed, the statute makes no mention of duplication.

are distinct concepts (Br. at 25, 34), it contends that they nonetheless duplicate each other and that paying a tribe for both is barred by a regulation that forbids duplicative compensation under an ISDA lease. 25 C.F.R. § 900.70. The agency contends that the two expenses duplicate each other to the extent that a tribe seeks both principal-and-interest on loans used to acquire/construct a facility, and depreciation on that facility. In short, IHS treats them as alternative costs. This 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 agency attempts to soften the conflict between its position and the statutory language. It argues that ISDA merely sets forth an "illustrative list of allowable costs [which] provides some guidance regarding how the costs associated with using a facility can be calculated." (Br. at 30). But a statute is not a suggestive outline. "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). Moreover, to the extent that ISDA is silent or ambiguous, Congress has mandated that it 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).

Likewise, IHS attempts to downplay the extent of the conflict between its position and the statutory language. It contends that, although depreciation and principal-and-interest are not inherently duplicative, they "would be duplicative under the specific facts presented" here. (Br. at 25). However, there is nothing fact-specific about IHS's regulatory construction. The agency claims that depreciation and principal-and-interest are always duplicative where they allegedly overlap, and that a tribe can never recover both in such situations.

Congress did not authorize IHS to impose any such limitation. It provided that lease compensation may include the expenses it enumerated plus "such other reasonable expenses that the Secretary determines, by regulation, to be allowable." 25 U.S.C. § 5324(l) (emphasis added). The "Secretary" means both the Secretary of Health and Human Services and the Secretary of the Interior, whom Congress tasked to jointly promulgate regulations. *See* 25 U.S.C. § 5328. Congress authorized the agencies to add other expenses by regulation, not to modify or limit the compensable expenses that Congress had already spelled out.[2]

[2] IHS asserts incorrectly that the Tribe "does not challenge the non-duplication requirement." (Br. at 29). The Tribe does not challenge the agencies' authority to promulgate a non-duplication requirement with respect to the "other reasonable expenses" that they identify by regulation. But the Tribe challenged below, and challenges here, the agencies' authority to apply that limitation to the compensable

Furthermore, the regulations are ambiguous about whether they limit the compensable expenses that Congress identified. 25 C.F.R. § 900.69 states unequivocally 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). IHS relies on the following regulation (§ 900.70) which purports to impose a no-duplication limitation on all of the expenses that "may be included" in lease compensation. As Judge Bates concluded, "there is no obvious way to reconcile this vacillation between permissive and mandatory language" in these two regulations. *Maniilaq Ass'n v. Burwell*, 170 F.Supp.3d 243, 250 (D.D.C. 2016). They create an ambiguity which must be resolved in favor of the Tribe. *See* 25 C.F.R. § 900.3(b)(11); *United States v. Osage Wind LLC*, 871 F.3d 1078, 1090 (10th Cir. 2017). The agency has no answer to this argument and so mischaracterizes it, claiming that the Tribe turns to these regulations to "suppl[y] the categorical directive that is lacking in the statute." (Br. at 35). To the contrary, the Tribe's point is that the regulations are ambiguous and so cannot be construed to limit the statutory expenses.

In summary, ISDA specifies principal-and-interest and depreciation as distinct expenses for which tribes can be compensated under a lease. 25 U.S.C. §

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expenses that Congress identified in ISDA. *See* Dkt. 15-1 at 10 ("Congress did not authorize the agencies to modify or limit any of the four reasonable expenses that it spelled out.").

5324(l). Congress did not authorize these expenses to be limited via regulation. Moreover, the regulations are ambiguous as to whether they place any limits on the expenses Congress identified and so they cannot be construed to do so. IHS's regulatory construction is unlawful and must be set aside.

B. Depreciation does not duplicate principal-and-interest

Even if the non-duplication regulation could be applied here, depreciation and principal-and-interest are not duplicative costs. They are distinct costs that arise from two different sources. Principal-and-interest is a cost incurred in acquiring or constructing a facility with borrowed funds. In contrast, depreciation is a cost (a decline in value) incurred in using a facility after it is acquired or constructed.[3] HHS has long acknowledged that these are distinct costs in its Medicare regulations:

> 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.

[3] "Depreciation 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. 1, 10 (1974). IHS makes the red herring argument that ISDA leases "compensate for that cost not via depreciation, but through another cost element: 'Contributions to a reserve for replacement of facilities.' " (Br. at 26). However, as the Supreme Court explained, the purpose of depreciation is not to establish a fund for replacement: "'(d)epreciation reflects the cost of an existing capital asset, not the cost of a potential replacement.'" *Id.* at 12 (quoting *United States v. Chicago, B. & Q.R. Co.*, 412 U.S. 401, 415 (1973)). In other words, depreciation (depletion) is a true cost regardless of whether there is a reserve for replacement.

42 C.F.R. § 413.149(b) (emphasis added). In short, depreciation is a cost incurred by the owner of an asset regardless of how the asset was financed. Principal-and-interest is a cost only if the asset was acquired with borrowed funds.

The agency is forced to concede that depreciation and principal-and-interest are distinct concepts: it "does not dispute that these concepts are not identical," (Br. at 25); it "does not dispute that these are distinct concepts." (Br. at 34). That is the end of the matter. If they are distinct concepts, they are distinct costs. The agency's argument boils down to the contention that these two distinct costs become duplicative when it must pay for both under a lease. But lessees routinely pay fair market rent that covers all of the lessor's costs. There is nothing novel in that concept.

To equate these two distinct costs, IHS argues that depreciation is calculated based on the acquisition cost of a facility and leaps to the conclusion that "[p]aying for depreciation is thus another way to pay for the acquisition costs of a facility …." (Br. at 22).[4] It contends that paying depreciation "may make sense" where a tribe pays the acquisition cost out of its own pocket but does "not make sense … if IHS,

[4] If Congress intended depreciation to be simply another way to pay a tribe for the acquisition cost of a facility, as IHS contends, then it is impossible to understand why the statute lists both depreciation and principal-and-interest as compensable expenses under an ISDA lease, one right after the other, without any indication that they are alternatives.

rather than the tribe, were also paying the acquisition cost of the facility itself." (*Id.*). However, Congress decided that it "makes sense" to pay both costs to a tribe. IHS must obey that determination. Further, it makes perfect sense that Congress decided to pay both costs as part of the tribal leasing program.

Suppose a tribe pays the entire acquisition cost out of its own pocket without using borrowed funds. According to IHS, the tribe will be gradually reimbursed for its investment via compensation for depreciation over 39 years (the specified depreciation period under ISDA). At that point, the tribe is left with a useless facility and has recovered the amount of money it originally invested, but has lost the "time value" of those funds, i.e., the income that could have been earned over 39 years by investing those funds elsewhere. In short, such a lease will produce a substantial net loss for the tribe. What rational lessor would make that deal?

Now suppose that a tribe borrows the entire acquisition cost for the facility (assuming that such 100% financing could be found). According to IHS, the tribe's lease compensation will cover all of its principal-and-interest expense but not depreciation. At the end of the lease the tribe is left with a useless facility and has received no compensation for the time and effort it invested in arranging the financing, supervising the construction of the facility, and managing the lease. While this deal is not as bad as the first one, it is still a deal that no rational lessor would make. *See Bobka v. Toyota Motor Credit Corp.*, 968 F.3d 946, 952 (9th Cir.

2020) ("no rational lessor" would agree to a lease that gave it nothing to compensate for the depreciation of the property's value); *Royal Farms Dairy Co. v. C.I.R.*, 40 T.C. 172, 189-90 (1963) ("a lessor expects … to recoup the value of depreciable or exhaustible assets").

ISDA does not create such a perverse leasing regime. Congress did not provide for tribes to receive a profit under ISDA leases but it did provide that both depreciation and principal-and-interest are compensable expenses, thereby creating a rational incentive structure for tribes to enter such leases.

Because depreciation and principal-and-interest are distinct costs, they do not come within the ambit of the regulation barring duplicative costs in an ISDA lease. The Tribe is not asking to be compensated twice for the same thing by seeking both costs under the lease for the Treatment Center. It simply is seeking full compensation for all of the costs it incurs.

C. IHS ignores the Indian canon of construction

The agency's various arguments blithely ignore the Indian canon of construction. Congress has mandated that the ISDA leasing provision "shall be liberally construed for the benefit of the Indian Tribe … and any ambiguity shall be resolved in favor of the Indian Tribe." *See* 25 U.S.C. § 5321(g). This canon of construction also applies to the interpretation of ISDA regulations. *See* 25 C.F.R. § 900.3(b)(11). The regulations "were promulgated against the backdrop

understanding that each provision of [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.

IHS contends in general terms that the Indian canon does not permit reliance on ambiguities that do not exist and that, for the canon to apply, the Tribe's construction must be reasonable. It denies that either of these conditions exist here. (Br. at 37-38). But the agency says little to elaborate upon this assertion because it cannot.

Start with the statute, itself. ISDA provides that lease compensation "may include … depreciation based on the useful life of the facility [and] principal-and-interest paid or accrued." 25 U.S.C. § 5324(l). The Tribe contends that "may" should be interpreted as mandatory, not permissive, because of the Indian canon and because the virtually identical IHCIA leasing provision provides flatly that both costs are compensable. The agency vainly tries to evade this argument by asserting that, even if the Tribe is correct, this "would not demonstrate that inclusion of full depreciation and principal-and-interest is mandatory in all leases." (Br. at 30) (emphasis added). IHS attacks a "straw man" argument that the Tribe hasn't made. The Tribe doesn't contend that both depreciation and principal-and-interest must be included in all ISDA leases, only those leases where a tribe is eligible for both, as here.

Next consider whether the ISDA regulations on which IHS relies even apply here. As discussed above, 25 C.F.R. § 900.69 states unequivocally that a lease "is to include compensation as provided in the statute" while § 900.70 imposes a no-duplication limitation on all lease expenses, including those listed in the statute. The agency cannot explain away this discrepancy. These regulations point in two different directions, creating an ambiguity which must be resolved in favor of the Tribe pursuant to the Indian canon. This means that a lease shall include "compensation as provided in the statute," which includes depreciation and principal-and-interest, and that the limit on duplicative costs does not apply.

Next consider the no-duplication limitation, itself. Section 900.70 does not apply unless cost elements are "duplicative." The Indian canon requires that depreciation and principal-and-interest be construed as non-duplicative if they can reasonably be construed in that manner. *See Muscogee (Creek) Nation v. Hodel*, 851 F.2d at 1445. There are multiple reasons why these two costs can reasonably be construed as non-duplicative. First, as IHS concedes, they are conceptually distinct and arise from different sources. Nothing more is required.

Second, HHS has recognized elsewhere that depreciation is distinct from acquisition costs. *See* 42 C.F.R. § 413.149(b) ("irrespective of the source of financing of an asset [used to provide services] … depreciation of the asset is, in fact, a cost of the production of those services"). The Indian canon precludes the

agency from taking a contrary position here. Seeking to avoid this point, the agency argues that its construction of ISDA leases treats tribes like facility owners under the Medicare program, who are reimbursed for interest, but not principal, on capital indebtedness, plus depreciation. (Br. at 35-36). It omits to note that Medicare also pays facility owners a return on equity. *See* 42 C.F.R. § 413.157. Congress did not include a return on equity in the compensation structure for ISDA leases, but it did provide explicitly for reimbursement of both "principal and interest paid or accrued," as well as depreciation.

Third, BIA, which promulgated and administers the ISDA regulations jointly with IHS, compensates the Tribe for both depreciation and principal-and-interest under its lease with the Tribe (which was entered into before the IHS lease at issue here). IHS contends that the conflict between the two agencies' positions simply "demonstrates that BIA overlooked the proper application of the non-duplication requirement. It does not suggest that IHS is wrong here …." (Br. at 37). But such inconsistent regulatory interpretations are impermissible under ISDA. Congress required the two agencies to promulgate joint ISDA regulations, and those regulations announce that they "codify uniform and consistent rules for [ISDA] contracts …." 25 C.F.R. § 900.2(a). Further, in 2020, Congress directed the two agencies "to implement a consistent and transparent process for payment of [section 105(l)] lease[s]". Pub. L. 116–260 § 431(b), 134 Stat. 1542 (2020). Pursuant to that

directive, the two agencies sent out a joint letter to tribal leaders on July 27, 2021, announcing that "[B]IA and the IHS are seeking to establish as consistent and transparent an approach as possible in their administration of 105(l) leases."[5] Both the Indian canon and the congressional directive preclude IHS from adopting a construction of the leasing regulations that contradicts BIA's interpretation and is less favorable to tribes.

In sum, the Indian canon undermines all of IHS's arguments in this case, which is exactly the result that Congress intended.

D. IHS's position that depreciation duplicates principal-and-interest contravenes ISDA's purpose

ISDA commits the federal government "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 contravenes this statutory purpose by refusing to compensate tribes for both depreciation and principal-and-interest under an ISDA lease. The agency's position disincentivizes tribes to build and lease facilities for use in ISDA contracts, and treats them worse than private landlords from whom the federal government leases facilities.

[5] This "Dear Tribal Leader" letter is available at: https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/2021_Letters/DTLL_07262021.pdf

The agency responds by arguing that "[t]he purpose of Section 105(l) is not to place tribes in the precise financial position of private entities …; it is to enable tribes to recover out-of-pocket expenses in connection with accessing and operating their facilities." (Br. at 32). But IHS cites no authority for this contention and none is to be found in ISDA. Section 105(l) provides that compensation "for the use of the facility leased … 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). Nowhere does it limit compensable expenses to "out-of-pocket expenses." And the statute explicitly provides that both depreciation and principal and interest are compensable expenses.

For all of these reasons, IHS's construction of section 105(l) should be rejected, and the district court's decision should be reversed.

II. IHS Must Provide The Declined Lease Funding For 2020 and 2021

The Tribe is also entitled to the compensation for principal-and-interest that IHS declined for 2020 and 2021 on the flawed rationale that this was not an eligible cost. The agency cannot reduce this obligation by now arguing that payment of principal-and-interest would duplicate the compensation it provided for depreciation for those years. As discussed above, the two expenses do not duplicate each other and the Tribe is entitled to be compensated for both.

In addition, the Tribe is entitled to this compensation because ISDA forbids IHS from belatedly changing its rationale for declining a tribal funding proposal, as the agency attempts to do here. 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). The statute provides that "the Secretary shall, within ninety days after receipt of [a tribal] proposal, approve the proposal and award the contract unless the Secretary provides written notification to the [tribe] that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that [one or more of five enumerated grounds for declining funding applies]." 25 U.S.C. § 5321(a)(2). If the agency declines a proposal and the tribe appeals, the agency "shall have 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).

"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.[6]

Yet this is exactly what IHS is trying to do here – give itself a mulligan and a do-over. During its 90-day window of authority to approve or decline the proposed 2020 and 2021 leases, IHS issued a final decision that approved funding for depreciation but declined to provide funding for principal-and-interest on the ground that it was unauthorized. A year later the agency sought to reverse course, conceding that the Tribe is entitled to compensation for principal-and-interest, but asserting that it can offset the allegedly “duplicative” depreciation funding it had previously approved and provided. However, the agency’s authority to invoke another ground for withholding the funding at issue had expired 90 days after it received the Tribe’s proposal.

IHS contends that it did not invoke the “duplication” rationale in its written final decision to the Tribe “because the point was moot in light of a different conclusion: that ISDA does not permit funding for repayment of a federal construction loan.” (Br. at 39). This excuse is belied by both the law and the facts.

[6] Another judge reached the same conclusion with respect to declinations under Title V of ISDA, which has comparable statutory provisions. “ISD[A] provides IHS with only four grounds for rejecting a final offer under Title V, and IHS must specify which grounds it invokes when it rejects an offer. In subsequent proceedings, the government may rely only on the particular grounds it specified.” *Fort McDermitt Paiute and Shoshone Tribe v. Price*, 2018 WL 4637009, at *4 (D.D.C. 2018).

ISDA does not limit an agency to providing only one reason for declining a tribal proposal; it can list multiple reasons. And IHS's final decision for 2020 and 2021 did list multiple reasons for declining the funding, but made no mention of duplication. *See* JA019-JA022.

ISDA directs agencies to provide assistance to tribes "to overcome the stated objections" when the agency declines a tribal proposal. 25 U.S.C. § 5321(b)(2). The agency contends that "[t]his provision would make no sense if IHS was prohibited from considering additional limitations on the funding available once the original objection was overcome." (Br. at 40). To the contrary, this statutory requirement buttresses the conclusion that Congress intended that an agency list all of its "objections" (plural) in its declination decision and then work with the tribe to overcome all of those objections, if possible. The notion that Congress impliedly authorized agencies to prolong the approval process by invoking a series of different objections one at a time until a tribe can overcome them all is absurd.[7]

IHS contends that "[t]he statute does not speak directly to the question of what happens when the stated reason [for declining a proposal] is erroneous." (Br. at 44). This is not so. Section 5321(a)(2) provides that "the Secretary shall, within ninety

[7] Otherwise, agencies could nullify the statute's 90-day time limit for declining a tribal proposal simply by asserting a series of different reasons to decline the proposal, one after the other, whenever the current justification is abandoned or rejected.

days after receipt of [a tribal] proposal, approve the proposal and award the contract unless the Secretary provides written notification to the [tribe] that contains a specific finding that [one or more of five enumerated grounds for declining funding applies]." Section 25 U.S.C. 5321(e)(1) provides that the agency "shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof)." In sum, unless the agency invokes a valid reason for declining the tribal proposal within 90 days, it shall approve the proposal and award the contract.

Thus, it is futile for IHS to analogize ISDA to the Clean Air Act provision at issue in *Ethyl Corp. v. Browner*, 989 F.2d 522 (D.C. Cir. 1993), which required the EPA Administrator to grant or deny requests for a waiver within 180 days or else the waiver "shall be treated as granted." 42 U.S.C. § 7545(f)(4). In that case, the Court refused to equate the agency's unlawful denial of a waiver with inaction, and thereby "extend Congress's remedy for delay into a … remedy for error." 989 F.2d at 524. It reasoned that the statute "says that the agency must act with speed to stave off an involuntary waiver grant, not that it must act with perfection." Here, in contrast, Congress specified that a tribal proposal shall be approved unless the agency announces a valid reason for declining it within 90 days.

Finally, IHS argues that ISDA's judicial review provision, 25 U.S.C. § 5331, gives courts broad discretion to fashion appropriate relief and that here the Court

should direct the parties to engage in further negotiations to determine the appropriate amount of funding. The agency again ignores ISDA's plain language mandating that it "shall … approve [a tribal] proposal and award the contract unless" it gives the tribe a valid reason for declining the proposal within 90 days. 25 U.S.C. § 5321(a)(2). Where Congress has directly spoken to the question at issue, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Thus, the only appropriate relief here is to require IHS to approve the Tribe's proposal for 2020 and 2021, and to provide compensation for principal-and-interest for those years.

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 without any offset.

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 used to construct that facility. 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: November 1, 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 **5,776 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: November 1, 2024

Respectfully submitted,

/s/ Steven D. Gordon
Steven D. Gordon

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2024, copies of the foregoing Appellant's Reply 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