[ORAL ARGUMENT NOT SCHEDULED]

No. 24-5098

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RED LAKE BAND OF CHIPPEWA INDIANS,
a federally recognized Indian Tribe,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; and XAVIER BECERRA, *in his official capacity as Secretary, U.S. Department of Health and Human Services*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiff in district court, and appellant here, is the Red Lake Band of Chippewa Indians.

Defendants in district court, and appellees here, are the United States Department of Health and Human Services; and Xavier Becerra, in his official capacity as Secretary of the U.S. Department of Health and Human Services.

There were no additional parties and no *amici curiae* in district court, and none have entered an appearance before this Court.

B. Rulings Under Review

The ruling under review is the February 26, 2024, memorandum opinion and order (Dkt. Nos. 27, 28) entered by the Honorable Royce C. Lamberth in *Red Lake Band of Chippewa Indians v. U.S. Department of Health & Human Services*, No. 1:23-cv-63 (D.D.C.), denying plaintiff's motion for summary judgment and granting defendants' cross-motion for summary judgment. The memorandum opinion is available at *Red Lake Band of Chippewa Indians v. Department of Health & Human Services*, __ F. Supp. 3d __, No. 1:23-cv-0063-RCL, 2024 WL 774857 (D.D.C. Feb. 26, 2024).

C. Related Cases

This case has not previously been before this Court. Counsel are not aware of any currently pending related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ McKaye L. Neumeister
McKaye L. Neumeister

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GLOSSARY

BIA	Bureau of Indian Affairs
EPA	Environmental Protection Agency
HHS	U.S. Department of Health and Human Services
IHS	Indian Health Service
ISDA	Indian Self-Determination and Education Assistance Act
Secretary	Secretary of Health and Human Services
Treatment Center	Obaashing Chemical Health Treatment Center
Tribe	Red Lake Band of Chippewa Indians
USDA	U.S. Department of Agriculture

INTRODUCTION

The Indian Health Service (IHS) is an agency within the Department of Health and Human Services (HHS) that provides health services to American Indians. The Indian Self-Determination and Education Assistance Act (ISDA) allows Indian tribes to take over IHS programs and provide health care themselves. When a tribe takes over an IHS program, it is entitled to receive from the Secretary of Health and Human Services (Secretary) the appropriated funds that otherwise would have funded the program that IHS operated for the tribe's benefit.

ISDA contains a special means of funding tribes' costs of obtaining and maintaining the facility used to provide services under IHS-funded programs, known as a Section 105(*l*) lease. In essence, IHS makes annual payments to a contracting tribe that, in effect, defray the cost to the tribe of accessing the facility used to carry out health programs. Compensation to a tribe under such leases can include various cost elements, depending on what might be relevant under the circumstances: for instance, rent (if the facility is rented), alterations (if the facility needs to be changed to meet contract requirements), or repairs (if buildings or equipment are broken). But IHS does not cover costs that are duplicative of one another. The overall objective of Section 105(*l*)

leases is to "compensate" tribes "for the use of the facility leased" to provide services. 25 U.S.C. § 5324(*l*)(2).

Here, the Red Lake Band of Chippewa Indians (Tribe) sought compensation under a Section 105(*l*) lease that would have covered the cost of payments on a loan used to fund construction of its facility, and the full cost of depreciation based on the entire value of the facility (including the portion funded by the loan and the portion funded by the Tribe's out-of-pocket down payment). In other words, the Tribe sought payment for depreciation that was calculated based on the total acquisition cost of the facility. IHS concluded that awarding the full amount requested would be duplicative. Payment of principal and interest on the loan fully compensates the Tribe for the acquisition costs associated with the loan, and paying for depreciation as well would pay the Tribe twice for the same acquisition costs. IHS was, however, prepared to pay depreciation associated with the portion of the facility's acquisition cost that the Tribe funded through its down payment, because IHS was not otherwise paying those costs. The district court upheld IHS's action.

This Court should affirm. Nothing in the statute or its implementing regulations requires that both depreciation and principal and interest be compensated to the fullest extent possible where doing so would provide a

windfall, going well beyond the amount of compensation that would cover the costs associated with obtaining and operating the facility.

STATEMENT OF JURISDICTION

Plaintiff invoked the jurisdiction of the district court pursuant to 25 U.S.C. § 5331(a) and 28 U.S.C. § 1331. JA7. The district court entered judgment in favor of the government on February 26, 2024. JA163. Plaintiff timely appealed on April 16, 2024. JA164. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether under ISDA, 25 U.S.C. § 5301 *et seq.*, and implementing regulations, IHS can decline to compensate a tribe for both full depreciation of a facility and principal and interest payments on a construction loan to build that facility on the basis that such cost elements are impermissibly duplicative.

2. Whether IHS, upon concluding that it erroneously determined that principal and interest were not recoverable for 2020 and 2021, must correct that error without regard to potential duplication of depreciation payments because IHS had previously noted the duplication issue only in the course of negotiations, rather than in a final declination decision in which duplication was not yet a relevant issue.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

This case concerns how much funding IHS must provide under ISDA to a tribe in connection with a facility that the tribe uses for the operation of IHS-contracted health programs.

A. Statutory and Regulatory Background

The Indian Health Service is a federal agency within HHS that provides health care to American Indians and Alaska Natives. *See* 25 U.S.C. § 1661; *see also* 42 U.S.C. § 2001(a). IHS provides care either directly through IHS-operated programs or indirectly through mechanisms including contracts with tribes under ISDA. *See* 25 U.S.C. § 13 (Snyder Act); *id.* § 1601 *et seq.* (Indian Health Care Improvement Act); *id.* § 5301 *et seq.* (ISDA).

Congress enacted ISDA to effect "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." 25 U.S.C. § 5302(b). Tribes and federal agencies memorialize this transfer of authority by entering into a "self-determination contract," *id.* § 5321, or a self-governance compact, *id.*

§ 5384. The contract is "entered into … between a Tribal organization and the appropriate Secretary for the planning, conduct, and administration of programs or services that are otherwise provided to Indian Tribes and [their] members … pursuant to Federal law." *Id.* § 5304(j); *see* 25 C.F.R. § 900.6 (incorporating this definition of "contract").

Self-determination contracts are funded one year at a time through an annual negotiation process between the tribe and the agency, which results in an annual funding agreement that is incorporated into the contract. *See* 25 U.S.C. § 5329(c) (setting forth model agreement); 25 C.F.R. § 900.6; 25 U.S.C. § 5388(b) (providing for multiyear funding under compacts). For a given program, funding in these agreements generally comprises the amount that the agency would have expended for the operation of the program (known as the "Secretarial amount") and reasonable additional unique costs that a tribe must incur for contract compliance (known as "contract support costs"). 25 U.S.C. § 5325(a)(1)-(2); *see id.* § 5388(c) (same funding scheme for contracts and compacts).

1. With respect to the facility used to provide services under the program, tribes can pursue additional funding through a Section 105(*l*) lease. Upon request, Section 105(*l*) requires the Secretary to "enter into a lease" with

a tribe that owns or leases a facility and uses the facility "for the administration and delivery of services" under ISDA. 25 U.S.C. § 5324(*l*)(1). The statute provides that "[t]he 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." *Id.* § 5324(*l*)(2).

Agreements under Section 105(*l*) are distinct from traditional leases, because although IHS pays a tribe to lease the facility, it is the tribe that will occupy and use the facility. But they are akin to traditional leases in the sense that IHS is paying the costs associated with obtaining access to the facility, which will be occupied by the tribe for use in providing services under the programs that IHS funds. Section 105(*l*) leases thus serve as an additional funding stream for tribes under ISDA, enabling a tribe to recover its reasonable costs such that the tribe is not required to suffer out-of-pocket loss in connection with acquiring a facility to provide services under its health programs.

In providing for cost recovery, ISDA contains guidance on the kinds of cost elements that could be applicable under Section 105(*l*) leases: "[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*)(2). The requirements for such leases are further spelled out in ISDA's implementing regulations. *See* 25 C.F.R. pt. 900, subpt. H. Tribes can propose a lease to be compensated based on "fair market rental," a list of compensation elements, or a combination of the two. 25 C.F.R. § 900.74. In enumerating the compensation elements available, the regulations provide:

> 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 … [;]
>
> (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.

Id. § 900.70. The regulations thus make clear that these various elements "may be included in the lease compensation" only "[t]o the extent that no element is duplicative." *Id.*

2. ISDA provides that 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" the reason for rejecting the proposal. 25 U.S.C. § 5321(a)(2). "A proposal that is not declined within 90 days … is deemed approved …." 25 C.F.R. § 900.18. But the agency "may extend or otherwise alter the 90-day period" with the tribe's consent. 25 U.S.C. § 5321(a)(2).

In issuing a declination under Section 5321(a), the agency must "state any objections in writing" and "provide assistance to the tribal organization to overcome the stated objections." 25 U.S.C. § 5321(b)(1)-(2). The regulations further provide that "[w]hen the Secretary declines all or a portion of a proposal," "[t]he Secretary shall provide additional technical assistance to overcome the stated objections," and "any necessary requested technical assistance to develop any modifications to overcome the Secretary's stated objections." 25 C.F.R. § 900.30.

B. Factual Background

1. The Red Lake Band of Chippewa Indians is a federally recognized Indian tribe with a reservation in Minnesota. JA7. For over a decade, the Tribe has operated substance-abuse related health programs under two contracts with IHS. JA45. Between 2018 and 2020, the Tribe constructed the Obaashing Chemical Health Treatment Center (Treatment Center) as a facility to provide services under these programs. JA45. The Treatment Center was constructed using a loan of $4.95 million obtained from the U.S. Department of Agriculture (USDA) and $856,493.50 of the Tribe's own funds, for a total acquisition cost of $5,806,493.50. JA65, 69.

2. In August 2020, the Tribe submitted a proposal to IHS for a Section 105(*l*) lease for the Treatment Center, seeking $923,965.85 in annual lease compensation. JA45-46. Following negotiations, the Tribe and IHS were able to reach agreement on most issues and compensation elements covering a pro-rated one-month lease for 2020 (beginning in December, when the facility began operations) and a 12-month lease for 2021. JA46-47. Among the agreed-upon costs were more than $148 thousand in depreciation and $150 thousand in contributions to a reserve, along with various other expenses

including operations and maintenance, building and equipment repairs, and alterations. JA61.

In the course of negotiations, IHS explained to the Tribe that providing the requested funding both for depreciation and for principal and interest on the USDA loan would be "impermissibly duplicative" because they "provide compensation for the exact same thing - the cost of the [Treatment Center] (plus interest)." JA121-22 (October 29, 2020 letter). That issue did not turn out to make any difference to IHS's final disposition of the request, however, because the parties also disagreed on a more fundamental issue: whether the Tribe could obtain compensation for the principal and interest payable on the USDA loan at all. IHS took the position that it lacked authority under ISDA to repay a federal loan provided by another agency for construction costs, JA48-49, and that the Tribe had not demonstrated that it was seeking compensation for principal and interest that was paid or accrued, JA49-50. IHS thus concluded that the compensation sought by the Tribe for loan payments exceeded the applicable funding level under the contract. JA48-50.

Accordingly, IHS partially declined the Tribe's proposal under 25 U.S.C. § 5321(a)(2)(D). In particular, IHS rejected the Tribe's request insofar as it

sought $136,186.29 per year in USDA loan payments, JA47-50, instead awarding a lease of $63,648 for 2020 and $763,770 for 2021, JA42, 57-60.

3. The Tribe submitted a subsequent proposal for a Section 105(*l*) lease for the Treatment Center for 2022, and again IHS partially declined the proposal. JA63.

In doing so, IHS addressed its decision to partially decline the 2020 and 2021 proposals on the basis that "repayment of a federal construction loan was not reasonable compensation allowable under [S]ection 105(*l*)," and explained that the agency "has revisited its position and has negotiated the inclusion of principal and interest" in the 2022 lease. JA66. IHS explained, however, that this inclusion was "subject to any necessary corresponding changes to the depreciation element caused by the inclusion of principal and interest." JA66. And IHS indicated that it would "complete any necessary contract modifications" for 2020 and 2021 "once an adjustment to the depreciation calculation has been agreed upon." JA66.

For 2022, IHS observed that the Tribe proposed $145,268.80 in compensation for depreciation and $205,623 in compensation for principal and interest. JA67. The agency explained that "[t]he addition of compensation for principal and interest … requires that the IHS assess whether there is any

duplication between the elements of compensation and whether the method for calculating depreciation continues to comply with legal requirements." JA67.

IHS concluded that the Tribe's proposal for depreciation did not meet the requirements of 25 C.F.R. § 900.70, because it was duplicative of compensation provided for principal and interest on the USDA loan, and because depreciation is limited to "acquisition costs not financed with federal funds." JA68-69 (capitalization altered) (quotation marks omitted). IHS thus determined that depreciation must be based only on the acquisition costs covered by the Tribe's own funds. JA69.

Accordingly, IHS partially declined the Tribe's proposal under 25 U.S.C. § 5321(a)(2)(D). In particular, IHS declined the request insofar as it sought $123,307.80 in additional depreciation, instead awarding total lease compensation of $648,709 for 2022. JA67, 130.

C. Prior Proceedings

The Tribe brought this suit in January 2023, arguing that IHS should have compensated the Tribe for both full depreciation and principal and interest under the Section 105(*l*) leases for the Treatment Center. JA6-12.

The district court granted summary judgment to the government. JA137-62 (district court opinion (Op.)).

The district court concluded that IHS correctly declined to compensate the Tribe in contract year 2022 for depreciation based on the portion of the Treatment Center's acquisition cost that was funded by the USDA loan, for which IHS was paying principal and interest. JA154-60 (Op. 18-24). The court explained 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 (Op. 21). The Tribe is thus "asking IHS to compensate it for both most of what it cost to build the Treatment Center (principal and interest on the USDA loan) and that same cost spread across the useful life of the facility (the amount of depreciation attributed to the portion of the acquisition cost funded by the USDA loan)." JA160 (Op. 24). This would amount to "compensat[ing] the Tribe for the same thing twice," which would be "impermissibly duplicative" under 25 C.F.R. § 900.70. JA160 (Op. 24).[1]

[1] The district court found it unnecessary to decide whether the Tribe's request for depreciation would also "be barred by 25 C.F.R. § 900.70(b)'s requirement that depreciation be 'based on the useful life of the facility based on acquisition costs not financed with Federal funds.'" JA146 n.2 (Op. 10 n.2).

The district court further concluded that IHS was not barred from relying on the duplication rationale as a basis for opposing full compensation of depreciation and principal and interest for the 2020 and 2021 leases. JA147-54 (Op. 11-18). The Tribe argued that it should receive the full level of funding it sought for 2020 and 2021—including loan payments and depreciation—on the theory that once IHS issues a declination decision it cannot alter its rationale. Dkt. No. 15-1, at 16-17; Dkt. No. 25, at 13-15. Although IHS did not formally repeat the duplication objection in its final declination letter for 2020 and 2021, the court observed that the agency had alerted the Tribe in an earlier communication during negotiations that full compensation for both depreciation and principal and interest would be duplicative. JA148-49 (Op. 12-13); *see* JA121-22. The court explained, moreover, that IHS's duplication argument is "clearly correct," and remand would be "pointless under the harmless error standard." JA150-52 (Op. 14-16) (quotation marks omitted); JA160 n.5 (Op. 24 n.5).

SUMMARY OF ARGUMENT

I. IHS properly concluded that an award of both principal and interest and the Tribe's requested level of compensation for depreciation would be impermissibly duplicative.

To calculate depreciation costs based on the full value of the Treatment Center—including both the portion funded by the Tribe's out-of-pocket down payment and the Tribe's USDA loan—would result in that cost element substantially overlapping with compensation to cover the Tribe's loan payments. IHS would be making two separate payments, each designed to cover the cost of acquiring the facility, thus going well beyond covering the Tribe's costs. ISDA does not permit near-double payment simply because a tribe can choose to own its facility (rather than rent) and fund ownership through a loan (rather than existing funds or grants). The total amount of lease compensation is meant to enable a tribe to recover its costs associated with obtaining and operating a facility for use in providing services through its IHS-funded health programs; it is not meant to vary dramatically based on how a tribe finances the acquisition or to provide a windfall.

The Tribe's arguments to the contrary are unavailing. Nothing in the text of ISDA or its implementing regulations obligates IHS to cover both depreciation based on the full value of a facility and loan payments funding the acquisition of a portion of that facility. In explaining that compensation under Section 105(*l*) leases "may include" depreciation and principal and interest, 25 U.S.C. § 5324(*l*)(2), Congress merely listed different cost elements that could

possibly be recovered, if appropriate under the circumstances. The various other statutes and regulations that the Tribe invokes are similarly unhelpful. It is unsurprising that various statutory provisions list both depreciation and principal and interest as recoverable costs because, under certain circumstances, those cost elements can have distinct effects and therefore can be awarded simultaneously. (Indeed, IHS awarded compensation under both of those cost elements here.) But where, as here, full costs sought in both categories would be duplicative under the circumstances, ISDA's regulations preclude such payment.

Far from supporting the Tribe, the purpose of ISDA confirms that the near-double payment that the Tribe seeks is impermissible. The overall statutory objective is to support tribal self-determination by enabling tribes to take over the administration of certain programs from federal agencies. Covering a tribe's out-of-pocket expenses in accessing and using a facility adequately serves that objective; providing windfall profits merely because a tribe obtained loan financing does not.

II. The Tribe errs in asserting that even if full compensation for both depreciation and principal and interest were impermissibly duplicative for contract year 2022, IHS cannot withhold duplicative payment for 2020 and

2021. Both parties agree that IHS erred in its declination decision for those earlier years insofar as it concluded that principal and interest costs were not recoverable at all, but the Tribe contends that in fixing that error IHS cannot exclude duplicative compensation because the final 2020-2021 declination letter did not discuss IHS's consistent objection to duplication. IHS adequately preserved an objection based on duplication during those lease negotiations, however; the only reason that objection did not appear in the final 2020-2021 letter is that it was no longer applicable based on the agency's other determinations.

In seeking to correct its error with respect to the 2020-2021 lease determinations, IHS is not required to commit another error by awarding duplicative payment. In arguing to the contrary, the Tribe invokes the requirement that IHS must approve a funding proposal "within ninety days after receipt," 25 U.S.C. § 5321(a)(2), or the proposal is "deemed approved," 25 C.F.R. § 900.18. But this provision merely imposes a penalty for delay; it does not mandate automatic approval of a duplicative funding proposal whenever a timely declination is later determined to be erroneous and IHS seeks to correct it. ISDA permits the matter to be sent back before IHS so that the parties can work out the appropriate amount of compensation for the

2020-2021 leases, accounting for any impermissible duplication and determining whether any modifications are required. At a minimum, the district court did not abuse its discretion in declining to compel IHS to make duplicative payments to which it had consistently objected.

STANDARD OF REVIEW

The district court's summary judgment ruling is subject to de novo review. *See, e.g.*, *Mayo v. Reynolds*, 875 F.3d 11, 19 (D.C. Cir. 2017). If the statute is ambiguous, it must be construed in favor of the Indian tribe, 25 U.S.C. § 5321(g), but the Indian canon "does not permit reliance on ambiguities that do not exist." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986); *see also Fort McDermitt Paiute & Shoshone Tribe v. Becerra*, 6 F.4th 6, 14 (D.C. Cir. 2021) ("As codified in ISDA, the canon applies only when a statute is ambiguous."). "As a general matter, a district court is afforded broad discretion to enter that relief it calculates will best remedy" the circumstances presented. *United States v. Microsoft Corp.*, 253 F.3d 34, 105 (D.C. Cir. 2001) (per curiam).

ARGUMENT

I. IHS Properly Declined the Section 105(*l*) Funding Proposal as Impermissibly Duplicative.

A. Payment of both full depreciation and principal and interest would compensate the Tribe twice for the cost of acquiring the facility.

IHS was correct to conclude that compensating the Tribe both for principal and interest and for depreciation based on the same acquisition cost was impermissibly duplicative.

1. Under ISDA, IHS provides funding to tribes who operate their own health-care programs to ensure that tribes have the same ability to conduct the program that IHS would have if it had continued to provide health care itself. *See Becerra v. San Carlos Apache Tribe*, 144 S. Ct. 1428, 1445 (2024). When a tribe uses a facility to operate a health-care program, the statute also provides an option to obtain a "lease" from IHS. 25 U.S.C. § 5324(*l*). Technically, IHS does not lease the property in the sense that it takes possession of it, but rather pays compensation to the tribe for the amount it costs the tribe to acquire access to and operate the facility for its programs. In this way, IHS bears the costs of obtaining access to a facility to provide health care.

The annual lease compensates a tribe for one year's use of an appropriate facility, though that compensation can include different cost elements depending on the tribe's proposal and the nature of the interest that the tribe holds in the facility. Calculation of the lease amount can be fairly straightforward if the tribe rents property to use for the program, as IHS can pay the rental costs and any operation and maintenance costs the tribe may incur. Similarly, if the tribe owns the property outright, it can determine the fair market rent that would be charged for the facility and recover costs that way. Alternatively, a tribe could claim depreciation of the property, along with operation and maintenance costs, in an effort to ensure that operation of the facility does not cost the tribe money.

In this case, a portion of the relevant property was obtained through a loan on which the Tribe was still paying principal and interest. The statute contemplates the payment of such principal and interest, 25 U.S.C. § 5324(*l*), and ISDA's implementing regulations provide that such principal and interest, along with other enumerated elements, "may be included in the lease compensation" under Section 105(*l*), "[t]o the extent that no element is duplicative." 25 C.F.R. § 900.70. In this case, IHS has agreed to pay the

principal and interest associated with the loan, thus fully reimbursing the Tribe for the costs funded through the loan.

The issue in this case arises because the Tribe has also sought compensation for depreciation of the value of the property. Normally, depreciation is recoverable under the statute and regulations, again with the proviso that it not be duplicative. 25 U.S.C. § 5324(*l*)(2); 25 C.F.R. § 900.70. Depreciation is "[a] reduction in the value or price of something," specifically, "a decline in an asset's value because of use, wear, obsolescence, or age." *Depreciation*, Black's Law Dictionary (12th ed. 2024). To compensate for the depreciation of an asset thus means to make payments equivalent to the lost value of the asset. Here, the regulation specifies that in calculating depreciation, the value of the asset is the "acquisition cost[]." 25 C.F.R. § 900.70(b). To fully compensate for depreciation in a Section 105(*l*) lease, therefore, means to pay a portion of funding every year equal to the decline in value that year from the facility's initial acquisition cost. And at the end of its "useful life," the total of those payments would thus equal the facility's acquisition cost.

Paying for such depreciation thus compensates a tribe for the use of a facility that it owns. If a tribe paid $5 million out of its own funds to construct

a facility, it begins by owning a facility worth $5 million; it receives depreciation payments annually as the facility loses its value; at the end of the facility's "useful life" the tribe would own a facility deemed to have $0 value and will have received depreciation payments totaling $5 million. Paying for depreciation is thus another way to pay for the acquisition costs of a facility, and may make sense, for example, if a tribe is not paying the acquisition costs during the lease term through principal and interest (such as where the tribe owns the facility outright).

It would not make sense, however, to pay depreciation if IHS, rather than the tribe, were also paying the acquisition cost of the facility itself. Obviously if IHS provided a facility for the tribe to use, it would not need to transfer money to the tribe to account for the cost of acquiring the facility. Similarly, if IHS purchased a facility for the tribe to use, that would suffice to ensure that the tribe has access to a cost-free facility to operate the program, and it would be nonsensical to pay depreciation to the tribe.

The analysis does not change if, instead of purchasing a facility for the tribe to use, IHS allows the tribe to purchase the facility with a loan but then IHS reimburses the tribe's principal and interest payments. In that circumstance, too, the tribe has access to a facility to operate the program

without being forced to incur any acquisition costs. The only difference from the circumstance in which IHS owned the facility itself and allowed the tribe to use it rent-free would be beneficial to the tribe: To the extent that the facility continues to have value at the end of the lease term, the tribe would own the facility and thus would receive that windfall.

Payments of depreciation are thus duplicative of payments of principal and interest for the same facility. In the example discussed above, where a tribe purchased a facility worth $5 million, if IHS pays the full sale price of $5 million, plus any interest accrued, then the tribe will have recovered all of its costs. Alternatively, IHS could pay for the depreciation in the facility's value during the lease term, thus gradually funding the acquisition costs by paying for reductions in the facility's value while the tribe is operating it—and ultimately paying the same $5 million by the end of the facility's useful life. But if IHS made both payments, then the tribe will have had free use of the facility for its entire useful life, and will also have received five million additional dollars. Nothing in the statute or regulations contemplates such a windfall.

That hypothetical is not far from the facts of this case. The Tribe took out a $4.95 million USDA loan to construct the Treatment Center. ISDA

provides that the Tribe does not have to bear the financial burden of that construction so it is entitled to reimbursement from IHS. The Tribe could obtain that reimbursement in the form of payments of annual principal and interest on the loan. Alternatively, the Tribe could fund the loan payments itself and obtain reimbursement in the form of annual payments equal to the depreciation of the property. But obtaining both forms of payment in full would result in double recovery of the acquisition cost of the facility.

The one wrinkle here is that part of the acquisition cost of the facility was not funded through a loan for which IHS was paying principal and interest, but was instead funded by the Tribe's down payment of $856,493.50. IHS properly ensured that the Tribe received compensation for that portion of the Tribe's costs by providing depreciation based on that acquisition cost. JA69. And the agency agreed to cover principal and interest payments on the $4.95 million USDA loan, to remove from the Tribe the remaining fiscal liability for acquiring the facility. JA68. The Tribe will thus recover the entire cost of acquiring the Treatment Center. Under a straightforward application of the ISDA regulations, IHS thus properly declined to issue duplicative payment for the use of the Treatment Center.

2. In challenging the agency's partial declination, the Tribe's primary argument (Br. 7, 12-14, 18-21) is that depreciation and principal and interest are "distinct" concepts. The government does not dispute that these concepts are not identical. But as the district court recognized, that "these elements are not *inherently* duplicative … does not mean they can *never* be duplicative." JA156 (Op. 20). IHS properly concluded that those elements would be duplicative under the specific facts presented, because both the full depreciation and the principal and interest would overlap in covering the same acquisition cost for the facility. The Tribe focuses (Br. 18-19) on the purported "purpose" of depreciation, but has no response to the *effect* that full compensation for both elements would have here: double payment for the cost of acquiring the facility. *See Duplicative*, Black's Law Dictionary, *supra* ("having overlapping content, intentions, or *effect*" (emphasis added)). Indeed, the Tribe itself described the depreciation it sought to recover as "the acquisition cost of $5,806,493.50, amortized over a 39-year useful life." JA9 (Compl. ¶ 21).

Even as to purpose, the Tribe overlooks numerous sources demonstrating that "[t]he purpose of depreciation is not simply to replace one's property but to 'replace the original investment therein,'" "thus serv[ing]

to compensate for the acquisition cost of the asset." JA159 (Op. 23) (quoting *Detroit Edison Co. v. Commissioner*, 319 U.S. 98, 101 (1943)); *see* JA158-59 (Op. 22-23) (collecting cases). Instead, the Tribe characterizes the "purpose" of paying depreciation costs as covering the expense of using up the facility—*i.e.*, "'the physical consumption of [the] capital asset.'" Tribe Br. 18-19. However, Section 105(*l*) leases compensate for that cost not via depreciation, but through another cost element: "Contributions to a reserve for replacement of facilities." 25 C.F.R. § 900.70(c); *see* JA160 n.4 (Op. 24 n.4). Here, IHS agreed to make reserve payments so that the Tribe could eventually replace various physical aspects of the Treatment Center, including "roofing; doors and frames; vinyl windows; acoustical ceilings; [and] tile and resilient flooring." JA120; *see* JA125. Compensation for contributions to the reserve totaled over $150 thousand in both 2021 and 2022. JA61, 130.

The Tribe is further incorrect to assert that IHS views depreciation and principal and interest as "always duplicative costs" such that a tribe can "never recover both." Br. 16 (emphases omitted). The regulation provides that the listed cost elements may be included "[t]o the extent" they are not duplicative. 25 C.F.R. § 900.70. This requires assessing the degree of overlap of these elements. Consistent with this direction, the Tribe here has received

compensation for both elements—depreciation to account for the loss in value for the portion of the facility for which the Tribe paid with its own funds, and principal and interest for the portion funded by the loan. JA130. IHS merely reduced the funding for depreciation based on the portion of those costs that overlapped with compensation for the USDA loan. *See* JA69.

3. The Tribe also objects (Br. 19) that it would be "nonsensical" for the amount of depreciation paid under a Section 105(*l*) lease to "vary depending on the source of funding." The Tribe is correct that the calculation of depreciation of property does not depend on the source of funding, but the question here relates not to that calculation but rather to whether a depreciation payment would be duplicative of another payment that is also being made. And that question necessarily depends on whether IHS is paying for the same acquisition costs in another way.

What would be nonsensical would be if the *total lease payment* differed significantly based on how acquisition of the facility was financed. By the Tribe's lights, if the Tribe had purchased the facility without a loan, IHS would owe depreciation but not principal and interest, but on the actual facts IHS owes both, with the result that over the useful life of the facility IHS payments would vary by roughly a factor of two based on the Tribe's financing choices.

How a tribe funds the purchase of a facility makes no difference to the facility's value, cost to operate, or any other factor that should be relevant to IHS's payment.

If a tribe could acquire a facility for $5 million on the market, then the total lease compensation that the tribe will receive during the facility's useful life in connection with acquiring the facility will be comparable to $5 million (excluding other lease costs, like maintenance and repairs). A tribe will suffer no out-of-pocket loss if IHS bought the facility for a tribe outright at $5 million; if IHS covered all of a tribe's rent payments; or if a tribe owned the facility outright and IHS paid depreciation to the tribe in the amount of $5 million. The amount required to compensate a tribe for its costs does not suddenly double where a tribe owns a small portion of the facility outright and holds a loan covering the rest: if IHS compensates for combined depreciation and principal payments totaling $5 million (and covers interest payments) a tribe has fully recovered its acquisition costs.

B. The Tribe misunderstands the statute's text and purpose.

As discussed above, the agency's application of Section 900.70's non-duplication requirement to the facts here faithfully carries out the statute and

applicable regulations. The Tribe misunderstands the statute's language in suggesting otherwise.

1. The Tribe properly does not challenge the non-duplication requirement, instead arguing only that the statute suggests that depreciation and principal and interest should categorically be treated as non-duplicative. *See* JA154 (Op. 18) ("The Tribe does not dispute that if its requests for principal and interest and depreciation are 'duplicative' in the sense of 25 C.F.R. § 900.70, then partial declination would be appropriate. … [I]t does not challenge the validity of the duplication provision."); *see also* JA147 & n.2 (Op. 11 & n.2) (similar). That argument is mistaken.

Section 105(*l*) provides that "[t]he Secretary shall compensate each Indian tribe or tribal organization that enters into a lease … for the use of the facility leased." 25 U.S.C. § 5324(*l*)(2). The relevant statutory inquiry is thus the one in which IHS engaged: calculating the amount that must be paid to a tribe to ensure that it is IHS, and not the tribe, that bears the financial burden of accessing a facility to provide health-care services. Nothing about that inquiry is changed by the further provision that "compensation" under a lease "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." *Id.* This illustrative list of allowable costs provides some guidance regarding how the costs associated with using a facility can be calculated. *See Jamestown S'Klallam Tribe v. Azar*, 486 F. Supp. 3d 83, 92 (D.D.C. 2020) (observing that the "listed examples are also intended to provide 'reasonable' compensation benchmarks"); *Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243, 250 (D.D.C. 2016) (observing that Section 105(*l*) "tether[s] the concept of compensation to ... 'reasonable expenses'"). It plainly does not suggest that every listed cost must be paid in every case.

The Tribe asserts that the word "may" in that provision should be interpreted as "mandatory," and not "permissive." Br. 14 (quotation marks omitted). But even if that abnormal construction were correct, it would not demonstrate that inclusion of full depreciation and principal and interest is mandatory in all leases. Focusing on the meaning of "may," in isolation, is unhelpful in trying to understand the statute. What matters instead is the reason IHS "may include" these cost elements—in order to "compensate" a tribe "for the use of the facility." 25 U.S.C. § 5324(*l*)(2). Not every cost element listed will be applicable in calculating proper compensation for the use of the facility at issue under each lease. Here, for instance, the Tribe did not seek or obtain rent, despite the express reference to "rent" in 25 U.S.C. § 5324(*l*)(2).

See JA130. Similarly, a tribe that leases a facility would likely have no cause for seeking depreciation costs; and a tribe that owns a facility outright would likely have no cause for seeking principal and interest. The inclusion of the various cost elements in Section 105(*l*)(2) thus cannot be read to mean that each lease must contain all elements.[2]

2. The Tribe is also mistaken in asserting (Br. 25-27) that IHS's application of the non-duplication requirement here is contrary to the purpose of ISDA.

The Tribe objects that it receives less favorable treatment than if a private landlord leased the same facility. *See* Br. 20-21, 25-27. It is not at all clear that is true; a private landlord would not likely be able to collect both its principal and interest from purchasing the property and depreciation on the property's value, for the reasons given above. But in any event, as the Tribe has acknowledged, this is far from a "traditional lease[]." JA140 (Op. 4) (quoting Dkt. No. 15-1, at 2) ("'Section 105(*l*) leases are not traditional leases' but instead 'are facility cost agreements that compensate the tribal owner for expenses associated with using the facility to administer or deliver contracted

[2] It is most likely, therefore, that Congress intended a third meaning for "may" in this context: "[t]o be a possibility." *May*, Black's Law Dictionary, *supra*.

services.'" (italics added)); JA140 (Op. 4) (noting that the compensating agency "neither occupies nor operates the facility").

Instead, these Section 105(*l*) agreements are "'leases,' in the nomenclature of [ISDA]," JA137 (Op. 1), a unique creature of statute intended to further the statutory goals of ISDA. The objective of ISDA is to give tribes "an effective voice in the planning and implementation of programs responsive to the true needs of their communities" by "promot[ing] 'maximum Indian participation' in the administration of healthcare programs." *San Carlos Apache Tribe*, 144 S. Ct. at 1444-45 (citing 25 U.S.C. §§ 5301(a)(1), 5302(a)); *Navajo Nation v. U.S. Dep't of the Interior*, 57 F.4th 285, 289 (D.C. Cir. 2023) ("Congress enacted [ISDA] to help Indian tribes assume responsibility for programs or services that a federal agency would otherwise provide to the tribes' members." (quotation marks omitted)). The purpose of Section 105(*l*) is not to place tribes in the precise financial position of private entities and facilitate profits in excess of the reasonable costs of using facilities to operate such programs for the government; it is to enable tribes to recover out-of-pocket expenses in connection with accessing and operating their facilities.

Accordingly, the Tribe is wrong to suggest (Br. 26) that compensation for depreciation should be a source of profit under its Section 105(*l*) leases.

The Tribe would be entitled to receive profit if it could demonstrate that the fair market rent of the facility were greater than its acquisition cost, by seeking a lease in the amount of the fair market rental as explicitly authorized by the regulations. 25 C.F.R. § 900.74(a)-(b); *see id.* § 900.70(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."); *Indian Self-Determination and Education Assistance Act Amendments*, 61 Fed. Reg. 32,482, 32,490 (June 24, 1996) ("In the Committee's view, a lease based upon fair market value provides for the recovery of profit … ."). IHS explained this to the Tribe during negotiations. *See* JA132. And the Tribe did obtain fair market rental under this provision "for the value of the land." JA47; *see also* JA126, 130. But there is no basis for suggesting that it is appropriate to allow the Tribe to obtain profit in the form of double payment for the cost of acquiring the property.

The Tribe also contends (Br. 27) that IHS's position is contrary to the purpose of ISDA because it "creates a strong disincentive for tribes to construct new facilities." But nothing in Section 105(*l*) favors constructing new facilities over leasing existing facilities. *See* 25 U.S.C. § 5324(*l*)(1)-(2)

(permitting leases for facilities in which a tribe has a "leasehold interest," and specifying "rent" as permissible compensation). The statute's purpose is to ensure that tribes have access to facilities to provide health-care services, at IHS's expense. That is fully accomplished when IHS pays the principal and interest associated with a loan to construct a health-care facility.

By contrast, it is the Tribe's position that creates a strange incentive for tribes to construct facilities using the largest loan possible—even when they have funds available for a down payment or to pay completely out of pocket—in order to recover the full double-cost of acquisition. Nothing in ISDA supports that result.

C. The Tribe's remaining arguments are unavailing.

1. The Tribe invokes various other statutes and regulations, but none undermine the government's straightforward reading of Section 900.70 and Section 105(*l*).

The Tribe emphasizes (Br. 13-14) that "Congress has treated depreciation and debt service as distinct costs in other statutes besides ISDA." But the government does not dispute that these are distinct concepts, *see supra* p. 25. And, as with ISDA, those statutes merely state both elements in lists of costs; nothing in the text of those provisions indicates that Congress

viewed depreciation and debt service as incapable of ever being duplicative in any circumstance. *See* 39 U.S.C. § 3621 (1970) (repealed 2006); 49 U.S.C. § 49104(a)(9); 25 U.S.C. § 1674(b).

The Tribe is further incorrect to suggest (Br. 17) that another of ISDA's implementing regulations supplies the categorical directive that is lacking in the statute. Section 900.69—which explains the "purpose of this subpart" of the regulations—provides that a Section 105(*l*) lease "is to include compensation as provided in the statute." 25 C.F.R. § 900.69. This provision thus merely incorporates Section 105(*l*)(2)'s list of the elements such compensation might possibly include, if relevant under the circumstances.

The Tribe also relies (Br. 20, 22-23) on a Medicare regulation for the proposition that HHS has already recognized in another context that compensation for depreciation is distinct from and not duplicative of compensation for debt service. *See* 42 C.F.R. §§ 413.130-413.157 (involving reimbursement for capital-related costs for certain Medicare facilities). But that regulation does not provide for the payment of principal; instead, it provides only for "*interest* on capital indebtedness and depreciation." Tribe Br. 20 (emphasis added); *see* 42 C.F.R. §§ 413.130(a)(1), (7), 413.153(a)(1). A similar approach here would yield a similar result. If IHS paid only interest,

but not principal, and paid full depreciation for the full useful life of the facility, the Tribe would make out-of-pocket payments for principal in paying the full value of the loan, but will have received an equivalent amount back in depreciation payments—the same result as if IHS paid full principal and interest (plus depreciation limited to the portion of Tribe's down payment) and the Tribe had no out-of-pocket responsibility for loan payments, as IHS contemplates here.

2. The Tribe fares no better in relying on agency practice. The Tribe asserts (Br. 5, 23-24) that the Bureau of Indian Affairs (BIA) entered into a Section 105(*l*) lease with the Tribe in which BIA included compensation for both depreciation and principal and interest. Therefore, the Tribe asserts (Br. 24), BIA's "construction of the ISDA regulations" aligns with the Tribe's position.

Significantly, however, the Tribe does not point to any affirmative interpretive document from BIA clearly laying out what that agency views as the correct approach to this question. Instead, it points to the bare existence of a single lease granted by BIA in 2022, JA72-76, in which BIA apparently acceded to the Tribe's effort to view depreciation and principal and interest as

non-duplicative, *see* JA86.[3] At most, this demonstrates that BIA overlooked the proper application of the non-duplication requirement. It does not suggest that IHS is wrong here, where the agency thoroughly considered the issue and reached an affirmative decision to apply the non-duplication requirement in this way.

3. The Tribe invokes the Indian canon of construction throughout its brief. *See* Br. 15, 17-18, 21-25. But the Indian canon "does not permit reliance on ambiguities that do not exist," *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986), and cannot be used to "produce an interpretation that … would conflict with the intent embodied in the statute Congress wrote," *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Additionally, for the canon to apply, the Tribe's construction of ISDA must be "reasonabl[e]." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988).

No ambiguity exists here: as discussed, the statute contemplates payments to require IHS to bear the costs of use of a facility, and IHS's calculation in this case does exactly that. The statute cannot be read to

[3] The amount of depreciation awarded in the BIA lease appears to be less than an amount corresponding to the full construction cost of the facility, JA86-87, 100, which indicates that BIA did not apply an identical approach to calculating depreciation to that which the Tribe urges here.

mandate that both depreciation and principal and interest be included to the maximum extent possible in every lease, even where they overlap; to the contrary, as noted, the Tribe does not even challenge the validity of the non-duplication regulation.

Nor is the Tribe's interpretation of the statute and regulation reasonable: it would mandate double payment related to the cost of acquiring a facility, resulting in compensation that would far exceed the actual cost of using the facility for the operation of programs under ISDA. The Court should "decline to adopt a strained interpretation of ISDA that would allow [such] double-dipping." *Fort McDermitt Paiute & Shoshone Tribe v. Becerra*, 6 F.4th 6, 14 (D.C. Cir. 2021).

II. The Tribe Is Not Entitled to Duplicative Compensation for the 2020 and 2021 Contract Years.

The Tribe independently argues that, even if IHS properly determined that the funding proposal was impermissibly duplicative for 2022, it must nonetheless pay duplicative funding for 2020 and 2021. *See* Br. 27-32. That is incorrect.

A. The Tribe's suggestion that IHS has somehow forfeited its duplication argument with respect to contract years 2020 and 2021 is difficult to fathom. IHS expressly raised the issue with the Tribe during the

negotiations surrounding those years, stating that the agency could not provide the level of funding requested for the depreciation and principal and interest elements, because it would be "impermissibly duplicative." JA121-22 (October 29, 2020 letter) ("These elements … provide compensation for the exact same thing - the cost of the [Treatment Center] (plus interest)."); *see* JA148-50 (Op. 12-14) (noting that IHS had made this objection).

In the final declination letter, IHS did not reiterate that concern not because it had backed off its consistent position, but rather because the point was moot in light of a different conclusion: that ISDA does not permit funding for repayment of a federal construction loan. *See* JA48-49; JA151 (Op. 15) ("IHS presumably omitted the duplication ground not because it changed its mind but because the duplication concern was essentially mooted by IHS' exclusion of loan payments for other reasons.").

After declining the leases on that basis, IHS "revisited its position" regarding the ability to compensate for principal and interest on a federal construction loan, concluding that ISDA permits the inclusion of this cost element in a Section 105(*l*) lease. *See* JA66. Given its earlier mistaken conclusion to the contrary, IHS expressed its willingness to recalculate the funding levels for 2020 and 2021 based on its revised understanding. JA66.

But in doing so, it explained that the parties would also need to make "an adjustment to the depreciation calculation" for those years to avoid duplicative payment. *See* JA66-67 ("The addition of compensation for principal and interest, however, requires that the IHS assess whether there is any duplication between the elements of compensation and whether the method for calculating depreciation continues to comply with legal requirements.").

That was entirely proper. ISDA directs IHS to "provide assistance" to tribes "to overcome the stated objections" when IHS issues a declination. 25 U.S.C. § 5321(b)(2); *see also* 25 C.F.R. § 900.30 (providing that when IHS "declines all or a portion of a proposal," it must "provide additional technical assistance to overcome the stated objections," and "any necessary requested technical assistance to develop any modifications to overcome" the objections). This provision would make no sense if IHS was prohibited from considering additional limitations on the funding available once the original objection was overcome.

Moreover, if IHS had litigated the question of whether principal and interest are recoverable and lost, the proper remedy would have been to instruct IHS to correct that error by allowing the recovery of principal and interest costs that would otherwise be compensable. The district court would

not, in that circumstance, have been obliged to order IHS to make duplicative payments that the statute does not contemplate, particularly where, as here, IHS has consistently maintained its meritorious objection to such payments. It would be anomalous if IHS's correction of its own error put it in a worse position.

At a minimum, the district court did not abuse its discretion in declining to require IHS to provide such an unauthorized windfall. The statute confirms that relief is discretionary: in actions arising under ISDA, "the district courts *may* order appropriate relief including money damages, injunctive relief …, or mandamus." 25 U.S.C. § 5331(a) (emphasis added). District courts in this Circuit have recognized that "the plain language of that section gives [courts] broad discretion to fashion an appropriate remedy, including, but not limited to, a remand to the agency for further proceedings." *Cook Inlet Tribal Council v. Mandregan* (*Cook II*), No. 14-CV-1835 (EGS), 2019 WL 3816573, at *8 (D.D.C. Aug. 14, 2019); *see, e.g.*, *Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 114-15 (D.D.C. 2019) (exercising "discretion to remand to IHS for further consideration"). Similarly, courts have issued relief in the form of directing the parties to engage in further negotiations consistent with the courts' reasoning. *See Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d

534, 545 (D.D.C. 2014); *Maniilaq Ass'n*, 170 F. Supp. 3d at 256. That is effectively what IHS seeks here: the ability to work out whether any increase in the Tribe's compensation for 2020-2021 is required based on the correct legal standard, which allows for the recovery of principal and interest but not the recovery of both principal and interest and depreciation for the same acquisition cost.

Given that IHS has expressed an intention to perform a new calculation to the extent any adjustment was warranted, the district court's dismissal of the Tribe's claims here is tantamount to a remand to allow the parties to work out the proper amount of compensation consistent with the district court's findings. And the Tribe's invocation of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), misses the point: IHS is not seeking affirmance of its decision on a ground upon which it did not previously rely, but rather merely seeking an opportunity to determine the proper amount of compensation based on the appropriate legal standard. And in any event, as noted, IHS did previously raise the duplication issue in the course of negotiations with the Tribe.

B. The Tribe's objection that it "does not seek [a] remand," Br. 31, is similarly misguided. It is common ground that the amounts owed for contract years 2020 and 2021 must be recalculated based on IHS's revised

understanding of principal and interest. *See* Br. 27 ("IHS is obliged to provide the Tribe with the funding for principal and interest that it declined for 2020 and 2021."). The only question is whether the amount of allowable principal and interest should be calculated based upon the correct interpretation of the statute or based upon the Tribe's erroneous interpretation that IHS has properly and consistently resisted during the agency proceedings and throughout this litigation. That question should answer itself.

The Tribe's argument to the contrary is both unduly formalistic and mistaken on its own terms. *See* Br. 28-29, 31. The Tribe relies on 25 U.S.C. § 5321, which provides that the Secretary must "approve the proposal" "within ninety days after receipt" "unless the Secretary provides written notification to the applicant" of the statutory basis for declining the funding. 25 U.S.C. § 5321(a)(2). And the Tribe invokes a regulation providing that "[a] proposal that is not declined within 90 days … 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." 25 C.F.R. § 900.18.

There is no dispute that those provisions were satisfied here: IHS declined the application within the 90-day period (as properly extended) and stated its reason for doing so, which was based on IHS's understanding at the

time. The statute does not speak directly to the question of what happens when the stated reason is erroneous, much less state that an agency's statement prior to the final declination letter does not count if it is not repeated in that letter despite being irrelevant in light of the letter's other contents.

This Court has, however, addressed a similar issue in the context of a comparable statute. In *Ethyl Corp. v. Browner*, 989 F.2d 522, 523 (D.C. Cir. 1993), this Court held that an agency had not forfeited its ability to raise an argument based on new evidence when it had initially based its decision on a separate ground. That case involved the Environmental Protection Agency's (EPA) authority to grant waivers from a prohibition on the sale of fuel additives. The statute provided that "[i]f the Administrator has not acted to grant or deny an application under this paragraph within 180 days of receipt of such application, the waiver authorized by this paragraph shall be treated as granted." *Id.* (alteration omitted) (quoting 42 U.S.C. § 7545(f)(4) (1988)). The EPA timely denied a waiver application, but then sought a voluntary remand in order to reconsider its decision in light of new evidence. *Id.* at 523-24. The petitioner opposed remand, "arguing that erroneous denial of a waiver was a nullity," and because the EPA had failed to issue a proper denial within the statutory window, the waiver must be deemed granted. *Id.* at 524. But

this Court refused to "equate[] unlawful denial with inaction," explaining 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." *Id.* Observing that "[a]utomatic issuance is itself a dramatic, even extreme, penalty for agency delay," the Court concluded that "given the tradition of allowing agencies to reconsider their actions where events pending appeal draw their decision in question," there was "no basis to extend Congress's remedy for delay into a similarly radical remedy for error." *Id.*

The same reasoning applies to the similarly worded requirement at issue here. Indeed, this case is easier for two related but independent reasons. Here, unlike in *Ethyl Corp.*, the agency had explained its objection before issuing its denial. *See* 989 F.2d at 523 (seeking remand to "review … other possible bases for denial that [EPA] alluded to but did not resolve"). And here, unlike in *Ethyl Corp.*, the agency's objection was rendered irrelevant by its separate basis for denial, as opposed to being a new justification for reaching the same decision.

Accordingly, district courts in this Circuit routinely decline to order an agency to grant the full amount of compensation proposed under ISDA when a timely declination decision later proves to be erroneous. Instead, courts have

directed the parties to engage in further negotiations to determine the appropriate amount of funding absent the error. *See Pyramid Lake Paiute Tribe*, 70 F. Supp. 3d at 545 (declining to grant tribe "the full amount of its contract proposal" and instead directing parties to negotiate over correct funding amount); *Maniilaq Ass'n*, 170 F. Supp. 3d at 256 (declining to require specific compensation amount proposed by tribe and instead "compel[ling] the parties to discuss, in a manner consistent with this opinion, the proper amount of compensation").

The same is true in *Cook II*, 2019 WL 3816573, on which the Tribe relies. *See* Br. 28-29, 31. There, the district court held that IHS improperly declined a funding proposal based on the erroneous conclusion that certain costs could not be funded as contract support costs. *Cook II*, 2019 WL 3816573 at *3 (citing *Cook Inlet Tribal Council v. Mandregan* (*Cook I*), 348 F. Supp. 3d 1 (D.D.C. 2018), *rev'd and remanded sub nom. Cook Inlet Tribal Council, Inc. v. Dotomain*, 10 F.4th 892 (D.C. Cir. 2021)). The tribe asked the district court to award it the specific amount of funding requested, but the court refused, explaining that it was not clear "that the requested amount does not duplicate any funding already provided." *Id.* at *12; *see Cook I*, 348 F. Supp. 3d at 16-17. Instead, the court ordered the parties to "negotiate the appropriate amount

for the facility support costs." *Cook II*, 2019 WL 3816573, at *13. The out-of-context statements from *Cook II* that are quoted in the Tribe's brief thus do not demonstrate that a tribe's specific funding request must be deemed approved if the agency's timely declination is later found to be erroneous.[4]

As those cases underscore, the Tribe's argument here runs contrary to common sense and would produce illogical results. In imposing a 90-day declination deadline, Congress ensured that the agency would act promptly in providing funding to tribes. Equating any error with untimeliness under ISDA would have the opposite effect: an agency will have every incentive to decide proposals slowly, seeking multiple extensions of the 90-day deadline in order to fully address every possible alternative rationale and eventuality in the ultimate declination letter.

If the Tribe's position were correct, it would also create incentives for federal agencies and tribes that contradict statutory objectives: rather than

[4] Notably, one of the statements quoted in the Tribe's brief itself merely quotes from the plaintiff's argument in *Cook II*, on which the plaintiff did not prevail in obtaining the specific level of funding proposed. *See* Tribe Br. 29, 31 (quoting *Cook II*, 2019 WL 3816573, at *9). Moreover, in *Cook II* the court rejected a plenary remand to IHS to further develop the factual record in order to defend the agency's "same" position again, deeming such a remand improper under the "unique facts and circumstances of this case." *Cook II*, 2019 WL 3816573, at *10. That conclusion does not apply to the materially distinct circumstances here.

negotiating cooperatively with an agency, tribes would be motivated to never consent to an extension of the 90-days, even if negotiations were productive, on the theory that less time for the agency's decision increases the chance of error or unaddressed alternative arguments. Tribes would also have an inducement to propose high compensation amounts unrelated to actual costs, because if the agency erred in its rationale for rejecting the inflated cost request, a tribe would be entitled to the original inflated proposal. For their part, agencies would have no motivation to ever revisit erroneous positions and seek to correct errors, or to provide robust technical assistance to tribes to overcome objections, if the necessary result would categorically mean defaulting to a tribe's original excessive compensation proposal, which could be contrary to ISDA's requirements in ways the agency did not previously need to address.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,234 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in CenturyExpd BT 14-point font, a proportionally spaced typeface.

/s/ McKaye L. Neumeister
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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

/s/ McKaye L. Neumeister
McKaye L. Neumeister

ADDENDUM

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25 U.S.C. § 5321

§ 5321. Self-determination contracts

(a) Request by tribe; authorized programs

* * *

(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,[**] 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. * * * *

[**] So in original. Probably should be "paragraph".

25 U.S.C. § 5324

§ 5324. Contract or grant provisions and administration

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(*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

§ 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. § 900.18

§ 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. § 900.69

§ 900.69. What is the purpose of this subpart?

Section 105(l) of the Act requires the Secretary, at the request of an Indian tribe or tribal organization, to enter into a lease with the Indian tribe or tribal organization for a building owned or leased by the tribe or tribal organization that is used for administration or delivery of services under the Act. The 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." This subpart contains requirements for these leases.

25 C.F.R. § 900.70

§ 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.

25 C.F.R. § 900.74

§ 900.74. How may an Indian tribe or tribal organization propose a lease to be compensated for the use of facilities?

There are three options available:

(a) The lease may be based on fair market rental.

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

(c) The lease may be based on paragraphs (a) through (h) of § 900.70 only.