UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SAINT REGIS MOHAWK TRIBE, Plaintiff, -against- **UNITED STATES OF AMERICA**; **ROBERT F. KENNEDY JR.**, in his official capacity as Secretary, U.S. Department of Health & Human Services; and **BENJAMIN SMITH**, in his official capacity as Acting Director, Indian Health Service, Defendants.	Civil Action No. 8:24-cv-1479 (AMN/CFH) **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION AND SUMMARY

Plaintiff Saint Regis Mohawk Tribe ("Tribe") compacts with the Secretary of the Department of Health and Human Services ("Secretary") through the Indian Health Service (IHS) under Title V of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5381 et seq (ISDEAA). The purpose of the ISDEAA is to reduce federal domination of Indian programs and promote tribal self-determination and self-governance by giving tribes the option to assume responsibility for the administration of certain federal programs. 25 U.S.C. § 5302(b); *Becerra v. San Carlos Apache Tribe*, 602 U.S. 222, 227 (2024); *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 639 (2005). By "assuring maximum Indian participation in the direction of … Federal services to Indian communities," the ISDEAA also seeks to "render such services more responsive to the needs and desires of those communities." 25 U.S.C. § 5302(a). Pursuant to its compact and annual funding agreements entered thereunder, the Tribe administers a variety of healthcare-related programs, services, functions, and activities (PSFAs) that the IHS is otherwise authorized to provide under federal law to American Indians and Alaska Natives in the Tribe's service area. *Id.* § 5321(a)(1).

Successful implementation of the ISDEAA requires federal agencies like the IHS to surrender both resources and decisionmaking authority to tribal contractors—a requirement that has engendered strong bureaucratic resistance over the years. *See, e.g.*, S. Rep. No. 100-274, at 37 (1987), *as reprinted in* 1988 U.S.C.C.A.N. 2620, 2656. To overcome this resistance, the ISDEAA significantly curtails agency discretion in several important respects.[1] Of particular relevance here, each funding agreement entered under Title V of the ISDEAA "shall, *as*

[1] *See, e.g.*, H.R. Rep. No. 106-477, at 34-35 (1999), *as reprinted in* 2000 U.S.C.C.A.N. 573, 592 ("Because the Act requires the agencies to divest themselves of programs, staff, and funding at tribal request, the courts should not give Administrative Procedure Act-type deference to agency decisionmaking.").

determined by the Indian tribe, authorize the Indian tribe to plan, conduct, consolidate, administer, and receive full tribal share funding" for eligible PSFAs. 25 U.S.C. § 5385(b)(1) (emphasis added). Further, the Secretary's authority under Title V of the ISDEAA to reject a tribe's proposed funding agreement terms is limited to specific, statutorily delineated criteria. *Id.* § 5387(c)(1)(A) (requiring the Secretary to "clearly demonstrate[]" in writing that one of four specific rejection criteria applies when rejecting a "final offer" proposal submitted by a tribe participating in the self-governance program under ISDEAA's Title V).

This case arises from the IHS's rejection of the Tribe's proposal under the ISDEAA to assume responsibility for PSFAs relating to sewage treatment, wastewater management, and the operation and maintenance of specific sanitation facilities—activities that the Tribe considers necessary and fundamental to the conservation of public health on its reservation. Congress has likewise found that "the provision of safe water supply systems and sanitary sewage and solid waste disposal systems is primarily a health consideration and function[,]" 25 U.S.C. § 1632(a)(1), and has statutorily authorized the U.S. Department of Health and Human Services (HHS) "to construct, improve, extend, or otherwise provide and maintain, by contract or otherwise, essential sanitation facilities … for Indian homes, communities, and lands" under the Indian Sanitation Facilities Construction Act, Pub. L. No. 86-121, § 7(a)(1), 73 Stat. 267 (1959) (codified at 42 U.S.C. § 2004a(1)) [hereinafter Sanitation Facilities Construction Act]. As part of the Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (1976) (codified at 25 U.S.C. §§ 1601–85) (IHCIA), Congress further provided that pursuant to the Sanitation Facilities Construction Act, the IHS is expressly authorized to provide "financial and technical assistance to Indian tribes and communities in the establishment, training, and equipping of utility organizations to operate and maintain Indian sanitation facilities[,]" as well as "operation

and maintenance assistance for, and emergency repairs to, tribal sanitation facilities when necessary to avoid a health hazard or to protect the Federal investment in sanitation facilities." 25 U.S.C. § 1632(b)(2)(A), (C).

These and other statutory authorities provide the necessary authorization for the IHS to administer the types of PSFAs that the Tribe proposed to assume and operate for itself under its compact and funding agreement. *See id.* §§ 1638e, 1603(11)(D), 1603(11)(G)(vii), (xx), (xxv) (providing additional programmatic authority to the IHS); *see also Setting New Foundations: Implementing the Infrastructure Investment and Jobs Act for Native Communities: Hearing Before the S. Comm. on Indian Affs.*, 117th Cong. 24–25 (2022) (statement of Elizabeth Fowler, Acting Dir., Indian Health Serv., U.S. Dep't of Health and Hum. Servs., agreeing with Senator Murkowski that the IHS "has the authority to fund the operation and maintenance costs for sanitation systems[.]"). Nonetheless, the IHS rejected the Tribe's final offer to assume these PSFAs, taking the position that IHS is *not* in fact authorized to administer programs for routine operation and maintenance of sanitation facilities, and therefore the Tribe could not assume responsibility for the proposed PSFAs under its compact and funding agreement. Letter from IHS Director Roselyn Tso to Tribal Chiefs Ronald LaFrance Jr., Beverly Cook, and Michael Conners (Aug. 8, 2024) [hereinafter Rejection Letter], Administrative Record ("AR") at USA000001–20. Relying on this exceptionally narrow interpretation of the relevant statutory authority, the IHS further asserted that because the Tribe's proposal was "outside the scope of the ISDEAA," AR at USA000008, the agency was not required to comply with the statutory rejection criteria in responding to the Tribe's final offer.

The ISDEAA does not permit the IHS to narrowly interpret statutory authority to its benefit in order to deny tribes the ability to assume PSFAs to further the health and welfare of

their tribal communities. To the contrary, in order to preclude this type of agency mischief, the ISDEAA mandates that the Secretary "shall interpret all Federal laws, Executive orders, and regulations in a manner that will facilitate" both "the inclusion of [PSFAs] (or portions thereof) and funds associated therewith" in ISDEAA funding agreements, and "the achievement of tribal health goals and objectives." 25 U.S.C. § 5392(a)(1), (3). The Tribe's proposal is amply supported by statutory authority, and the IHS may only reject the proposal pursuant to the statutory rejection criteria set out in the ISDEAA at 25 U.S.C. Section 5387(c)(1)(A).

Both of the rejection criteria cited by the IHS in its rejection letter, however, are plainly inapplicable. First, the IHS claimed that the Tribe's Final Offer exceeds the applicable funding to which the Tribe is entitled under Title V of the ISDEAA—even though the Tribe proposed *no additional funds* for the sewage treatment, wastewater management, and sanitation facilities PSFAs.[2] AR at USA000016 (citing 25 U.S.C. § 5387(c)(1)(A)(i)). Second, mischaracterizing the Tribe's request as one to "create a new program authorization for the IHS to administer," the IHS rejected the Tribe's proposal as consisting of "an inherent Federal function that cannot be delegated." AR at USA000018; 25 U.S.C. § 5387(c)(1)(A)(ii). But the PSFAs that the Tribe actually proposed to carry out—i.e., sewage treatment, wastewater management, and the operation and maintenance of sanitation facilities—are not inherently federal functions.

The ISDEAA sets a high bar for the IHS's rejection of a Title V final offer proposal, requiring the Secretary to make a "specific finding that clearly demonstrates, or that is supported by a controlling legal authority," that one or more of the statutory rejection criteria apply. 25

[2] As discussed below, inclusion of a PSFA in an ISDEAA funding agreement provides numerous benefits beyond direct program funding, such as the ability to redesign programs, access to Federal Tort Claims Act coverage, entering into ISDEAA Section 105(*l*) leases, and others. By including the proposed sewage treatment, wastewater management, and sanitation facilities PSFAs in its funding agreement, the Tribe can access these benefits and use third-party revenues generated from other compacted PSFAs to fund these programs.

U.S.C. § 5387(c)(1)(A). The IHS has failed to do so. The Tribe therefore initiated this action under the ISDEAA, asking the Court for declaratory, mandamus, and injunctive relief, as authorized in 25 U.S.C. Sections 5387(c)(1)(C), 5331(a), and 5391(a), and 28 U.S.C. § 2201, declaring that the IHS is authorized to administer programs for the routine operation and maintenance of sanitation facilities, reversing Defendants' rejection of the Tribe's final offer, and compelling Defendants to approve the final offer and execute and enter into the proposed amendment.

LEGAL BACKGROUND

I. The Federal Responsibility for Indian Health Care, Including Safe and Sanitary Water Supplies.

The United States has long recognized a federal responsibility and corresponding authority to provide for safe, sanitary water supplies and systems in tribal communities. In 1921, before the IHS was created within the Public Health Service (PHS), the United States passed the Snyder Act, which authorized the Bureau of Indian Affairs (BIA) to carry out programs "for the benefit, care, and assistance of Indians …". Pub. L. No. 67-85, 42 Stat. 208 (1921) (codified at 25 U.S.C. § 13). The Snyder Act included the first statutory authorization for Indian health care programs. Under the Snyder Act, the BIA was obligated and authorized to direct, supervise, and expend funds "[f]or relief of distress and conservation of health," but also "[f]or extension, improvement, operation, and maintenance of existing Indian irrigation systems and for development of water supplies," among other activities. 25 U.S.C. § 13.

These functions remained with the BIA until 1954, when Congress transferred responsibility for Indian health services from the BIA to the Surgeon General of the PHS, within

HHS. Transfer Act, Pub. L. No. 83-568, § 1, 68 Stat. 674 (1954) (codified at 42 U.S.C. § 2001).[3] Initially, the Transfer Act was limited to those "functions, responsibilities, authorities, and duties of the [BIA] … relating to the maintenance and operation of hospitals and health facilities for Indians, and the conservation of the health of Indians …." 42 U.S.C. § 2001(a). Within five years, however, Congress passed the Sanitation Facilities Construction Act amending the Transfer Act to explicitly include sanitation authority. *Id.* § 2004a.[4]

With the passage of the Sanitation Facilities Construction Act, Congress expressly authorized the Surgeon General:

> (1) to construct, improve, extend, or otherwise provide and maintain, by contract or otherwise, essential sanitation facilities, including domestic and community water supplies and facilities, drainage facilities, and sewage- and waste-disposal facilities, together with necessary appurtenances and fixtures, for Indian homes, communities, and lands;
>
> (2) to acquire lands, or rights or interests therein, including sites, rights-of-way, and easements, and to acquire rights to the use of water, by purchase, lease, gift, exchange, or otherwise, when necessary for the purposes of this section, except that no lands or rights or interests therein may be acquired from an Indian tribe, band, group, community, or individual other than by gift or for nominal consideration, if the facility for which such lands or rights or interests therein are acquired is for the exclusive benefit of such tribe, band, group, community, or individual, respectively;
>
> (3) to make such arrangements and agreements with appropriate public authorities and nonprofit organizations or agencies and with the Indians to be served by such sanitation facilities (and any other person so served) regarding

[3] In 1955, one year after the Transfer Act, the IHS was established as an agency within the PHS. Brett Lee Shelton, *Legal and Historical Roots of Health Care for American Indians and Alaska Natives in the United States* 9 (2004), https://www.kff.org/wp-content/uploads/2013/01/legal-and-historical-roots-of-health-care-for-american-indians-and-alaska-natives-in-the-united-states.pdf.

[4] These acts of Congress followed a 1952 survey of environmental conditions on tribal reservations finding that most American Indian and Alaska Native families were still living in unsanitary conditions, and that nearly 80% of those families were hauling drinking water from ditches, creeks, stock ponds, and other unprotected sources. Indian Health Serv., Sanitation Facilities Construction 50th Anniversary, 12 (2009), https://www.ihs.gov/sites/dsfc/themes/responsive2017/display_objects/documents/reports/SFC50thAnniversary.pdf.

> contributions toward the construction, improvement, extension and provision thereof, and responsibilities for maintenance thereof, as in his judgment are equitable and will best assure the future maintenance of facilities in an effective and operating condition; and
>
> (4) to transfer any facilities provided under this section, together with appurtenant interests in land, with or without a money consideration, and under such terms and conditions as in his judgment are appropriate, having regard to the contributions made and the maintenance responsibilities undertaken, and the special health needs of the Indians concerned, to any State or Territory or subdivision or public authority thereof, or to any Indian tribe, group, band, or community or, in the case of domestic appurtenances and fixtures, to any one or more of the occupants of the Indian home served thereby.

Id. § 2004a(a)(1)–(4).

By 1976, it had become clear that the broad, general authorization and meager appropriations for Indian health under the Snyder Act and other existing authorizations were inadequate to address the egregious health conditions in tribal communities. In response, Congress enacted the IHCIA. *See* IHCIA, Pub. L. No. 94-437, § 2, 90 Stat. 1400 (1976) (codified as amended at 25 U.S.C. § 1601). In contrast to the Snyder Act's generic authorization for the government to expend funds for the "conservation of health," the IHCIA included numerous statutory programs designed to address specific drivers of poor health status and outcomes among American Indian and Alaska Native people, expressly including the "lack of safe water and sanitary waste disposal services" in tribal communities. *Id.* § 2(f)(6), 90 Stat. at 1401 (prior to 1992 amendment). At the time of IHCIA's initial passage, Congress noted that "over thirty-seven thousand four hundred existing and forty–eight thousand nine hundred and sixty planned replacement and renovated Indian housing units need new or upgraded water and sanitation facilities." *Id.* Congress also acknowledged that "the provision of safe water supply systems and sanitary sewage and solid waste disposal systems is primarily a health consideration

and function" and that Indian people suffer an "inordinately high incidence of disease" attributable to the failure of these systems. 25 U.S.C. § 1632(a)(1), (3).

In part to address these findings, Congress further clarified the IHS's authority under the Sanitation Facilities Construction Act in the IHCIA. Section 302(b)(2) of the IHCIA states that "[t]he Secretary, acting through the Service, is authorized to provide under [42 U.S.C. § 2004a]—

> (A) financial and technical assistance to Indian tribes and communities in the establishment, training, and equipping of utility organizations to operate and maintain Indian sanitation facilities;
> (B) ongoing technical assistance and training in the management of utility organizations which operate and maintain sanitation facilities; and
> (C) operation and maintenance assistance for, and emergency repairs to, tribal sanitation facilities when necessary to avoid a health hazard or to protect the Federal investment in sanitation facilities."

Id. § 1632(b)(2)(A)–(C). 25 U.S.C. Section 1638e(a)(2)(A) further authorizes the Secretary to "accept from any source … funds, equipment, or supplies that are available for the construction or operation of … sanitation facilities." The Secretary may utilize those resources to operate sanitation facilities, "*including pursuant to a contract or compact under the Indian Self-Determination and Education Assistance Act*." *Id*. § 1638(a)(2)(B) (emphasis added).

In addition, the IHCIA authorizes and obligates the Secretary to provide health promotion services to Indians, which encompasses a broad range of health-related services. *Id.* § 1621b(a). Relevant here, the IHCIA defines "health promotion" to include "any activity" "for making available safe water and sanitary facilities" and "providing adequate and appropriate programs" for "environmental health"; "safe and adequate water"; and "sanitary facilities." *Id.* § 1603(11)(D), (G)(vii), (xx), (xxv).

II. The Indian Self-Determination and Education Assistance Act.

One year prior to the enactment of the IHCIA, Congress passed the ISDEAA. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 5301–99). Congress's intent in enacting the ISDEAA, also known by its Public Law number, 93-638, was to promote Indian self-determination by increasing tribal control over services otherwise administered by the federal government for the benefit of Indians, and to assist tribes in developing strong, stable tribal governments capable of administering quality programs and developing strong economies. *See* H.R. Rep. 93-1600, at 1, 6–7 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7775, 7776, 7781–82; 25 U.S.C. § 5302(b). In service of these goals, the ISDEAA authorizes Indian tribes and tribal organizations to assume responsibility to directly administer PSFAs that the Secretary would otherwise be authorized to provide under federal law to American Indians and Alaska Natives. 25 U.S.C. § 5321(a)(1).

Title V of the ISDEAA requires the Secretary to establish and carry out within the IHS a program known as the "Tribal Self-Governance Program." *Id.* § 5382. Title V provides tribes with wide latitude to determine what PSFAs ought to be included in their compacts and annual funding agreements and how their programs ought to be designed. *Id.* § 5381 (note) (Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, § 3(2)(F), 114 Stat. 711, 712) (describing the policy of Congress to, among other things, "provide Indian tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer [PSFAs] (or portions thereof) that meet the needs of the individual tribal communities"). 25 U.S.C. Section 5386(e) grants tribes the ability to redesign or consolidate PSFAs included in a funding agreement and reallocate funds for such PSFAs in any manner which the tribes determine is in the best interest of the health and welfare of the tribal community being served.

Pursuant to 25 U.S.C. Section 5385(b)(2), a tribe may include in its funding agreement any of the following PSFAs:

> Such programs, services, functions, or activities (or portions thereof) include all programs, services, functions, activities (or portions thereof), including grants (which may be added to a funding agreement after an award of such grants), with respect to which Indian tribes or Indians are primary or significant beneficiaries, administered by the Department of Health and Human Services through the Indian Health Service and all local, field, service unit, area, regional, and central headquarters or national office functions so administered under the authority of—
>
> a) section 13 of this title[5];
> b) the Act of April 16, 1934 (48 Stat. 596; chapter 147; 25 U.S.C. 452 et seq.);
> c) the Act of August 5, 1954 (68 Stat. 674; chapter 658) [42 U.S.C. 2001 et seq.][6];
> d) the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.);
> e) the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2401 et seq.);
> f) any other Act of Congress authorizing any agency of the Department of Health and Human Services to administer, carry out, or provide financial assistance to such a program, service, function or activity (or portions thereof) described in this section that is carried out for the benefit of Indians because of their status as Indians; or
> g) any other Act of Congress authorizing such a program, service, function, or activity (or portions thereof) carried out for the benefit of Indians under which appropriations are made available to any agency other than an agency within the Department of Health and Human Services, in any case in which the Secretary administers that program, service, function, or activity (or portion thereof).

Title V also requires that "[i]n the negotiation of compacts and funding agreements the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy." *Id.* § 5387(e).

Title V of the ISDEAA provides for a "final offer" process in the event of a stalemate in negotiations over the contents of a tribe's compact or funding agreement. Subsection 507(b) of the ISDEAA provides:

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[5] I.e., the Snyder Act.
[6] I.e., the Transfer Act.

> In the event the Secretary and a participating Indian tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels), the Indian tribe may submit a final offer to the Secretary. Not more than 45 days after such submission, or within a longer time agreed upon by the Indian tribe, the Secretary shall review and make a determination with respect to such offer. In the absence of a timely rejection of the offer, in whole or in part, made in compliance with subsection (c) of this section, the offer shall be deemed agreed to by the Secretary.

Id. § 5387(b). Subsection 507(c) of the ISDEAA further provides that if the Secretary rejects a final offer, the Secretary shall provide:

> (A) a timely written notification to the Indian tribe that contains a specific finding that ***clearly demonstrates***, or that is ***supported by a controlling legal authority***, that [one or more of the following four reasons for rejection apply:]
>
> (1) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this subchapter;
>
> (2) the program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe;
>
> (3) the Indian tribe cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in significant danger or risk to the public health; or
>
> (4) the Indian tribe is not eligible to participate in self-governance under section 5383 of this title …

Id. § 5387(c)(1)(A)(i)–(iv) (emphases added).

These robust statutory provisions are designed in large part to counter the reluctance of the federal agencies to willingly surrender their resources and authority to tribes. In 1988, for example, Congress was motivated by "bureaucratic recalcitrance" to extend to tribal contractors the right to seek injunctive relief and damages in federal court under Section 110 of the ISDEAA, and affirmed: "The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under

the Act have been systematically violated … ." *Shoshone-Bannock Tribes of Fort Hall Rsrv. v. Shalala*, 988 F.Supp. 1306, 1315–16 (D. Or. 1997), *modified*, 999 F.Supp. 1395 (D. Or. 1998) (citing S. Rep. No. 100–274, at 37 (1987), *as reprinted in* 1988 U.S.C.C.A.N. 2620, 2656). Prior to enacting additional amendments to the ISDEAA in 2000, Congress again acknowledged that "Federal bureaucracy, with its centralized rules and regulations, has eroded tribal self-governance and dominates tribal affairs … ." 25 U.S.C. § 5381 (note) (Tribal Self-Governance Amendments of 2000 § 2(3)). At the same time, Congress emphasized that the ISDEAA is designed, in part, "to strengthen tribal control over Federal funding and program management … ." *Id.* (Tribal Self-Governance Amendments of 2000 § 2(4)).

FACTUAL BACKGROUND

The Tribe is a federally recognized Indian tribe located on the Saint Regis Mohawk Reservation in Franklin County and St. Lawrence County, New York. Bureau of Indian Affairs, Notice: Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 89 Fed. Reg. 99899, 99901 (Dec. 11, 2024). The Tribal headquarters is located in Akwesasne, New York. The Tribe is an "Indian tribe" for purposes of ISDEAA Title V and its implementing regulations. *See* 25 U.S.C. § 5381(b); 42 C.F.R. § 137.10. The Tribe operates health facilities and provides health care services to its Tribal members and other American Indian and Alaska Native beneficiaries under its compact with the IHS under Title V of the ISDEAA and pursuant to its funding agreements with the IHS thereunder. Title V Compact of Self-Governance Between St. Regis Mohawk Tribe and the United States Department of Health and Human Services, Indian Health Service–Amended and Restated December, 2010 [hereinafter Compact], AR at USA000070–94; Funding Agreement Between Saint Regis Mohawk Tribe and United States Department of Health and Human Services, Indian

Health Service–Calendar Years 2021-2024 [hereinafter Funding Agreement], AR at USA000031–69.

Like many tribal communities, the Saint Regis Mohawk Reservation is served by aging sanitation infrastructure, which directly impacts the health and well-being of the entire community. The Tribe is therefore contemplating the construction of a new sanitation facility, which would improve the Tribe's capacity to treat sewage and wastewater. The Tribe already operates an Environmental Health Program pursuant to Section 4(b)(8) of the Funding Agreement, which provides that "[e]lements to consider for a comprehensive [Environmental Health] program" include "Recreational Sanitation, Safety, Sanitation and Safety at Celebrations," "Waste Disposal," and "Water Supply," among others. AR at USA000038. Consistent with this language, the Tribe sought to expand its Environmental Health Program to include "Sewage Treatment" and "Wastewater Management." It also sought to create a new Sanitation Facilities Program, which would include ongoing operation and maintenance of the new and existing facilities and infrastructure.

The Tribe submitted to the IHS a proposed amendment to its Funding Agreement on December 8, 2023, proposing the incorporation of PSFAs related to sewage treatment, wastewater management, and the operation and maintenance of sanitation facilities. AR at USA000111–13 [hereinafter Amendment]. The Tribe did not request additional funds to support these PSFAs, but simply proposed to include the PSFAs in the Funding Agreement Scope of Work. *Id.* The Tribe would then be able to fund these PSFAs using the ISDEAA authority to reallocate compact funds, including third-party revenues or "program income" from Medicaid and other third-party payers. *See* 25 U.S.C. §§ 5386(e) (redesign and reallocation authority), 5388(j) (use of program income). The Tribe would also be eligible to seek lease funding under

Section 105(*l*) of the ISDEAA for facilities where these PSFAs are carried out or administered. 25 U.S.C. § 5324(*l*). An additional component of the amendment also included proposed language related to a behavioral health program, self-sufficient gardening, and other language related to healthy habits. AR at USA000111–13.

Although the Tribe and the IHS tried to reach an agreement on the Amendment, the parties were unable to do so. The Tribe therefore submitted a final offer, proposing the Amendment, on June 17, 2024. AR at USA000024–30 [hereinafter Final Offer]; *see also* USA000022–23 (transmittal email for Final Offer). The Final Offer provided for an effective date of June 12, 2024, the date the Final Offer was signed by the Tribal Chiefs. AR at USA000030.

The IHS responded to the Final Offer by letter from Director Roselyn Tso. Rejection Letter, AR at USA000001–20. In the Rejection Letter, the IHS indicated it was willing to accept the Tribe's proposed language related to behavioral health, healthy habits, the Akwesasne Boys and Girls Club, and the Community Services Building. AR at USA000001. The IHS rejected, however, the inclusion of the PSFAs related to sewage treatment, wastewater management, and the operation and maintenance of sanitation facilities. *Id.*

As an initial matter, the IHS took the position that it "is not authorized" to perform the PSFAs related to the maintenance and operation of sanitation facilities, and therefore cannot transfer authority over those PSFAs to the Tribe under the ISDEAA. AR at USA000008–15. The IHS asserted that neither the Sanitation Facilities Construction Act, the Transfer Act, nor the IHCIA authorizes the IHS to administer a program for the routine operation and maintenance of sanitation facilities. AR at USA000010–14. Although the Tribe did not submit a proposal under the Indian Lands Open Dump Cleanup Act of 1994, in the Rejection Letter the IHS further

asserted that the Act's inclusion of language governing the maintenance of closed dumps supported the IHS's position that the Sanitation Facilities Construction Act and the IHCIA do not authorize the IHS to administer a program for the routine operation and maintenance of sanitation facilities. AR at USA000015 (citing Pub. L. No. 103-399 (1994) (codified at 25 U.S.C. §§ 3901–08)). For these reasons, the IHS rejected the Final Offer on its face, stating that a proposal to add unauthorized PSFAs is not subject to the final offer rejection process and criteria at 25 U.S.C. § 5387(b). AR at USA000016.

Second, and in the alternative, the IHS partially rejected the Final Offer under two separate rejection criteria at 25 U.S.C. § 5387(c). AR at USA000016. Citing 25 U.S.C. Section 5387(c)(1)(A)(i), the IHS asserted that the Tribe's proposal exceeds the applicable funding level to which the Tribe is entitled for sanitation facility construction activities, and that the prospective funding requests the Tribe may submit for the proposed PSFAs in the future would also exceed the applicable funding the Tribe is entitled to receive. AR at USA000016–17. Citing 25 U.S.C. Section 5387(c)(1)(A)(ii), the IHS further asserted that the Tribe was attempting to assume inherent federal functions including "expand[ing] Federal law or … interpreting Federal executive branch authorities." AR at USA000018. With respect to the proposed sanitation facilities program, the IHS stated that "the Tribe seeks to create a new program authorization for the IHS to administer, which is an inherent Federal function that cannot be delegated." *Id.* Lastly, the IHS rejected the Tribe's proposed effective date, claiming that a retroactive funding date could entitle the Tribe to funding that exceeded the applicable funding level and require the Tribe to perform an inherent federal function, for all the same reasons. AR at USA000018–19.

The Tribe filed this action to challenge IHS's rejection of the Final Offer as authorized by

25 U.S.C. Sections 5387(c), 5331(a), and 5391(a).

STANDARD OF REVIEW

Summary judgment is considered "an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (citing Fed. R. Civ. P. 1). Thus, summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp.*, 477 U.S. at 322 (citing same). The movant bears the initial burden of "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)). However, "this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact," which "might affect the outcome of the suit under the governing law … ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

Under 25 U.S.C. Section 5331(a), federal district courts have original jurisdiction over any civil action or claim against the Secretary arising under the ISDEAA. Courts apply a *de novo* standard of review when considering a tribe's challenge to an agency rejection under the ISDEAA. *Jamestown S'Klallam Tribe v. Azar*, 486 F. Supp. 3d 83, 87–88 (D.D.C. 2020); *Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 108 (D.D.C. 2019). First, "Congress' use of the phrase 'civil action' in combination with 'original jurisdiction' supports *de novo* review." *Shoshone-Bannock Tribes*, 988 F.Supp. at 1318, *modified*, 999 F.Supp. 1395 (D. Or. 1998). Second, the ISDEAA's legislative history illustrates that a more limited and deferential review

would utterly fail to effectuate Congressional intent to eliminate bureaucratic recalcitrance. *See id.* at 1315–17.

This appeal implicates a different standard of review than the deferential arbitrary and capricious standard applied where relief is sought under the Administrative Procedure Act, 5 U.S.C. §§ 701–06 (APA). Indeed,

> The ISDEA[A]'s object and policy are best achieved, and any agency mischief best redressed, by affording tribes the right to *de novo* review of their claims. The Secretary does not merely act as an impartial regulator, but has an obvious conflict of interest when enforcing the ISDEA[A]'s mandate to transfer federal programs and funds to tribes on demand.

Id. at 1316.

RULES OF CONSTRUCTION

Congress has mandated specific rules for interpretation of statutes, regulations, and ISDEAA agreements which favor tribes, which is inconsistent with the deference granted to the judiciary under *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), for APA-like statutes. Congress made clear its intention that Title V of the ISDEAA be liberally construed to favor tribes and further tribal self-governance by including in the statute a special rule for the interpretation of federal laws and regulations. 25 U.S.C. Section 5392(a), provides that:

> Except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive orders, and regulations in a manner that will facilitate—(1) the inclusion of programs, services, functions, and activities (or portions thereof) and funds associated therewith, in the agreements entered into under this section; (2) the implementation of compacts and funding agreements entered into under this subchapter; and (3) the achievement of tribal health goals and objectives.

25 U.S.C. Section 5392(f) provides that: "Each provision of this subchapter and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the

Indian tribe." Section VI.4 of the Compact itself incorporates this rule of interpretation, providing:

> In the implementation of this Compact, each provision of P.L. 93-638, as amended, and each provision of this Compact and the associated [funding agreements] shall be liberally construed pursuant to Section 512(f) of Title V, for the benefit of the Tribe to transfer the funding and the PSFAs (or portions thereof) that are otherwise contractible under Section 102(a) of the Act, including all related administrative functions, from DHHS to the Tribe. The Secretary, to the extent feasible, shall interpret all Federal laws, executive orders and regulations in a manner that facilitates the purposes of this Compact and achievement of the Tribe's health goals and objectives in accordance with Section 512(a) of Title V.

AR at USA000088–89. This mandate is consistent with the more general rule that "the standard principles of statutory construction do not have their usual force in cases involving Indian law" but rather, because of the "unique trust relationship between the United States and the Indians ... statutes are to be construed liberally in favor of the Indians[,]" *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (citing *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)), even when a competing canon might otherwise require deference to an agency interpretation. *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991).

BURDEN OF PROOF

Under the ISDEAA, the burden is on the Secretary to establish, by "clear and convincing evidence," the validity of the grounds for rejecting a final offer. 25 U.S.C. §§ 5387(d), 5398; 42 C.F.R. § 137.150.

ARGUMENT

I. The IHS is authorized to perform the proposed PSFAs and was required to accept or properly reject the Tribe's Final Offer.

In the Rejection Letter, the IHS asserted that the IHS is not authorized to perform PSFAs for the routine maintenance and operation of sanitation facilities, and therefore the Tribe's proposal does not fall under 25 U.S.C. Section 5387(b). AR at USA000008–15. Therefore, IHS

claimed a rejection of the Tribe's proposal in accordance with the criteria in 25 U.S.C. Section 5387(c)(1)(A) was not required. AR at USA000016.

IHS's assertion that it is not authorized to perform PSFAs for the routine maintenance and operation of sanitation facilities is based on an impermissibly narrow construction of certain applicable law and ignores other authorizing law. In relevant part, the Sanitation Facilities Construction Act authorizes HHS to "provide and maintain, by contract or otherwise, essential sanitation facilities … for Indian homes, communities and lands … ." 42 U.S.C. § 2004a(a)(1). The Sanitation Facilities Construction Act further authorizes the agency "to make such arrangements and agreements … with the Indians to be served by such sanitation facilities … regarding contributions toward the construction, improvement, extension and provision thereof, and responsibilities for maintenance thereof . . ." *Id.* § 2004a(a)(3).

The Sanitation Facilities Construction Act does not limit the IHS's authority to administer a program for the routine operation and maintenance of sanitation facilities. Rather it provides the IHS with two options for doing so–"by contract or otherwise." *Id.* § 2004a(a)(1). The IHS can enter into contracts or agreements with tribes or third-parties to provide and maintain essential sanitation facilities. Or, IHS can provide and maintain essential facilities through other means, such as taking on the responsibility itself. IHS can also choose to enter into agreements with tribes to delineate the financial and maintenance responsibilities over sanitation facilities, which could include an obligation for IHS to contribute financially and take an active role in the operation and maintenance of the facility.

Congress further delineated that authority in the IHCIA. The plain language of the IHCIA authorizes the IHS to administer a program for the routine operation and maintenance of sanitation facilities. In relevant part, the IHCIA authorizes the Secretary to provide "operation

and maintenance assistance for…tribal sanitation facilities when necessary to avoid a health hazard or to protect the Federal investment in sanitation facilities." 25 U.S.C. § 1632(b)(2)(C). The IHCIA also expressly authorizes the Secretary to use funds, equipment, and supplies available to the agency for the planning, design, construction, and operation of sanitation facilities, including pursuant to an ISDEAA agreement. *Id.* § 1638e(a)(2)(B).

Further, the IHCIA authorizes the IHS to deliver specific services related to the provision of safe water and sanitation facilities. The IHCIA does so by authorizing and obligating the Secretary to provide health promotion services to Indians, *id.* § 1621b(a), which include any activity for making available safe water and sanitary facilities and providing adequate and appropriate programs for environmental health; safe and adequate water; and sanitary facilities, *id.* § 1603(11)(D), (G)(vii), (xx), (xxv). Under the former section, the Secretary is granted broad discretion to provide these health promotion services, which may include any activity for the furtherance of the delineated objectives. *Id.* § 1621b(a) (citing *id.* § 1602(b)). These activities reasonably include the routine operation and maintenance of sanitation facilities, which would further the agency's goals of making safe water and sanitary facilities available to Indian communities. The agency could also administer, facilitate, and/or provide a program for the routine operation and maintenance of sanitation facilities, which would address the need for improved environmental health, safe and adequate water, and sanitary facilities.

Here, the IHS has ignored the ISDEAA's clear instruction to interpret federal law in a manner that will facilitate the inclusions of the proposed PSFAs and the Tribe's health goals and objectives. 25 U.S.C. § 5392(a). Instead, the IHS applied a narrow and technical interpretation of the Sanitation Facilities Construction Act, resorting to principles such as "*noscitur a sociis*," and limiting its interpretation of the Act only as applied to the Tribe's existing Title V

Construction Project Agreement. AR at USA000011–12. Although the IHCIA broadly authorizes the IHS to perform these PSFAs, both by reference to the Sanitation Facilities Construction Act in 25 U.S.C. subsection 1632(b), but also separately through its authorization of expansive "health promotion" activities in 25 U.S.C. subsection 1603(11), the IHS chose instead to interpret *all* of those IHCIA authorities as cabined by its restrictive reading of the Sanitation Facilities Construction Act. *See* AR at USA000014. To wit, the IHS's limited reference to the IHCIA's requirement to provide health promotion activities reads: "However, the health promotion activities listed in 25 U.S.C. § 1603 must be interpreted through the lens of 42 U.S.C. § 2004(a) and 25 U.S.C. § 1632." *Id.* Furthermore, the IHS's failure to interpret federal law in accordance with the ISDEAA frustrates the Tribe's ability to conduct its health goals and objectives, which include providing clean water to its Tribal members. To the extent any of the statutes above may be considered ambiguous, which the IHS did not even consider, they must also be construed in favor of the Tribe. *See Blackfeet Tribe*, 471 U.S. at 766.

Under the ISDEAA, a tribe may include in its funding agreement any PSFA administered by the IHS under the authority of the Snyder Act, the Transfer Act, the IHCIA, and any other Act of Congress authorizing HHS to administer or carry out such a PSFA for the benefit of Indians because of their status as Indians. 25 U.S.C. § 5385(b)(2)(A), (C), (D), (F). Because the Final Offer proposes the inclusion of PSFAs that the IHS is authorized to administer, it is a final offer under 25 U.S.C. Section 5387(b), and the IHS was required to respond to the Final Offer subject to the provisions of 25 U.S.C. Section 5387(c). The IHS's novel attempt to reject the Tribe's Final Offer without relying on any of the declination criteria in 25 U.S.C. Section 5387(c)(1)(A) is not authorized by the ISDEAA or supported by law, and must be reversed.

II. None of the ISDEAA rejection criteria apply to the Tribe's Final Offer and the IHS has not met its burden to show otherwise.

Insofar as the IHS rejected the Tribe's Final Offer under the rejection criteria in 25 U.S.C. Section 5387(c), the IHS failed to clearly demonstrate or support with specific legal authority that the cited criteria apply to the Tribe's Final Offer.

i. The Tribe's proposal does not exceed applicable funding, because the Tribe did not propose any funding for its sanitation PSFAs.

Relying on 25 U.S.C. Section 5387(c)(1)(A)(i), the IHS rejected the Final Offer because it found the Final Offer exceeds the applicable funding the Tribe is entitled to under Title V of the ISDEAA. AR at USA000016–17. Under this rejection criterion, the Secretary must reject a final offer by providing a timely written notification that contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority that "the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this subchapter." 25 U.S.C. § 5387(c)(1)(A)(i).

The rejection based on available funding is facially inapplicable to the Final Offer proposal, because the Tribe did not request any funds for the sanitation PSFAs in its Final Offer. The IHS even appears to have acknowledged that the Tribe did not request funds at this time, stating that the Final Offer "*suggests an expectation* of additional funding," and claiming that "even if the Tribe does not currently explicitly seek specific amounts of additional IHS funding, it may do so *in the future*." AR at USA000017 (emphasis added). AR at USA000017. But the statutory criterion does not say that the IHS may reject an offer that might later lead to funding requests that exceed the applicable funding level at some unspecified point in the future. The rejection criterion plainly refers only to "the amount of funds proposed in the final offer." 25 U.S.C. § 5387(c)(1)(A)(i). If the Tribe were to seek additional funds in the future, that proposal

itself would be subject to negotiation procedures, including the final offer process, if necessary, under the ISDEAA. *See* 42 C.F.R. § 137.130 (providing that final offer provisions apply to proposed amendments to a funding agreement). Thus, the agency does not preclude itself from evaluating later funding requests by accepting the Final Offer.

The IHS did not clearly demonstrate, or support with legal authority, how a rejection based on the applicable funding level is appropriate in circumstances when no funds are proposed, as required by statute. For this reason, the rejection is improper under the ISDEAA.

ii. The Tribe's proposal does not require the Tribe to perform an inherent federal function.

The IHS also rejected the Final Offer under 25 U.S.C. Section 5387(c)(1)(A)(ii), asserting that the Final Offer includes the impermissible assumption of inherent federal functions. Specifically, the IHS argued that "[d]istinguishing between construction project and program activities is an inherent Federal function" and that "the Tribe seeks to create a new program authorization for the IHS to administer, which is an inherent Federal function that cannot be delegated." AR at USA000018. As discussed above, however, *Congress* created the program authorization at issue here. The Tribe simply seeks to assume operation of the program from IHS, as it has the right to do under the ISDEAA.

Simply put, the Tribe did not propose to take over the function of "[d]istinguishing between construction project and program activities" or "creat[ing] a new program authorization for the IHS to administer." *Id.* Instead, the Tribe proposed to take over certain explicit PSFAs relating to sewage treatment, wastewater management, and operation and maintenance of specific sanitation facilities identified in the Final Offer. USA000026–27. The rejection criterion permits the IHS to reject a final offer where "**the program, function, service or activity <u>(or portion thereof)</u> that is the subject of the final offer**" is *itself* "an inherent Federal

function that cannot legally be delegated to an Indian tribe … .” (Emphasis added). 25 U.S.C. § 5387(c)(1)(A)(ii). The IHS may not invoke this criterion by mischaracterizing the Tribe’s proposal by describing purported activities other than the PSFAs that the Tribe has actually proposed to assume.

iii. The Tribe’s proposed effective date does not materially affect the Tribe’s Final Offer.

The IHS rejected the Tribe’s proposed effective date, claiming that a retroactive funding date could entitle the Tribe to funding that exceeded the applicable funding level to which the Tribe is entitled, and that the Tribe was trying to perform an inherent Federal function, citing the rejection criteria in 25 U.S.C. Section 5387(c)(1)(A)(i)–(ii). AR at USA000018–19. As discussed *supra*, IHS failed to clearly demonstrate, or support with controlling legal authority, that the Tribe’s Final Offer exceeds applicable funding levels, or that the proposed PSFAs that are the subject of the Final Offer are inherent Federal functions. The Tribe’s proposed effective date does not affect the material terms of the Tribe’s Final Offer. The Tribe is still not requesting any additional funding, and the retroactive start date would not entitle it to perform (nor is it proposing to perform) any PSFAs that are inherent federal functions because Congress has authorized the Tribe to assume the functions at issue under the ISDEAA.

The IHS failed to demonstrate that any of the ISDEAA Title V statutory rejection criteria apply to the Final Offer. Clearly, it cannot rely on its failed application of those criteria to further reject the Tribe’s proposed effective date.

III. Because none of the ISDEAA Rejection Criteria apply, the Court should compel the IHS to accept the Final Offer.

The IHS failed to properly support its rejection of the Final Offer under the rejection criteria set forth in 25 U.S.C. Section 5387(c)(1)(A), as discussed *supra*. In the absence of a

properly supported rejection, the Final Offer must be deemed accepted and the amendments executed and entered into as proposed. 25 U.S.C. § 5387(b).

25 U.S.C. Section 5331(a) authorizes the Court to provide "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)." Section 511(a) of Title V of the ISDEAA provides: "For the purposes of section 5331 of this title, the term 'contract' shall include compacts and funding agreements entered into under this subchapter." *Id.* § 5391(a). The Court should therefore issue a mandamus order compelling the IHS to accept the Final Offer.

CONCLUSION

The IHS has authority to administer a program for the routine operation and maintenance of sanitation facilities, and the Tribe has the right to assume that authority under the ISDEAA. The IHS's novel attempt to reject the Tribe's Final Offer without using the ISDEAA rejection criteria is improper. Insofar as the IHS did apply the rejection criteria, it failed to clearly demonstrate or provide controlling legal authority to meet its burden under the ISDEAA. Because the material facts are not in dispute, the Tribe requests that this Court grant the accompanying Motion for Summary Judgment and compel the IHS to accept the Tribe's Final Offer.

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Respectfully Submitted,

By: */s/ Jennifer P. Hughes*

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