UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SAINT REGIS MOHAWK TRIBE,

Plaintiff,

v.

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,[1]

Defendant.

Civil Action No.
8:24-cv-01479 (AMN/PJE)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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[1] Pursuant to Federal Rule of Civil Procedure 25(d), the current Secretary of the U.S. Department of Health and Human Services, Robert F. Kennedy, Jr., and the current Acting Director of Indian Health Service, Benjamin Smith, should be substituted for their predecessors, Xavier Becerra and Roselyn Tso, respectively.

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INTRODUCTION

Defendants, the United States of America, Robert F. Kennedy, Jr., Secretary of the United States Department of Health and Human Services ("DHS"), and Benjamin Smith, Acting Director of the Indian Health Service ("IHS"), hereby oppose Plaintiff's motion for summary judgment, *see* Dkt. 25, and cross-move for summary judgment under Federal Rule of Civil Procedure 56.

Plaintiff Saint Regis Mohawk Tribe ("Tribe") challenges, under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 5301-5423 ("ISDEAA"), the August 8, 2024, decision of IHS to deny the final offer to enter into the Tribe's proposed amendment to its multiyear funding agreement. The proposed amendment sought to add a new Sanitation Facilities Program and to update the list of sanitation facilities where the Tribe carries out that program. Through that proposal, the Tribe sought to make IHS function as a public utility for Indian homes, communities, and lands. Because no statute or combination of statutes authorizes IHS to function that way—and indeed, relevant statutes and legislative history indicate that Congress authorized IHS only to construct sanitation facilities before turning title of them over to individual Indian homeowners, Tribes, or to state or city governments for ongoing maintenance and operation—IHS properly denied the proposed amendment in its final decision dated August 8, 2024. For those reasons, and as discussed below, the Court should deny Plaintiff's motion for summary judgment, grant Defendants' cross motion for summary judgment, and enter judgment in Defendants' favor.

STATUTORY BACKGROUND

The following overview of IHS, its primary authorizing statutes, and key legislative acts authorizing IHS to engage in *construction* of sanitation facilities is presented as background before

a discussion of the factual background related to IHS' denial of the Tribe's proposed amendment.

I. The Indian Health Service

The principal mission of the IHS is to provide health care to American Indian and Alaska Native ("AI/AN") people throughout the United States. *See* S. Rep. No. 102-392, at 2-3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3943. IHS provides health care services through three primary mechanisms: (1) by providing health care services directly through facilities owned and operated by the government; (2) by contracting with Indian tribes and tribal organizations pursuant to ISDEAA, to allow those tribes to independently operate health care delivery programs that IHS would otherwise provide for AI/AN people; and (3) by funding contracts and grants to organizations operating health programs for urban Indians. *Id.* at 4. IHS' authority to carry out its mission to provide health care to AI/AN people derives primarily from two authorizing statutes: the Snyder Act and the Indian Health Care Improvement Act ("IHCIA").

The Snyder Act was enacted in 1921 as a broad statutory mandate for the Bureau of Indian Affairs ("BIA") to "expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians," for a range of services, including, but not limited to, education, industrial assistance, "extension, improvement, operation, and maintenance of existing Indian irrigation systems and *for development of water supplies*," the "relief of distress and conservation of health," and employment of physicians and other employees. 25 U.S.C. § 13 (emphasis added). In 1954, Congress transferred from BIA to IHS *only* the authority "relating to the maintenance and operation of hospital and health facilities for Indians, and the conservation of the health of Indians." 42 U.S.C. § 2001(a) (hereinafter the "Transfer Act"). Notably absent from the Transfer Act was any mention of transferring from BIA to IHS the authority for the "development of water supplies." *Compare* 25 U.S.C. § 13, *with* 42 U.S.C. § 2001(a).

IHCIA was enacted by Congress in 1976 and authorized IHS to carry out several specific health care programs. *See* 25 U.S.C. §§ 1601-85. Those specific health care programs included disease prevention, diabetes treatment, mental health treatment, mammography screening, urban Indian health programs, and treatment of Indian victims of domestic violence or sexual assault. *Id.* §§ 1621b, 1621c, 1621h, 1621k, 1651-60i, 1665m. The IHCIA also established IHS as an agency of the Public Health Service in 1988. *See id.* § 1661.

II. Sanitation Facilities Construction Program and Other Legislative Acts Impacting Indian Sanitation Facilities Construction

Based on IHS's authorizing statutes and various other legislative acts (as explained below), Congress authorized IHS to carry out the Sanitation Facilities Construction ("SFC") Program. The SFC program was established when Congress passed the Indian Sanitation Facilities Construction Act in 1959. *See* Pub. L. 86-121, 73 Stat. 267 (codified at 42 U.S.C. § 2004a) (commonly referred to in IHS publications as "Public Law 86-121," and hereinafter as the "Indian Sanitation Construction Facilities Act"). Through the Indian Sanitation Construction Facilities Act, Congress amended the Transfer Act to add a program—the SFC Program—for the "provision of sanitation facilities and services" and to authorize IHS to deliver essential water supply, sewage, and solid waste disposal facilities for AI/AN homes and communities, as set forth in 42 U.S.C. § 2004a(a)(1)-(4).[2]

A. Congressional Funding for the SFC Program as "Construction of Indian Health Facilities" Appropriations

When the Indian Sanitation Facilities Construction Act was passed, the appropriations act enacted by Congress for the fiscal year ending in June 1960 divided funding for Indian health

[2] The full text of 42 U.S.C. § 2004a(a)(1) through (4) is included in Point I of the Argument section of this brief.

matters into two different pots: "Indian Health Activities," and "Construction of Indian Health Facilities." *See* Pub. L. No. 86-158, 73 Stat. 350 (Aug. 14, 1959). "Indian Health Activities" appropriations funded the costs of routine maintenance and operation of hospitals and health facilities. *See id*. By contrast, "Construction of Indian Health Facilities" appropriations provided "[f]or construction, major repair, improvement, and equipment of health and related auxiliary facilities, including quarters for personnel; preparation of plans, specifications, and drawings; acquisition of sites; purchase and erection of portable buildings; and purchase of trailers; $4,587,000, to remain available until expended." *Id*. A supplemental appropriations bill enacted shortly thereafter tied the Indian Sanitation Facilities Construction Act to *construction* appropriations, providing "[f]or an additional amount for 'Construction of Indian health facilities', including the purposes of Public Law 86-121 [i.e., Indian Sanitation Facilities Construction Act], approved July 31, 1959, $200,000." Pub. L. No. 86-383, 78 Stat. 724 (Sept. 28, 1959).

Congress has continued funding the Indian Sanitation Facilities Construction Act under "Construction of Indian Health Facilities" appropriations rather than "Indian Health Activities." *See* Pub. L. No. 86-703, 74 Stat. 766 (Sept. 2, 1960) ("For construction, major repair, improvement, and equipment of health and related auxiliary facilities, including quarters for personnel; preparation of plans, specifications, and drawings; acquisition of sites; purchase and erection of portable buildings; purchase of trailers; *and provision of domestic and community sanitation facilities for Indians*; $9,714,000, to remain available until expended." (emphasis added)). The Committee on Appropriations' Report for the fiscal year ending on September 30, 1994, affirmed that IHS' authority extended to *construction* of sanitation facilities, followed by transfer to tribes for the facilities' routine operation and maintenance:

The IHS should continue its practice of turning these [sanitation] facilities over to the tribes

> for operation and maintenance upon completion of construction. The Committee has recommended an increase of $1,000,000 to enhance the IHS' ability to provide training to tribal personnel on the operation and maintenance of these facilities.

H.R. Rep. No. 103-158, at 107 (1993).

Current appropriations acts similarly distinguish between constructing and maintaining health facilities and the provision of sanitation facilities. *See* Consolidated Appropriations Act, 2024, Pub. L. No. 118-42, 138 Stat 25, 275 (March 9, 2024) ("*For construction, repair, maintenance, demolition, improvement, and equipment of health and related auxiliary facilities*, including quarters for personnel; preparation of plans, specifications, and drawings; acquisition of sites, purchase and erection of modular buildings, and purchases of trailers; *and for provision of domestic and community sanitation facilities for Indians*, as authorized by Section 7 of the Act of August 5, 1954 (42 U.S.C. 2004a), the Indian Self-Determination Act, and the Indian Health Care Improvement Act, and for expenses necessary to carry out such Acts and titles II and III of the Public Health Service Act with respect to environmental health and facilities support activities of the Indian Health Service." (emphasis added)).

B. IHCIA and its Amendments Regarding Sanitation Facilities

The IHCIA "reaffirms the primary responsibility and authority of the [IHS] to *provide* the necessary sanitation facilities and services as stated in [the Indian Sanitation Facilities Construction Act]." 25 U.S.C. § 1632(b)(1) (emphasis added).[3] When Congress enacted the IHCIA in 1976, section 302 of Pub. L. 94-437 appropriated funds for the construction of safe water and sanitary waste disposal facilities in new and existing Indian homes. *See* Pub. L. 94-437, 90 Stat. 1407 (codified as amended at 25 U.S.C. § 1632 (1976)). The House Committee Report summarizes

[3] The IHCIA was permanently authorized by § 10221(a) of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 935 (Mar. 23, 2010).

Congressional intent for the Indian Sanitation Facilities Construction Act to authorize IHS to *construct* sanitation facilities:

> Public Law 86-121 authorizes the Indian Health Service to help alleviate the substandard environmental conditions described above. *This law authorizes construction* of domestic water supplies, waste disposal facilities and other essential sanitation facilities for Indian homes, communities, and lands. Projects include one or more of the following features: water-- source development, treatment, storage facility, distribution systems; waste (liquid and solid)-- collection system, sewage treatment, disposal facility; household appurtenances-- such as flush toilet or sanitary pit privy, kitchen sink, lavatory, and connecting plumbing.

H.R. Rep. No. 94-1026, at 102, *reprinted in* 1976 U.S.C.C.A.N. 2652, 2740 (emphasis added). That report also observed that "[p]articipation by the Indians i[n] project execution is stressed and tribes are equipped, trained and assisted to assume responsibility for continued operation and maintenance of completed community sanitation facilities." *Id*. at 103. The report recognized that construction was needed "to provide capital improvements to community water and sewer systems." *Id*. at 104. For example, IHS may provide flush toilets, kitchen sinks, and the connecting plumbing to Tribally or state/city owned and operated water or wastewater treatment facilities, and IHS transfers the household appurtenances to the individual Indian homeowner to own and maintain responsibility for continued operation and maintenance. *See id.* at 103-04.

Section 302 of the IHCIA has been amended twice since first enacted. Both amendments underscore that IHS is not authorized to carry out the routine operation and maintenance of sanitation facilities on an ongoing basis. In a 1988 amendment to section 302, Congress authorized IHS to assist Indian tribes to assume operations and maintenance of sanitation facilities under the Indian Sanitation Facilities Construction Act, as follows:

> The Secretary . . . is 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; ongoing technical assistance and training in the management of utility organizations which operate and

> maintain sanitation facilities; and 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.

Pub. L. No. 100-713, 102 Stat. 4814, codified at 25 U.S.C. § 1632(b)(2)(A)-(C) (1988).

The IHCIA authorizes IHS to provide financial assistance to Tribes for tribal operation and maintenance of sanitation facilities. Since 1977, Congress authorized IHS to accept

> from any source, including Federal and State agencies, funds, equipment, or supplies that are available for the construction or operation of health care or sanitation facilities; and use those funds, equipment, and supplies to plan, design,, [sic] construct, and operate health care or sanitation facilities for Indians, including pursuant to a contract or compact under [ISDEAA].

25 U.S.C. §§ 1638e(a)(2)(A)-(B). In a 1992 amendment to IHCIA, Congress authorized IHS "to provide financial assistance to Indian tribes and communities in an amount equal to the Federal share of the costs of operating, managing, and maintaining the facilities provided under the plan" to provide safe water supply and sanitation sewage and solid waste disposal facilities to existing Indian homes and communities and to new and renovated Indian homes, as described in § 1632(c). Pub. L. No. 102-573, 106 Stat. 4560 (codified at 25 U.S.C. § 1632(e)(1) (1992)).

C. Activities Permitted under the Sanitation Facilities Construction Program

Activities under the SFC Program include "program" and "project" activities. "[C]onstruction program" means "programs for the planning, design, construction, repair, improvement, and expansion of buildings or facilities, including, but not limited to, housing, law enforcement and detention facilities, sanitation and water systems, roads, schools, administration and health facilities, irrigation and agricultural work, and water conservation, flood control, or port facilities" 25 U.S.C. § 5304(a). As set out in 25 U.S.C. § 5304(m), a "'construction contract' means a fixed-price or cost-reimbursement self-determination contract for a construction project."

By contrast, the term "construction project" means "an organized noncontinuous

undertaking to complete a specific set of predetermined objectives for the planning, environmental determination, design, construction, repair, improvement, or expansion of buildings or facilities, as described in a construction project agreement," *id.* § 5381(a)(1)(A), and by definition, "does not include construction program administration and activities described in paragraphs (1) through (3) of section 5304(m) of this title, that may otherwise be included in a funding agreement under this subchapter," *id.* § 5381(a)(1)(B).

III. The Indian Self-Determination and Education Assistance Act

In 1975, Congress enacted the ISDEAA, codified as amended at 25 U.S.C. §§ 5301-5423. As relevant here, Title V of the ISDEAA directs IHS to enter into self-governance "compacts" with federally recognized Indian Tribes in order for the Tribe to assume responsibility for the operation of health programs that IHS is statutorily authorized to carry out for the benefit of AI/AN people because of their status as Indians. *See id.* §§ 5381-99.

Under Title V of the ISDEAA, the "compact" agreement "shall set forth the general terms of the government-to-government relationship between the Indian tribe and the Secretary, including such terms as the parties intend shall control year after year." *Id.* § 5384(b). IHS must negotiate and enter into a funding agreement with the Tribe. *See id*. § 5385(a). The funding agreement

> shall, as determined by the Indian tribe, authorize the Indian tribe to plan, conduct, consolidate, administer, and receive full tribal share funding, including tribal shares of discretionary Indian Health Service competitive grants (excluding congressionally earmarked competitive grants), for all programs, services, functions, and activities (or portions thereof), that are carried out for the benefit of Indians because of their status as Indians without regard to the agency or office of the Indian Health Service within which the program, service, function, or activity (or portion thereof) is performed.[4]

[4] An Indian tribe cannot assume responsibility for inherent Federal functions or "those Federal functions which cannot legally be delegated to Indian tribes." 25 U.S.C. § 5381(a)(4).

Id. § 5385(b)(1). ISDEAA creates a term of art—"programs, services, functions, and activities," *id.* ("PSFAs" or "programs")—to describe the range of items available for contracting by a tribe.

A funding agreement may include only a program that IHS is authorized to administer, and the statute limits the PSFAs that may be included as those "administered under the authority of" certain enumerated statutes and acts of Congress:

> (A) section 13 of this title [popularly known as the Snyder Act, 25 U.S.C. § 13];
>
> (B) the Act of April 16, 1934 (. . . 25 U.S.C. 452 et seq.);
>
> (C) the Act of August 5, 1954 . . . [popularly known as the Transfer Act];
>
> (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 [HHS] to administer, carry out, or provide financial assistance to such a [PSFA] (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 [PSFA] (or portions thereof) carried out for the benefit of Indians under which appropriations are made available to any agency other than an agency within [HHS], in any case in which the Secretary administers that program, service, function, or activity (or portion thereof).

Id. § 5385(b)(2)(A)-(G).

In addition to identifying in general terms of the programs to be performed or administered by a tribe, *id.* § 5385(d)(1), a Title V funding agreement must identify "the general budget category assigned; the funds to be provided, including those funds to be provided on a recurring basis; the time and method of transfer of the funds; the responsibilities of the Secretary; and any other provision with respect to which the Indian tribe and the Secretary agree," *id.* § 5385(d)(2).

A. Funding Sources

Multiple sources of funding—including some provided by IHS, and some from other

sources—may be available to a Tribe as part of a Title V compact and funding agreement.

A tribe is entitled to receive from IHS the "Secretarial amount" for "direct program costs," 25 U.S.C. § 5388(c), which ""shall not be less than the [agency] would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract." *Id.* § 5325(a)(1). In other words, the Secretarial amount "ensures that the tribes receive funding equal to what the government would have spent if it provided the services at issue itself." *Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 104 (D.D.C. 2019).

IHS must offer funding to offset certain "contract support costs," which are the reasonable additional costs (such as administrative or overhead expenses) of operating a particular program. *See* 25 U.S.C. §§ 5325(a)(2)-(3), 5388(c). Contract support costs reimburse for the reasonable costs for activities that contractors must carry on to ensure contract compliance and prudent management, resources for which were not otherwise transferred to an Indian tribe—either because the Secretary does not normally carry on the activities, or because the Secretary provided for those activities from resources other than those transferred under the contract. *See id.* §§ 5325(a)(2)-(3).

Additionally, section 105(*l*) of the ISDEAA requires IHS to enter into a "lease" of certain facilities from the tribe at the tribe's request, known as a "section 105(*l*) lease." *See id.* § 5324(*l*). Under § 5324(l), IHS must "enter into a [section 105(*l*)] lease with the Indian tribe . . . that holds title to, a leasehold interest in, or a trust interest in, a facility used by the Indian tribe . . . for the administration and delivery of services" under a funding agreement. *Id.* § 5324(*l*)(1). IHS must also compensate the tribe for "use of the facility." *Id.* § 5324(*l*)(2). *See Maniilaq Ass'n v. Burwell*, 72 F. Supp. 3d 227, 237-39 (D.D.C. 2014) (*Maniilaq I*) (concluding that section 105(*l*) lease may be included as part of a Title V compact and funding agreement). 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 services. So, although the agency neither occupies nor operates the facility, it pays at least some compensation under a 'lease' agreement." *Red Lake Band of Chippewa Indians v. Dep't of Health & Hum. Servs.*, 718 F. Supp. 3d 50, 56 (D.D.C. 2024), *appeal filed*, D.C. Cir., April 22, 2024 (citations omitted).

In addition to those three sources of funding by IHS, tribes may generate income from third parties when operating the program. For example, tribes may receive Medicare and Medicaid reimbursements for treating beneficiaries. *See* 42 U.S.C. §§ 1395qq(a), 1396j(a). That income is considered "supplemental funding," 25 U.S.C. § 5388(j), and must be used "to further the general purposes of" the federal program under the funding agreement, *id.* § 5325(m)(1). *See also id.* §§ 1621f, 1641(d)(2)(A).

B. Negotiations under ISDEAA

If during negotiations IHS and the tribe cannot agree on terms of the compact or funding agreement, the tribe may submit a "final offer" to IHS. *Id.* § 5387(b). IHS must review and make a determination on the final offer within 45 days of receiving it. *Id.* The final offer is deemed "agreed to" by IHS if the agency fails to timely reject it. *Id.* To reject a final offer, IHS must provide the tribe a written notification containing a specific finding that clearly demonstrates, or is supported by a controlling legal authority, of one of the following rejection criteria:

> (i) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this subchapter;
>
> (ii) 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;
>
> (iii) 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

> (iv) the Indian tribe is not eligible to participate in self-governance under section 5383 of this title.

Id. § 5387(c)(1)(A)(i)-(iv). IHS may reject the final offer in whole or in part. *Id.* § 5387(c)(1). The tribe may challenge IHS's rejection decision by bringing an action in federal district court. *Id.* § 5387(c)(1)(C). In such action, IHS bears the burden of "demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer." *Id.* § 5387(d).

C. Construction Project Agreements

Separate and apart from the Title V compacts and funding agreements, Indian tribes and IHS may enter into "sanitation facility construction project agreements" to carry out construction project activities. *See* 42 U.S.C. § 2004a(a)(3) (authorizing IHS 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 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"); *see also* 25 U.S.C. §§ 5324(m) (setting forth provisions regarding Title I construction project agreements), 5389 (setting forth provisions regarding Title V construction projection agreements); 25 C.F.R. §§ 900.110-900.137 (Title I construction project implementing regulations); 42 C.F.R. §§ 137.270-137.379 (Title V construction project implementing regulations). "Construction projects are separately defined in Title V and are subject to a separate proposal and review process." 42 C.F.R. § 137.271; *see also* 25 C.F.R. § 900.114 (Title I construction project "contracts are separately defined in the Act and are subject to a separate proposal and review process"). A Tribe may also enter into a memorandum of agreement (MOA) or project funding agreement pursuant to 42 U.S.C.

§ 2004a with IHS to carry out the sanitation facility construction project. *See* Indian Health Manual ("IHM"), Part 5, Chapter 2, https://www.ihs.gov/IHM/pc/part-5/p5c2/.[5] The title to the constructed or improved sanitation facility, together with any appurtenant interests in land, is transferred to or retained with the appropriate non-federal entity whether it be a Tribal government, state or city public utility organization, or individual Indian homeowner. *See* 42 U.S.C. § 2004a(a)(4).

FACTUAL BACKGROUND

I. The Tribe's Compact and Multiyear Funding Agreement

Plaintiff is a federally recognized Indian tribe located the Saint Regis Mohawk Reservation in Franklin County, New York and St. Lawrence County, New York. *See* Dkt. 1 ¶ 5. On December 14, 2010, the Tribe executed a Title V Compact of Self-Governance ("Compact") with IHS, which remains in effect today. *See* USA000070-94;[6] 25 U.S.C. § 5384. In addition to the Compact, the Tribe and IHS have also entered into a multiyear funding agreement for Calendar Years 2021 through 2024, effective January 1, 2021 ("Funding Agreement"). *See* USA000031-69. Section 4 of the Funding Agreement lists the programs that the Tribe has assumed responsibility from IHS to carry out, *see* USA000036-40, as well as the funds that the Tribe receives from IHS to carry out those programs, *see* USA000033-37, USA000046-47. IHS retains responsibility for programs that the Tribe has not included in the Funding Agreement. *See* USA000041-42.

The Funding Agreement, including Attachment "B" to the Funding Agreement, sets forth the funds the Tribe receives under the Facilities Appropriations Account. *See* USA000053

[5] IHS may also enter into a MOA with appropriate public authorities, nonprofit organizations, and other agencies and units of the federal government to establish "a cooperative relationship among the committed parties in accomplishing work authorized under P.L. 86-121." *See* Indian Health Manual, §§ 5-2.2(A) and (C), *available at* https://www.ihs.gov/ihm/pc/part-5/p5c2/#5-2.2A; *see, e.g.*, Project Funding Agreement between the United States of America and the St. Regis Mohawk Tribe, USA000169-71.

[6] Citations to "USA_____" refer to the stipulated record previously filed at Dkt. 26.

("Attachment B"). The Funding Agreement indicates that the Tribe takes all available Tribal shares for the contractible parts of the SFC Program. *See, e.g.*, USA000006, USA000046, USA000053, USA000064, USA000097-99. Pursuant to Section 3(e) of the Funding Agreement, the IHS shall make payment to the Tribe for "all other funded items in Headquarters or IHS Area Offices including those in Indian Health Facilities, Office of Environmental Health and Engineering ('OEH&E') such as, but not limited to, OEH&E support, environmental health, facilities maintenance and improvement, and equipment replacement." USA000035. Attachment "B" to the Funding Agreement includes Table 4F Estimated Area and Headquarters Facilities Appropriation Funds and a Remarks page. USA000064. These documents are updated annually and incorporated in the Funding Agreement via amendment. For example, in calendar year 2024, IHS Headquarters (HQ) Line 2300 (11) and (13) of Table 4F identify the total Tribal shares the Tribe receives for the SFC Program. *See* USA000064 (Table 4F). Remark No. 10 to Attachment B states as follows: "On existing projects, IHS shall retain $0 for all project and non-project related SFC program services tied to RRM tasks already completed. For CY 2024 the SRMT share of program funds for SFC project management funds for SFC is $145,698." USA000099.

II. The Tribe's Existing Water, Sanitation and Health Facilities

The Tribe has operated a water and wastewater treatment public utility under its Department of Planning and Infrastructure. *See* Saint Regis Mohawk Tribe, Planning and Infrastructure, https://www.srmt-nsn.gov/programs/planning-and-infrastructure (last accessed May 29, 2025). Of that Department, the Tribe reports as follows:

> The Department has been in existence since 2000 and is largely funded through grant applications from the United States Environment Protection Agency, the United States Department of Agriculture, the Indian Health Service, Housing and Urban Development and the Bureau of Indian Affairs. In addition, the Tribal General Fund allocates annual funding for the in-house operation and maintenance of the Water Treatment Plant, the

Wastewater Treatment Plant and the distribution and collection systems.

Id. The Wastewater Treatment Facility is a public utility that provides "wastewater treatment for 35 residences as well as the Mohawk School, Tribal Police, Seniors, IGA, AMC, Comfort Inn, and the Speedway Plaza." *Id.* The Water Treatment Facility is a public utility that draws and treats water from the St. Lawrence River for the community. *Id.* The Tribe also runs a solid waste management program and collects fees. *See* Saint Regis Mohawk Tribe, Solid Waste Management, https://www.srmt-nsn.gov/programs/environment/solid-waste-management (last accessed May 29, 2025).

IHS provides funding to the Tribe for the costs of routine operation and maintenance of hospital and health facilities. For example, through section l05(*l*) leases, IHS provides compensation to the Tribe for operation and maintenance expenses for health facilities used by the Tribe for the administration and delivery of services under the Funding Agreement. For example, in 2023, the Tribe and the IHS initiated a new section 105(*l*) lease agreement for the Conner IRA Home Long Term Care Facility. *See* USA000105. The Conner IRA Home Long Term Care Facility is a lease based on fair market rental pursuant to 25 C.F.R. § 900.74(a). *See* USA000106. The fair market rental for the health facility includes all operation and maintenance expenses, such as water, sewage, utilities, trash and waste removal and disposal, and other reasonable expenses. *See* USA000106 (defining in Paragraph 4 what is included in rent rate); 25 C.F.R. §§ 900.70(e)(l)-(16).

With respect to the provision of sanitation facilities, IHS has entered into construction project agreements with the Tribe to address aging sanitation infrastructure. For example, in 2023, IHS and the Tribe executed a Title V Construction Project Agreement in the amount of $2,542,905.00 in federal funds for the Tribe to modify, through construction and improvements, the existing Solid Waste Transfer Station to address deficiencies, improve efficiency and update

facility to current standards. *See* USA000155-68. Upon completion of the construction improvement project, IHS and the Tribe agreed that the Tribe "will assume ownership of the solid waste facilities constructed under this agreement. Operation and maintenance will be undertaken by the Tribe's Solid Waste Transfer Station O&M Program staff once the project is complete and the warranty period has expired." USA000163.

III. The Tribe's Proposal to Amend the Funding Agreement and Subsequent Negotiations

On December 8, 2023, the Tribe emailed IHS with a proposal to amend the Funding Agreement in three ways: (1) to edit pre-existing language pertaining to the Health Promotion and Disease Prevention program (Section 4(b)(3)), to the Behavioral Health program (Section 4(b)(4)), and to the Environmental Health program (Section 4(b)(8)); (2) to add a new Sanitation Facilities Program as Section 4(b)(20); and (3) to update the list of facilities and locations where the Tribe carries out these programs. *See* USA000110-13. As to the Sanitation Facilities Program, the Tribe proposed adding a new Section 4(b)(20) that would read as follows:

> Sanitation Facilities Program. The Sanitation Facilities Program:
>
> (a) will maintain a comprehensive program for the planning, design, and construction of new and replacement facilities and supporting infrastructure to meet the water supply and wastewater disposal and solid waste disposal needs of IHS beneficiaries;
>
> (b) will provide technical assistance and planning support in the evaluation of sanitation facility requirements, and the design of systems to meet these requirements;
>
> (c) will establish agreements with appropriate entities to facilitate the design, planning, and construction of sanitation facilities projects approved by the IHS;
>
> (d) will provide planning, design, and construction services in accordance with project requirements approved by IHS and/or other funding sources; and
>
> (e) will operate and maintain the sanitation facilities to effectively treat sewage, manage wastewater, dispose of solid waste, and provide clean water.

USA000112. The Tribe and IHS then began to negotiate the proposed amendments to the Funding Agreement through email correspondence and videoconferences. *See* USA000110-37.

On February 16, 2024, IHS emailed the Tribe with "comments/counter proposed edits" for the parties' discussion at a future call. USA000116-19. IHS explained that "[t]he plain language of the IHCIA does not create a water/sewer operation and maintenance PFSA that may be included in an ISDEAA contract," and as such, IHS proposed striking certain language from the Tribe's proposed amendment. *See* USA000118 (citing 25 U.S.C. § 1632(b)(2)(A)-(C)).

On February 21, 2024, the Tribe responded to IHS, disagreeing with IHS's analysis of IHCIA and maintaining "its position that pursuant to the ISDEAA and the IHCIA, the Tribe can assume responsibility for the operation and maintenance of sanitation facilities in order to ensure that beneficiaries have access to safe water and sanitary facilities, and in furtherance of programs related to environmental health, safe and adequate water, and sanitary facilities." USA000120.

On February 26, 2024, the Tribe and IHS met via videoconference to discuss the proposed amendments. USA000122-23. During that videoconference, the Tribe and IHS "reached agreement on the proposed amendments (1) to update the [PFSAs] for Health Promotion and Disease Prevention (HPDP) and Behavioral Health and (2) to add the Akwesasne Boys & Girls Club as a facility or location where PSFAs are provided." USA000122. IHS also "suggested moving forward with the agreed-upon amendment language." *Id.* But the Tribe and the IHS "did not reach an agreement on including the proposals to add operation and maintenance of sanitation facilities as a PSFA, or the individual sanitation facilities as facilities or locations where PSFAs are provided." *Id.* During the videoconference, the Tribe "also shared . . . that the proposed edits to the Environmental Health PSFA is tied to the request to add operation and maintenance of

sanitation facilities as a PSFA and should be interpreted as such." *Id.*; *see also* Dkt. 25-1 at 18[7] ("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.").

On May 9, 2024, IHS emailed the Tribe with a proposed amendment to the Funding Agreement to reflect the terms that the parties could agree on by that point in the negotiations. The purpose of doing so was to incorporate those agreed upon provisions as expeditiously as possible, while addressing the areas of disagreement on a separate track. *See* USA000122-29. Thereafter, the Tribe and IHS continued to refine the agreed-upon language. *See* USA000130-37.

IV. June 17, 2024 Final Offer

On June 17, 2024, the Tribe terminated negotiations and emailed the final offer to IHS, including seeking a final offer for many of the provisions that the parties had already agreed upon and that IHS sought to execute. *See* USA000022-30.

On July 22, 2024, IHS reached out to the Tribe to offer technical assistance and to share all relevant information to avoid rejection of the Tribe's final offer, pursuant to 42 C.F.R. § 137.144. USA000138-40. IHS flagged three issues related to the Tribe's final offer and amendment to include a sanitation facilities construction program and related facilities in the Funding Agreement. USA000138. First, IHS reiterated that "there is no additional programmatic funding available for the sanitation facility construction program, as the Tribe has taken the entirety of all available program related funding." *Id.* Second, IHS asked the Tribe to "reconsider [its] earlier

[7] Citations to documents filed on the Court's docket refer to the pagination generated by CM/ECF.

recommended edits to the sanitation facilities construction program language" to reflect the distinction between "construction 'project' and construction 'program' activities," as the Funding Agreement "may only include sanitation facilities construction program activities." *Id.* (citing 25 U.S.C. § 5381(a)(1)(A)-(B)). Third, IHS highlighted a discrepancy between the current Funding Agreement and the proposed amendment as to the facility locations included. *See id.*

The Tribe permitted IHS a brief extension of the final offer deadline until August 8, 2024. USA000141. The Tribe and IHS met by videoconference on July 30, 2024. USA000141-51. After consideration, the Tribe "decided not to withdraw [the] final offer." USA000152-54.

V. August 8, 2024 Partial Denial or Rejection of the Final Offer

By letter dated August 8, 2024, IHS partially denied the Tribe's Final Offer for proposed amendments to the Funding Agreement ("Agency Decision Letter"). USA000001-20. Specifically, IHS denied the Tribe's final offer to the extent that it sought to add the routine operation and maintenance of a sanitation facilities program that is not authorized pursuant to 25 U.S.C. §§ 5385(b)(2)(A)-(G) and add sanitation facilities to Section 4 of the Funding Agreement where these unauthorized programs are carried out. USA000001. IHS offered three primary responses to the Final Offer. First, IHS explained that routine operation and maintenance of sanitation facilities or a utility organization is not an authorized program and thus cannot be added to the Tribe's Funding Agreement, and, because of its status as an unauthorized program, it was not subject to the final offer procedure of 25 U.S.C. § 5387(b) or the "rejection" criteria of 25 U.S.C. § 5387(c). USA000008-16. Second, IHS alternatively rejected the final offer under § 5387(c) criteria—namely, that the amount of funds proposed in the final offer exceeded the applicable funding level to which the Tribe was entitled under Title V, and that the PSFA that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe. USA000016-18.

Third, IHS rejected the retroactive effective date of the amendments. USA000018-19.

VI. Proceedings in this Court

On December 5, 2024, the Tribe filed this lawsuit seeking declaratory, mandamus, and injunctive relief against IHS, asking the Court to (i) declare that IHS is authorized under law to administer programs for the operation and maintenance of sanitation facilities and that such programs may be included in a funding agreement under ISDEAA; (ii) reverse the partial rejection of the Tribe's final offer and deem the final offer approved by operation of law; and (iii) grant mandamus and injunctive relief to compel IHS to enter into the Tribe's proposed funding agreement amendment along with necessary language to implement the final offer. *See* Dkt. 1.

STANDARD OF REVIEW

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine issue of material fact is one that would change the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248.

Although ISDEAA does not identify any applicable standard of review, the trend among federal courts is to apply a *de novo* standard of review to cases brought solely pursuant to the ISDEAA or that only present questions of law. *See, e.g.*, *Jamestown S'Klallam Tribe v. Azar*, 486 F. Supp. 3d 83, 87 (D.D.C. 2020); *Pyramid Lake Pauite Tribe v. Burwell*, 70 F. Supp. 3d 534, 542 (D.D.C. 2014). In conducting that *de novo* review, Title V of the ISDEAA requires that "[e]ach provision of th[at] [title] and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe[,] . . . and any ambiguity shall be resolved in favor of the Indian tribe." 25 U.S.C. § 5392(f); *see also* 25 C.F.R. § 900.3(b)(11). Those provisions codify

the generally applicable "Indian law canon of statutory construction." *Pyramid Lake Paiute Tribe*, 70 F. Supp. 3d at 541-42; *see, e.g.*, *Chickasaw Nation v. United States*, 534 U.S. 84, 93-94 (2001). That canon must be given its due, but—like other canons—it "need not be conclusive," and "other circumstances evidencing congressional intent can overcome [its] force." *Chickasaw Nation*, 534 U.S. at 94 (quotation omitted); *see also South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 & n.16 (1986) (citing cases).

ARGUMENT

I. IHS is Not Authorized to Perform Routine Operation and Maintenance of Sanitation Facilities.

As IHS explained in the Agency Decision Letter, IHS is not authorized to perform a PSFA for the routine maintenance and operation of sanitation facilities, and, therefore, the Tribe's proposal does not fall within the scope of 25 U.S.C. § 5387(b) and trigger the rejection criteria of § 5387(c) or impose the burden of proof set forth in § 5387(d). As discussed below, none of the enumerated statutes and Acts of Congress referenced in § 5385(b)(2) of ISDEAA permit IHS to carry out routine operation and maintenance of sanitation facilities, and as a result, the Tribe may not assume that unauthorized program.

A. The Sanitation Facilities Construction Act, 42 U.S.C. § 2004a, Does Not Authorize IHS to Administer the Proposed Program.

The Tribe may assume responsibility for a program authorized by the Act of August 5, 1954, also known as the Transfer Act. *See* 25 U.S.C. § 5385(b)(2)(C). As discussed above, Congress amended the Transfer Act in 1959 to authorize a new program for the provision of sanitation facilities and services in what is known as the Indian Sanitation Facilities Construction Act, 42 U.S.C. § 2004a(a). Section 2004a(a) authorizes IHS to do the following:

(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 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.

42 U.S.C. § 2004a(a)(1)-(4) (emphasis added). The question is whether § 2004a(a) authorizes IHS to carry out routine operation and maintenance of sanitation facilities as proposed by the Tribe. The answer is no, for three main reasons explained, in turn, below: (i) the plain language of 42 U.S.C. § 2004a(a)(1)-(4); (ii) the statutory context of § 2004a(a)(1); and (iii) contemporaneous Congressional activities.

1. The Plain Language of § 2004a(a)(1)-(4) Shows IHS is Not Authorized to Perform Routine Operation and Maintenance of Sanitation Facilities.

First, as IHS explained in its Agency Decision Letter, the plain language of the Indian Sanitation Facilities Construction Act in § 2004a(a) is evidence that IHS is not authorized to

perform routine operation and maintenance of sanitation facilities.

The Tribe would have the Court view the § 2004a(a) superficially, without full consideration of the statutory terms and context. *See* Dkt. 25-1 at 24-25. But subsections (1) and (3) of § 2004a(a) must be read together, in their context. *See Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022) (explaining that to interpret statutory language according to its ordinary meaning, its "words must be read and interpreted in their context, not in isolation" (internal quotation marks and citations omitted)). Subsection (1) authorizes IHS to "construct, improve, extend, or otherwise provide and maintain" essential sanitation facilities, whereas subsection (3) authorizes IHS to enter into "agreements" with the Tribe served by the sanitation facilities regarding "contributions" of the Tribe "toward construction, improvement, and provision thereof, and responsibilities for maintenance thereof." 42 U.S.C. § 2004a(a)(1), (3). Within subsection (3), the statute distinguishes the tasks of arranging for the "construction, improvement, extension, and provision" of sanitation facilities from the task of arranging for the "responsibilities for maintenance" of sanitation facilities. *See id.* Nowhere in subsections (1) or (3) is IHS made responsible for the maintenance of newly built or renovated sanitation facilities. *See id.* To the contrary, subsection (3) assigns IHS the task of making an agreement with *the Tribe* to ensure *the Tribe's responsibility* for the maintenance of the sanitation facility going forward. The inference from the plain language of subsection (3) is that the Tribe to be served by a constructed or improved sanitation facility will, in turn, assume responsibility for maintenance of it. *See id.*

That plain-language reading of subsections (1) and (3) is furthered by the other subsections of § 2004a(a). Subsection (2) authorizes IHS to acquire land and rights of way on which to construct, extend, improve, or otherwise provide and maintain a sanitation facility. *Id.* § 2004a(a)(2). Then, subsection (4) authorizes IHS to transfer title of the completed or improved

sanitation facility to the Tribe. *See id.* § 2004a(a)(4). Nowhere in subsections (2) or (4) has Congress authorized IHS to retain title to a sanitation facility or responsibility to operate and maintain it. *See id.* § 2004a(a)(2), (4).

Thus, taken as a whole, the plain language of § 2004a(a) is evidence that IHS is not authorized to provide routine operation and maintenance of sanitation facilities. This plain language reading also makes practical sense. To adopt the Tribe's expansive reading of § 2004a(a) would make IHS responsible for routine, ongoing operation and maintenance of sanitation facilities for individual Tribal homeowners. *See* 25 U.S.C. § 2004a(a)(1) (providing certain authorization as to "domestic . . . water supplies and facilities . . . for Indian homes"). Domestic water supplies and facilities include "household appurtenances-- such as flush toilet or sanitary pit privy, kitchen sink, lavatory, and connecting plumbing." H.R. Rep. No. 94-1026, at 102, *reprinted in* 1976 U.S.C.C.A.N. 2652, 2740. In other words, the federal government would be an on-call plumber for clogged water and sewage lines connected to a family home. "'The illogical results of applying such an interpretation . . . argue strongly against the conclusion that Congress intended these results.'" *Jones v. Hendrix*, 599 U.S. 465, 480 (2023) (quoting *Western Air Lines, Inc. v. Board of Equalization of S.D.*, 107 S. Ct. 1038, 1044 (1987)). The absurd result of the Tribe's interpretation should thus be avoided.

2. The Statutory Context of § 2004a(a)(1) Further Supports IHS' Interpretation of its Authority.

The Tribe's reading of "maintain," *see* Dkt. 25-1 at 24-25, gives that word more weight than it can bear, given the surrounding context within § 2004a(a)(1). Relying on the principle of "*noscitur a sociis*—a word is known by the company it keeps"—the Court should avoid ascribing to one word in the statute "a meaning so broad that it is inconsistent with its accompanying words,

thus giving unintended breadth to the Acts of Congress." *Yates v. United States*, 574 U.S. 528, 543 (2015) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995)). Applying that canon here, the words immediately surrounding the phrase "otherwise maintain" cabin the contextual meaning of that phrase. Within § 2004a(a)(1), "[o]therwise maintain" is the last in a list of the following actions: "construct, improve, extend, and otherwise provide." As such, it should be read in a similar manner. "Construction" is defined as "the act of building by combining or arranging parts or elements." *Construction*, Black's Law Dictionary (12th ed. 2024). The other words—improve, extend, and provide—indicate that construction may be to improve or extend an existing sanitation facility or to provide a new sanitation facility. Thus, "maintain"—read in this context—indicates that subsection (1) authorizes IHS to provide new or to maintain sanitation facilities *through* construction, improvements, or extensions.

3. Contemporaneous Legislation Also Shows IHS Is Not Authorized to Administer a Program for Routine Operation and Maintenance of a Sanitation Facility.

As explained in IHS's Agency Decision Letter, evidence of Congress's meaning that "otherwise provide and maintain" means only to construct or renovate such facilities, without ongoing maintenance of them, can also be found in contemporaneous legislation, which has consistently funded the SFC Program as "construction" activities. *See Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text."). Notably, the Tribe's summary judgment motion neither mentions nor grapples with this legislative history. *See generally* Dkt. 25-1.

As discussed above, when Public Law 86-121 was passed, the appropriations act enacted by Congress divided funding into two pots: Indian Health Activities and Construction of Indian Health Facilities. *See* Pub. L. No. 86-158. The Indian Health Activities appropriations funded the

costs of routine maintenance and operation of hospitals and health facilities. *See id.* The Construction of Indian Health Facilities appropriations provided "[f]or construction, major repair, improvement, and equipment of health and related auxiliary facilities, including quarters for personnel; preparation of plans, specifications, and drawings; acquisition of sites; purchase and erection of portable buildings; and purchase of trailers; $4,587,000, to remain available until expended." *Id.*

For years, Congress has continued to fund the SFC Program through "*Construction* of Indian Health Facilities" appropriations and emphasized that IHS' role is to construct sanitation facilities before turning them over to tribes for operation. *See* Pub. L. No. 86-383, 78 Stat. 724 (Sept. 28, 1959) (supplemental appropriations for Public Law 86-121 purposes as "Construction of Indian Health Facilities); Pub. L. No. 86-703, 74 Stat. 766 (Sept. 2, 1960) ("For construction, major repair, improvement, and equipment of health and related auxiliary facilities, including quarters for personnel; preparation of plans, specifications, and drawings; acquisition of sites; purchase and erection of portable buildings; purchase of trailers; *and provision of domestic and community sanitation facilities for Indians*; $9,714,000, to remain available until expended." (emphasis added)); H.R. Rep. No. 103-158, at 107 (1993) ("IHS should continue its practice of turning these [sanitation] facilities over to the tribes for operation and maintenance upon completion of construction."); Pub. L. No. 118-42, 138 Stat 25,275 (Mar. 9, 2024) ("*For construction, repair, maintenance, demolition, improvement, and equipment of health and related auxiliary facilities*, including quarters for personnel; preparation of plans, specifications, and drawings; acquisition of sites, purchase and erection of modular buildings, and purchases of trailers; *and for provision of domestic and community sanitation facilities for Indians*, as authorized by Section 7 of the Act of August 5, 1954 (42 U.S.C. 2004a), the [ISDEAA], and the

[IHCIA], and for expenses necessary to carry out such Acts and titles II and III of the Public Health Service Act with respect to environmental health and facilities support activities of the Indian Health Service." (emphasis added)).

In this way, the plain language of the statute, along with its surrounding context and the actions of Congress, all show IHS is not authorized to administer a program for the routine operation and maintenance of sanitation facilities after the sanitation facility has been constructed, improved, extended, or otherwise provided and maintained.

B. The IHCIA (25 U.S.C. § 1632(b)) Does Not Authorize IHS to Administer the Tribe's Proposed Program.

Nor does Section 302 of the IHCIA (25 U.S.C. § 1632(b)) authorize IHS to administer a program for the routine operation and maintenance of sanitation facilities, as the Tribe proposes. Section 1632(b)(2) authorizes IHS to provide under 42 U.S.C. § 2004a the following assistance:

> (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.

25 U.S.C. § 1632(b)(2)(A)-(C).

Contrary to the Tribe's assertion, *see* Dkt. 25-1 at 24-25, § 1632 does not authorize IHS to provide routine operation and maintenance of sanitation facilities. Rather, § 1632(b) merely builds on the Act of August 5, 1954, as amended, to clarify what, if any, role the IHS plays after those sanitation facilities have been provided and ownership transferred to an Indian tribe. As the Tribe conceded during negotiations, the language of § 1632(b)(2) only "authorizes the IHS to perform

limited services related to the operation and maintenance of water and sewage treatment plants under certain circumstances." USA000120 (emphasis added). Such "limited services" in subparts (A) and (B) refer only to technical assistance and the narrow circumstance contemplated by subpart (C)—authorizing only operation and maintenance assistance for, and emergency repairs to, tribal sanitation facilities in emergency situations. Section 1632(b) shows that Congress authorized IHS to provide support services that will enable Indian *tribes* to successfully operate and maintain sanitation facilities and utility organizations. Congress provided only one limited circumstance in which IHS is authorized to provide "operation and maintenance assistance": in a situation where "emergency repairs" to sanitation facilities are "necessary to avoid a health hazard or to protect the Federal investment in sanitation facilities." 25 U.S.C. § 1632(b)(2)(C). Congress' authorization for IHS to operate and maintain sanitation facilities *only* in emergency situations is telling: if the IHS was authorized to provide operation and maintenance assistance on a routine, daily basis, then Congress would have scant reason to carve out an exception for emergency intervention like it did in § 1632(b)(2)(C). *See Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 698-99 (2022) ("[W]e must normally seek to construe Congress's work so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant." (internal quotation marks omitted)).

Contrary to the Tribe's assertion, *see* Dkt. 25-1 at 13, the health promotion activities contemplated by 25 U.S.C. §§ 1603(11)(D) and (G)(iv), (xx), and (xxv), and by 25 U.S.C. § 1621b, do not provide authorization for the proposed sanitation facilities program. The health promotion activities contemplated by those statutes—which require IHS to engage in activities for "making available safe water and sanitary facilities," *id.* § 1603(11)(D), and "providing adequate and appropriate programs, including programs for . . . consumer health education; . . . safe and adequate water; . . . [and] "sanitary facilities," *id.* § 1603(G)(xxv)—must be viewed in their statutory

context. "After all, a statute's meaning does not always turn solely on the broadest imaginable definitions of its component words. Instead, linguistic and statutory context also matter." *Dubin v. United States*, 599 U.S. 110, 120 (2023) (citations and alterations omitted). As set forth above, examination of 42 U.S.C. § 2004(a) and 25 U.S.C. § 1632 elucidates IHS' role in constructing sanitation facilities before turning them over to the Tribe for ongoing maintenance and operation. That statutory context cabins the meaning of § 1603(11) and § 1621b, such that they do not provide the broad authorization to IHS that the Tribe seeks.

C. Other Authorizing Statutes Show that Congress Knows How to Authorize IHS to Provide Ongoing Maintenance, but Chose Not to Do So.

Congress' silence as to an authorization for IHS to provide routine operation and ongoing maintenance of sanitation facilities is significant because it has explicitly authorized IHS to provide routine operation and maintenance services for programs in other authorizing statutes. Because Congress provided that type of authorization for some IHS programs but did not do so for sanitation facilities, it should be inferred that Congress acted intentionally and purposely in not doing so for sanitation facilities. *See Bittner v. United States*, 598 U.S. 85, 94 (2023) ("When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*)."); *Polselli v. Internal Revenue Serv.*, 598 U.S. 432, 439 (2023) ("We assume that Congress 'acts intentionally and purposely' when it 'includes particular language in one section of a statute but omits it in another section of the same Act.'" (quotation marks omitted)).

For example, ISDEAA allows the Tribe to assume responsibility for a program authorized by the Indian Lands Open Dump Cleanup Act of 1994, Pub. L. No. 103-399, 25 U.S.C. §§ 3901-3908. *See* 25 U.S.C. § 5385(b)(2)(F). Under the Indian Lands Open Dump Cleanup Act of 1994,

IHS is tasked with taking an inventory of open dumps and assessing the costs for closure and post-closure maintenance. *See* 25 U.S.C. § 3904(a)(1)-(2). The IHS is next tasked with providing financial and technical assistance to Indian tribes to "close" the open dumps and "provide for postclosure maintenance of such dumps." *Id.* § 3904(b)(l)-(2). Congress' express provision of authority to provide ongoing maintenance of dumps under the Indian Lands Open Dump Cleanup Act—but not for sanitation facilities—should be taken as a deliberate choice *not* to authorize IHS to provide ongoing operation and maintenance for sanitation facilities.[8] *Compare* 42 U.S.C. § 2004a(a)(1) (authorizing IHS "to construct, improve, extend, or otherwise provide and maintain, by contract or otherwise, essential sanitation facilities"), *with* 42 U.S.C. § 2001 ("All functions, responsibilities, authorities, and duties of the Department of the Interior . . . relating to the maintenance and operation of hospital and health facilities for Indians . . . are transferred to, and shall be administered by, the Surgeon General of the United States Public Health Service"), *and* 25 U.S.C. § 3904(b)(1)-(2) (authorizing IHS to "provide financial and technical assistance to the Indian tribal government or Alaska Native entity to carry out the activities necessary to close such dumps; and provide for post-closure maintenance of such dumps").

D. Conclusion

For the foregoing reasons, routine operation and maintenance of sanitation facilities is not an authorized program and therefore cannot be added to the Tribe's Funding Agreement. Section 5385(b) allows the Tribe to add to the Funding Agreement only those programs authorized by an Act of Congress. *See* 25 U.S.C. § 5385(b). As discussed above, the Tribe sought to add an ineligible

[8] The Tribe's emphasis on the fact that the Tribe did not submit a proposal under the Indian Lands Open Dump Cleanup Act of 1994, *see* Dkt. 25-1 at 19-20, misses the point. The significance of that legislation is not whether the Tribe relied on it in its Final Offer to IHS; rather, it is evidence of Congress' intentional choice *not* to authorize IHS to provide ongoing operation and maintenance for sanitation facilities.

program. Even the Tribe's recent Title V Construction Project Agreement acknowledges that the Tribe—not IHS—assumes title to any constructed or improved sanitation facility, and that the Tribe's public utility program—not IHS—is responsible for the continued operation and maintenance of that sanitation facility. *See* USA000155-68. Agencies may not act in excess of their statutory authority, *cf.* 5 U.S.C. § 706(2)(A), and so it follows that the Tribe cannot assume from IHS programs that IHS is not authorized to do. Whether the proposed program is one that IHS is authorized to carry out is a threshold requirement—a sort of "step zero"—that must be met before engaging the final offer and rejection procedure of § 5387(b), (c), and (d). *Cf. Navajo Nation v. HHS*, 325 F.3d 1133, 1141 (9th Cir. 2003) (holding that the Temporary Assistance for Needy Families program is "not a contractable program under the self-determination provisions of" Title I of the ISDEAA, 25 U.S.C. §§ 5321(a)(1)(A)-(E), because "analysis of the plain language of the two statutes, buttressed by [ISDEAA's] stated policies" led to the conclusion that "TANF is neither a "program[ ] or service[ ]" that is "otherwise provided" to tribes under federal law, nor is it "for the benefit of Indians because of their status as Indians" (citing 25 U.S.C. §§ 5304(j), 5321(a)(1)(E)). Here, the Tribe cannot clear that threshold requirement. Because the program the Tribe sought to add to its funding agreement is not contractable, the final offer procedure, "rejection" criteria, and burden of proof on IHS do not apply. *See* 25 U.S.C. § 5387(b), (c), (d).

II. Alternatively, IHS Properly Rejected the Tribe's Proposal Pursuant to § 5387(c).

IHS maintains that it need not issue a decision consistent with § 5387(c) in order to reject an unauthorized program. Nevertheless, IHS properly rejected the proposal under the rejection criteria, as the proposed amendment to add routine operation and maintenance of sanitation facilities and the list of sanitation facilities exceeds the applicable funding level to which the Tribe is entitled, pursuant to § 5387(c)(1)(A)(i), and is an "inherent Federal function that cannot legally

be delegated to an Indian Tribe," pursuant to § 5387(c)(1)(A)(ii).

A. The Amount of Funds Proposed in the Final Offer Exceeds the Applicable Funding Level to which the Tribe is Entitled Under Title V of ISDEAA.

The Tribe's Final Offer to add Sections 4(b)(20)(a)-(d) must be rejected because it exceeds the applicable funding level to which the Tribe is entitled. *See* 25 U.S.C. § 5387(c)(l)(A)(i). The Tribe currently receives all funding to which it is entitled for assuming responsibility for the contractible parts of the SFC Program. *See* USA000095-97, USA000105-09. The Tribe's proposed language fails to distinguish between sanitation facilities construction "project" activities and sanitation facilities construction "program" activities. *See* 25 U.S.C. §§ 5381(a)(1)(A)-(B) ("construction project . . . does not include construction program administration and activities described in paragraphs (1) through (3) of section 5304(m) of this title, that may otherwise be included in a funding agreement under this subchapter"); *see also id.* § 5304(m)(1). As discussed above, "program" and "project" activities and funding are distinct. By proposing to add construction project activities to the Funding Agreement, the Tribe's final offer exceeds the applicable funding level to which the Tribe is entitled, as it has already received all such funding.

Although the Tribe argues that no additional funding was being proposed, *see* Dkt. 25-1 at 27, that is incorrect as a functional matter. For one, the Tribe admits that "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." *Id.* at 9. Benefits of ISDEAA may include coverage under the Federal Torts Claims Act. *See* 25 U.S.C. § 5396(a) (making 25 U.S.C. §§ 5321(c) and (d) and Section 314 of Pub. L. 101-502 applicable to Title V compacts and funding agreements). Benefits of ISDEAA may also include requesting an ISDEAA section 105(*l*) lease and

compensation for the operation and maintenance of a health facility leased under section 105(*l*) of ISDEAA. *See* 25 U.S.C. § 5324(l); *see also* 25 C.F.R. § 900.70 (lease compensation cost elements). That is, "section 105(*l*) of the ISDEAA requires IHS to enter into a 'lease' of certain facilities from the tribe at the tribe's request. Although the agency does not physically occupy or take over the facility, it nonetheless must pay at least some amount of compensation as part of the lease agreement." *Jamestown S'Klallam Tribe v. Azar*, 486 F. Supp. 3d 83, 85 (D.D.C. 2020) (internal citations omitted). Compensation under a section 105(*l*) lease is mandatory. *See id.* 25 U.S.C. § 5324(*l*)(2); s*ee also Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243, 254-55 (D.D.C. 2016). Since 2020, Congress has annually authorized an indefinite appropriation for tribal lease payments. *See* Consolidated Appropriations Act, 2024, Pub. L. No. 118-42, 138 Stat 25 (Mar. 9, 2024).

To qualify for an ISDEAA Section 105(*l*) lease, a Tribe must hold title to, leasehold interest in, or a trust interest in a facility used by the Tribe for the administration and delivery of services under an ISDEAA funding agreement. 25 U.S.C. § 5324(l)(1). Preliminarily, a Tribe needs to show that the program is included in the funding agreement and the facility is being used to carry out that program. The Tribe admits that "[b]y including the proposed sewage treatment, wastewater management, and sanitation facilities PSFAs in its funding agreement, the Tribe can access these *benefits* . . . to fund these programs." Dkt. 25-1 at 9 n.2 (emphasis added). Thus, the "benefits" or funding that the Tribe would receive as a result of adding this language into the Funding Agreement exceeds the applicable funding level to which the Tribe is entitled.

B. The Tribe's Proposal Requires the Tribe to Perform an Inherent Federal Function.

The proposed program is an "inherent Federal function that cannot legally be delegated to an Indian Tribe." 25 U.S.C. § 5387(c)(l)(A)(ii). Through its proposed amendment, the Tribe attempts to expand existing federal law and to assume the federal function of determining what

programs fall under the statutory authority of the IHS. Because there is no authority for the Tribe to do so, IHS appropriately rejected its proposal under § 5387(c)(1)(A)(ii).

As discussed above, the Tribe's Final Offer seeks to add construction project activities into a Funding Agreement and to add an unauthorized program for the routine operation and maintenance of sanitation facilities or utility organizations. Distinguishing between construction project activities and program activities, and determining which programs IHS is authorized to administer, are inherent and nondelegable Federal functions. Through its proposal, the Tribe would usurp those federal functions by creating a new health program authorization for IHS to administer. As discussed, Congress has enumerated the types of health programs that may be included in a funding agreement between a tribe and IHS. *See* 25 U.S.C. § 5385(b)(2). The Tribe argues that "[s]uccessful 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." Dkt. 25-1 at 6 (emphasis added). Only an act of Congress, which is vested with the authority to create Federal law, may enumerate the health programs that may be included under an ISDEAA agreement with IHS and determine the level of funding provided to support those health programs. Determining the health programs that fall under IHS's statutory authority is an inherent Federal function that cannot be delegated to the Tribe, and it is impermissible to permit the Tribe to use the ISDEAA funding agreement to expand IHS's statutory authorities beyond the dictates of Congress. IHS thus appropriately rejected the proposal under § 5387(c)(1)(A)(ii).

C. IHS Properly Rejected the Retroactive Effective Date of the Tribe's Amendments.

Finally, IHS properly rejected the effective date listed on both amendments proposed by the Tribe on the basis that an effective date of June 12, 2024, could entitle the Tribe to funding that

exceeds "the applicable funding level to which the Tribe is entitled" under ISDEAA, and that the program that is the subject of the final offer is an inherent federal function that cannot be delegated to the Tribe. IHS received the Final Offer on June 17, 2024—five days after the effective date in the proposed amendments. USA000022-30. But IHS has 45 days to respond to a final offer under ISDEAA (i.e., until August 1, 2024). *See* 25 U.S.C. § 5387(b). As IHS's response to the Final Offer was still pending, the Tribe obviously had not contractually assumed the responsibility to carry out the proposed programs on June 12, 2024. And, ISDEAA does not *require* that the effective date be made retroactive. *See id.* § 5384(d). Section 5384(d) governs the effective date of a compact:

> The effective date of a compact shall be the date of the approval and execution by the Indian tribe or another date agreed upon by the parties, and shall remain in effect for so long as permitted by Federal law or until terminated by mutual written agreement, retrocession, or reassumption.

Id. IHS and the Tribe have not agreed to an effective date of June 12, 2024. As such, under § 5384(d), the effective date must be one that the Tribe and IHS agree on, or the date on which the parties execute the several portions of amendment. The Tribe does not cite to § 5384(d), let alone offer any persuasive reason a departure from its clear requirements would be appropriate. *See* Dkt. 25-1 at 29. IHS thus appropriately rejected the retroactive date of the Tribe's amendments.

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment should be granted, the Tribe's motion denied, and judgment entered for Defendants as a matter of law.

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