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/PJE) ORAL HEARING REQUESTED

PLAINTFF'S COMBINED MEMORANDUM OF LAW IN REPLY TO DEFENDANTS' OPPOSITION TO PLANTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Plaintiff, Saint Regis Mohawk Tribe (Tribe), seeks to exercise its self-governance authority under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 5301–5423 (ISDEAA), to carry out sanitation programs authorized by multiple federal statutes, including the Indian Sanitation Facilities Construction Act, 42 U.S.C. § 2004a, (hereinafter Sanitation Facilities Construction Act), and the Indian Health Care Improvement Act, 25 U.S.C. §§ 1601–85 (IHCIA) which authorize the Indian Health Service (IHS) to administer programs for the routine operation and maintenance of sanitation facilities, among other things.[1]

The ISDEAA mandates that IHS "*shall* interpret all Federal laws, Executive orders, and regulations in a manner that will facilitate" both "the inclusion of programs, services, functions, and activities (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) (emphasis added). The IHS ignores these statutory instructions and instead reads the applicable statutes as narrowly as possible, presenting a convoluted interpretation that is neither reasonable or logical. Strikingly, the IHS's interpretation of its authority to administer programs for the operation and maintenance of sanitation facilities is so narrow that it contradicts the agency's previous interpretation that its own Director communicated to Congress. In 2022, former Acting Director of IHS Elizabeth Fowler, in response to a question from Senator Murkowski, stated without reservation that IHS "has the authority to fund the operation and maintenance costs for sanitation systems," during testimony in the Senate Committee on Indian Affairs. *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).

[1] The Sanitation Facilities Construction Act considers "sanitation facilities" to include "domestic and community water supplies and facilities, drainage facilities, and sewage- and waste-disposal facilities …" 42 U.S.C. § 2004a(a)(1). This case involves the operation and management of both water and sewage treatment facilities.

In framing their position in this litigation, IHS chooses to ignore a core part of its public health mission: to ensure that tribal communities have clean water and functioning sewage systems, both of which are paramount to the health of tribal members in tribal communities. *See* Dkt. 25-1 at 10-13. Here, the applicable statutes empower the IHS to use a range of options to provide or otherwise ensure ongoing operations and maintenance support necessary to protect the federal investment in water and sewage treatment facilities in tribal communities. Nothing in the statutory authorities relied upon by the Tribe would require the agency to become the "on-call plumber," Dkt. 29-1 at 28, that IHS's brief flippantly refers to, but neither does anything prohibit the IHS from carrying out routine maintenance where appropriate.

Like IHS, once the Tribe assumes these programs, services, functions, and activities (PSFAs) under its own self-governance agreement, it has the discretion to operate its programs as it sees fit, and within the confines of its own available funding. Although the IHS has chosen here not to allocate funding for the operation and routine maintenance of these facilities, the Tribe is entitled under Title V of the ISDEAA to assume responsibility for implementing these statutory provisions and programs in its own community, and may subsequently use its re-budgeting and reprogramming authority to carry them out in a manner differently from how IHS would choose. 25 U.S.C. § 5386(e).

In operating these programs, the Tribe is entitled to the protections and benefits of the ISDEAA, including the final offer process and criteria. Here, the IHS has failed to establish that any of the limited final offer rejection criteria apply, and therefore the Tribe's final offer proposal must be accepted by operation of law under the statute. Notwithstanding the IHS's complaints that the Tribe's proposal would entitle it to certain benefits and protections under the ISDEAA, some of which might cost the federal government to provide, the Tribe's proposal did

not request any additional program funding from the IHS. Even if this Court considered the Tribe's final offer to impliedly include a request for additional funds, the Tribe is entitled to those funds as a matter of law because each of those protections and benefits arise from express entitlements under the ISDEAA.

At bottom, the IHS asks this Court to judicially overrule Congress's delegation of broad authority to the IHS to provide routine maintenance and operation of sanitation facilities. In doing so, the agency interprets the Sanitation Facilities Construction Act and the IHCIA so narrowly that it contradicts IHS's past interpretations, ignores the ISDEAA's statutory rules of construction, and diminishes the flexibility of self-governance to which the Tribe is entitled. To agree with IHS's interpretation would also deny tribes a key tool for providing clean water and sewer treatment to their communities: inclusion of these services in their ISDEAA agreements. For these reasons, the Court should deny IHS's cross motion, grant the Tribe's motion for summary judgment, and enter judgment in the Tribe's favor.

STANDARD OF REVIEW AND RULES OF CONSTRUCTION

The IHS does not contest that a *de novo* standard of review applies to this Court's review of the IHS's final offer rejection. Dkt. 29-1 at 24. The IHS also acknowledges the Indian canons of construction, which include a 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) (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); and then citing *e.g. McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973); *Choate v. Trapp*, 244 U.S. 665 (1912)), 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) (citing *Muscogee (Creek) Nation v. Hodel*, 891 F.2d 235 (D.C. Cir. 1988)).

Although the IHS suggests that these canons "need not be conclusive," and "other circumstances evidencing congressional intent can overcome [their] force[,]" Dkt. 29-1 at 25, here Congress has made its intent known by expressly incorporating the canons in the ISDEAA itself. *See* 25 U.S.C. § 5392(f) ("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."). Therefore, "if the [ISDEAA] can reasonably be construed as the Tribe would have it construed, ***it must be construed that way.***" *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1062 (10th Cir. 2011) (emphasis added) (citations omitted).

In fact, Congress here has mandated not only the ISDEAA but ***all*** federal laws be construed favorably to the Tribe in cases like this one:

> 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. § 5392(a). Congress's command to interpret *all* federal laws to "facilitate … the inclusion of programs, services, functions, and activities (or portions thereof) … in the agreements entered into under this section" bears directly on the key legal question at issue in this case: whether or not the Tribe may add to its funding agreement programs for the operation and maintenance of sanitation facilities on its Reservation.

Similar rules of interpretation are also expressly incorporated into the Tribe's compact. Title V Compact of Self-Governance Between St. Regis Mohawk Tribe and United States

Department of Health and Human Services, Indian Health Service–Amended and Restated December, 2010 [hereinafter Compact], Administrative Record (AR) at USA000070–94.

Section V.4 of the Compact provides:

> 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.

So "while the canon in some cases is a 'guide[ ] that need not be conclusive,' it is here incorporated into the Contract with binding language[.]" *San Carlos Apache Tribe v. Becerra*, 53 F.4th 1236, 1240-41 (9th Cir. 2022) (quoting *Chickasaw Nation v. United States*, 534 U.S. 84, 85 (2001)). As a result, the court "need not conclude that the statutory meaning is plain; rather, to find that the Tribe has plausibly alleged a claim for relief, [it] merely must conclude that the language is ambiguous to read it as the Tribe does." *Id.* at 1241.

ARGUMENT

I. The IHS is statutorily authorized to perform routine operation and maintenance of sanitation facilities, and its policy decision not to do so does not constrain the Tribe's exercise of self-governance under the ISDEAA.

The Sanitation Facilities Construction Act and the IHCIA both use the words "maintain" or "maintenance" when describing the scope of IHS's authority over sanitation facilities. To be sure, both statutes grant the IHS a great deal of discretion in determining whether and how to utilize this authority, and they permit the IHS to carry out *or* to delegate maintenance responsibilities for sanitation facilities to tribes and other third parties. The IHS can choose in the operation of its direct programs and allocation of its discretionary budget not to provide for

ongoing maintenance. But to construe these statutes so narrowly that the word "maintain" is effectively rendered superfluous, and the IHS's authority over maintenance responsibilities is eliminated or reduced, directly contravenes the ISDEAA's statutory rules of construction and impermissibly constrains the Tribe in the exercise of its self-governance rights to reallocate funds and redesign federal programs.

a. *Sanitation Facilities Construction Act*

The Sanitation Facilities Construction Act authorizes IHS to "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 . . ." 42 U.S.C. § 2004a(a)(1) (emphasis added). It also provides that IHS has the authority and discretion "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, as in [its] judgment are equitable." *Id.* § 2004a(a)(3).

Despite the IHS's insistence that their statutory argument is premised on the plain language of the Sanitation Facilities Construction Act, it relies instead on negative inferences and chooses to ignore key clauses that expand, not limit, IHS's discretion to carry out maintenance activities. The IHS's insistence that 42 U.S.C. § 2004a(a) "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[,]" Dkt. 29-1 at 27, ignores the language in that subsection broadly permitting the Secretary to make arrangements and agreements "as in his judgment are equitable and will best assure the future maintenance of facilities in an effective and operating

condition[.]" Likewise, the IHS conveniently ignores the statutory language "by contract or otherwise" in subsection 1. 42 U.S.C. § 2004a(a)(1).

This language plainly grants the agency discretion in how it may carry out maintenance activities for essential sanitation facilities. IHS's argument to the contrary relies on an inference that IHS's *option* to enter contracts, arrangements, or agreements for other entities to assume maintenance responsibilities is actually a command that precludes any other type of arrangement or agreement—including an agreement for the IHS to directly support or carry out ongoing maintenance. There is no reason to adopt such a narrow construction of the statutory language in this context, where Congress has required the opposite. For that matter, there is also no reason to assume that such contracts, arrangements, or agreements could not include an ISDEAA agreement like the one proposed here, where the Tribe takes on operations and maintenance responsibilities as part of its PSFAs, without dedicated funding from the IHS to perform those functions.

IHS further argues that instead of the ISDEAA rules of construction, the court should employ *noscitur a sociis* to drastically limit the plain meaning of the word "maintain." The statute provides that IHS may "construct, improve, extend, or otherwise provide ***and maintain***, by contract or otherwise, essential sanitation facilities[.]" 42 U.S.C. § 2004a(a)(1) (emphasis added). Here, "to construct, improve, extend . . . provide and maintain," are all verbs, modified by an adverbial phrase that explains how those verbs may be conducted— "by contract or otherwise." *See id.* The statute provides the IHS with a series of actions it can take, by contract or otherwise, for essential sanitation facilities. *See id.*

To the contrary, IHS's interpretation seeks to change the parts of speech, rearrange the words, and ignore the plain language, "by contract or otherwise." Dkt. 29-1 at 29. The agency

argues that the court should interpret the phrase "otherwise maintain" as "cabined" by the definition of "construction," since it is "the last in a list of the following actions: 'construct, improve, extend, and otherwise provide[.]'" Dkt. 29-1 at 29. Neither the plain language of the statute nor the application of *noscitur a sociis* supports this interpretation. First, *noscitur a sociis* should only be used in circumstances where statutory language is ambiguous, such that a party cannot reasonably define one word amongst a group of others. *See Russell Motor Car Co. v. United Sates*, 261 U.S. 514, 519-21 (1923). Here, there is no reason not to give the word "maintain" its plain meaning in the context of 24 U.S.C § 2004a(a)(1), which logically permits the IHS not just to construct essential sanitation facilities, but to also improve, extend, and maintain them as the agency deems necessary and appropriate. Second, to the extent the statute could be read as authorizing the IHS to "construct, improve, extend, or otherwise provide" and "otherwise maintain," as the IHS read it, the term "otherwise" operates to *expand* the agency's ability to maintain essential sanitation facilities in ways other than through construction—not to limit it.

IHS's efforts to limit the plain meanings of "maintain" and "by contract or otherwise" violate the general rule that the Court "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.'" *See Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 698–99 (2022) (*quoting Corley v. United States*, 556 U.S. 303, 314 (2009)). Moreover, to the extent this language is ambiguous, the ISDEAA and Indian canons require that it must be interpreted to the benefit of the Tribe and to facilitate the inclusion of PSFAs in the Tribe's funding agreement. *See Blackfeet Tribe of Indians*, 471 U.S. at 766; 25 U.S.C. § 5392(a), (f).

Nor would the Tribe's interpretation of the Sanitation Facilities Construction Act require IHS to become an "on-call plumber," as IHS ridiculously asserts. Dkt. 29-1 at 28. The Sanitation Facilities Construction Act is broad, but also discretionary. The Tribe does not dispute that IHS can make rational decisions about how to use its limited funds to carry out the activities it is authorized to perform, and may sometimes exercise less than the full extent of its statutory authority if it so chooses. *See e.g., Lincoln v. Vigil*, 508 U.S. 182 (1993). However, the Tribe's authority under the ISDEAA to assume programs, redesign those programs, and reallocate whatever funding the IHS has made available, is limited by the outer bounds of IHS's statutory authority—not agency priorities.[2] *See* 25 U.S.C. §§ 5385(b)(2), 5386(e).

Finally, IHS's arguments citing "contemporaneous legislation," like its "plain language" and "statutory context" arguments, rely on unsupported negative inferences. The fact that Congress provides a separate Construction of Indian Health Facilities appropriation, including for the "provision" of sanitation facilities, Dkt. 29-1 at 30, does not hinder IHS's ability to also use its discretionary Indian Health Activities funding for operation and maintenance of such facilities—just as it does with hospitals and other health facilities. Even the Consolidated Appropriations Act, 2024, cited by IHS, states that the Indian Health Facilities funding is "[f]or construction, repair, **maintenance**, demolition, improvement, and equipment of health and related auxiliary facilities." Dkt. 29-1 at 30 (quoting Pub. L. No. 118-42, 138 Stat. 25, 275 (Mar. 9, 2024) (emphasis added)). The IHS infers from this that "IHS is not authorized to administer a program for the routine operation and maintenance of sanitation facilities after the sanitation

[2] To be sure, the Tribe is limited by the amount of funding that the agency has allocated to its discretionary programs, even where that amount is $0. *See* 25 U.S.C. § 5325(a) (providing that the Tribe is entitled to amount of funds the Secretary would have otherwise provided to operate the contracted or compacted programs, plus certain delineated contract support costs); 25 U.S.C. § 5387(c)(1)(A)(i) (permitting the Secretary to reject a final offer proposal that exceeds the amount of funds to which a Tribe is entitled). However, the Tribe may reallocate the Secretarial funds it does receive, as well as its program income, to operate all programs in a funding agreement based on tribal priorities and needs. 25 U.S.C. § 5386(e).

facility has been constructed, improved, extended, or otherwise provided and maintained." *Id*. at 31. In doing so, IHS acknowledges, as it must, that maintenance is allowed, but insists that "routine maintenance" is not. This distinction is yet another inference unsupported by the plain language of the statute.

b. *Indian Health Care Improvement Act*

The IHCIA authorizes the IHS to maintain sanitation facilities and to provide additional health promotion activities for the provision of safe and adequate water and sanitary facilities. In relevant part, the IHCIA authorizes the Secretary to provide "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)(C). The IHS narrowly interprets this statute to limit IHS's authorization to provide operation and maintenance assistance for sanitation facilities only "in a situation where 'emergency repairs'" are necessary. Dkt. 29-1 at 32 (quoting 25 U.S.C. § 1632(b)(2)(C)). To the contrary, the plain statutory language authorizes IHS to provide "operation and maintenance assistance" *and* "emergency repairs," for sanitation facilities. 25 U.S.C. § 1632(b)(2)(C). It is reasonable to interpret IHS's authorization to provide operation and maintenance assistance as an authorization for IHS to conduct routine maintenance separate from "repairs." By its very nature, maintenance is routine, otherwise it would be categorized as a repair. To interpret those authorizations instead as covering the same scope would be redundant and render Congress's choice to use "maintenance" as superfluous. *See Texas*, 596 U.S. at 698–99. Further, there is no denying that ongoing maintenance of sanitation facilities is inherently necessary to avoid health hazards on Tribal lands and protect the federal government's investment in those same facilities. *See* 25 U.S.C. § 1632(b)(2)(C).

The IHCIA also authorizes the Secretary to provide health promotion services to Indians, 25 U.S.C. § 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). The IHS argues that these health promotion activities should be cabined by their narrow interpretation of the Sanitation Facilities Construction Act and 25 US.C. § 1632(b), but there is no reason to do so. Dkt. 29-1 at 32-33. That interpretation is overly restrictive, and does not acknowledge the inherent relationship between making available safe water and operating systems which facilitate that activity.

The IHS makes no effort to apply ISDEAA's statutory rules of construction, which would require IHS to interpret the IHCIA's health promotion activities more broadly and in manner that facilitates the inclusion of PSFAs related to those health promotion activities into the Tribe's funding agreements. 25 U.S.C. § 5392(a)(1). Instead, the IHS ignores the plain language authorizing it to make available safe and adequate water, which by its very nature requires the operation and maintenance of sanitation facilities to treat and distribute that water. Congress itself, at the time of the IHCIA's passing, found 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), (2). The IHS's insistence that IHS is not authorized to operate and maintain the water supply systems necessary to provide clean water and operate a properly functioning sewage treatment facility is a stunning rebuke to clearly expressed congressional policy and unquestionably frustrates the achievement of the Tribe's health goals and objectives. *See* 25 U.S.C. § 5392(a)(3).

c. *The Indian Lands Open Dump Cleanup Act is not instructive.*

The Indian Lands Open Dump Cleanup Act authorizes IHS to "provide for post-closure maintenance of . . . dumps." 25 U.S.C § 3904(b)(2). The Tribe does not contest that the Indian Lands Open Dump Cleanup Act authorizes IHS to provide ongoing maintenance for closed dumps, but this statute has no impact on IHS's operation and maintenance authority with respect to water and sewage treatment facilities. The IHS presents the Indian Lands Open Dump Cleanup Act as evidence that Congress has authorized the IHS to provide ongoing maintenance in other circumstances, so its decision not to do so in the Sanitation Facilities Construction Act must have been an intentional choice. Dkt. 29-1 at 33-34.

In addition to ignoring the multiple express statutory authorizations to provide for maintenance of sanitation facilities as identified above, this argument ignores the possibility that Congress may have included this authorization in the Indian Lands Open Dump Cleanup Act for reasons other than to diminish IHS's authority to maintain other facilities. For example, Congress may have deemed this "ongoing maintenance" language necessary in the context of the Indian Lands Open Dump Cleanup Act because it would not be immediately apparent that the agency has the authorization or responsibility to provide *ongoing* maintenance for *closed* facilities. The IHS's reliance on the Indian Lands Open Dump Cleanup Act, then, is a weak attempt at creating a negative inference that seeks to circumvent the rules of statutory construction that Congress has mandated be applied in this context.

d. *The Existing Construction Project Agreement does not limit IHS's statutory authority.*

The Tribe's existing Title V Construction Project Agreement in the amount of $2,542,905.00 (hereinafter Construction Project Agreement), AR at USA000155-68, does not impact the Tribe's ability to propose incorporating the sanitation PSFAs in its scope of work, nor

does it negate IHS's authority to administer a program for the routine operation and maintenance of sanitation facilities. The IHS contends that the 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." Dkt. 29-1 at 35. But the Construction Project Agreement, which applies only to the Tribe's Solid Waste Transfer Station, AR at USA000159, is just one example of how IHS may choose to use its statutory authority to ensure that certain sanitation facilities are maintained. *See* 42 U.S.C. § 2004a(3). There is nothing in the Construction Project Agreement that precludes IHS, or the Tribe, from entering into other agreements or arrangements, for the provision of operation and maintenance for sanitation facilities on the Reservation, including those that were not initially constructed under the Sanitation Facilities Construction Act. *See* AR at USA000155-68.

To the extent IHS is suggesting that the Construction Project Agreement must have some impact on its broader statutory authority, that is of course impossible. The Construction Project Agreement is not a statute. And to the extent the Construction Project Agreement may impact IHS's maintenance authority over the Solid Waste Transfer Station under that agreement, it does not invalidate the Tribe's broader proposal. To that end, the Tribe's proposed program for the operation and maintenance of sanitation facilities encompasses more than the single Solid Waste Transfer Station covered by the Construction Project Agreement. The program will provide operation and maintenance of facilities such as water treatment plants and lift stations, and it would bring the Tribe's holistic efforts to deliver safe water to its Tribal members within the scope of its self-governance agreements.

II. The Tribe does not request any additional funds as part of its final offer, and any future benefits available to the Tribe as a result of the proposal arise from express entitlements under the ISDEAA.

The IHS must justify its final offer rejection with "a specific finding that clearly demonstrates, or that is supported by a controlling legal authority," that at least one of the Title V rejection criteria applies. 25 U.S.C. § 5387(c). Although IHS cites to criterion (i)—i.e., "the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this title" (*see* Dkt. 29-1 at 36-37)—that criterion is inapplicable because the Tribe did not request any funding for its proposed sanitation facilities PSFAs.

The IHS argues that the Tribe's Final Offer requests funds in excess of the applicable funding level as a "functional matter" because inclusion of the proposed PSFAs in its Funding Agreement will entitle the Tribe to certain "benefits" under the ISDEAA, and (IHS argues) the cost of these benefits "exceeds the applicable funding level to which the Tribe is entitled." Dkt. 29-1 at 36-37. This argument is flawed for a number of reasons.

To begin with, and most fundamentally, the IHS's argument does not align at all with the plain language of the statutory rejection criterion, which refers to the "amount of funds proposed in the final offer." 25 U.S.C. § 5387(c)(1)(A)(i). Further, and even to the extent that the IHS will incur additional costs to provide these benefits in the future, the benefits cited by the IHS arise under specific statutory entitlements granted by the ISDEAA.

The IHS cites specifically to Section 105(*l*) leases as an example. Self-governance tribes are entitled to propose and enter into Section 105(*l*) leases for facilities that meet the statutory criteria. 25 U.S.C. § 5324(l). In order to enter a 105(*l*) lease, a tribe must show that it has an ownership, leasehold, or trust interest in a facility that is used to administer and deliver PSFAs under an ISDEAA agreement. 25 U.S.C. § 5324(*1*)(1). However, when that criterion is met a

Section 105(*l*) lease is mandatory. *Id.; Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243, 246, 254-55 (D.D.C. 2016). In order to fund this mandatory leasing obligation, Congress has enacted a separate, indefinite appropriation for 105(*l*) lease funds. Consolidated Appropriations Act, 2024, Pub. L. No. 118-42, 138 Stat. 25 (2024). This separate and indefinite appropriation underscores that Congress understands and intends that tribes are entitled to 105(*l*) lease funds for any facility being used to carry out and administer a PSFA included in its funding agreement, separate and distinct from the availability of programmatic funding for that PSFA.

Likewise, tribal employees performing PSFAs under Title V compacts and funding agreements are entitled to receive Federal Tort Claims Act (FTCA) coverage as a matter of law. 25 U.S.C. § 5396(a). The IHS appears to suggest that the potential cost to the government of providing this FTCA coverage provides justification for the final offer rejection under the excess funding criteria at 25 U.S.C. § 5387(c)(1)(A)(i). The IHS, however, offers no evidence to meet the Secretary's burden of demonstrating, by "clear and convincing evidence," that providing FTCA coverage results in the Tribe's proposal exceeding the applicable funding level to which the Tribe is entitled. *See* 25 U.S.C. §§ 5387(d), 5398, 5387(c)(1)(A)(i); 42 C.F.R. § 137.150. The IHS's speculative claim that approving the Tribe's proposal could potentially cost the agency more money in FTCA coverage falls far short of meeting the Secretary's burden under the ISDEAA to justify a final offer rejection with specific findings and controlling legal authority. 25 U.S.C. § 5387(c)(1)(A).

In any event, these benefits under the ISDEAA are available to the Tribe for its proposed sanitation facilities PSFAs only once its program for the operation and maintenance of sanitation facilities on its Reservation is accepted into its funding agreement scope of work. To state the obvious, if this Court disagrees with the Tribe that its proposed sanitation facilities PSFAs are

authorized by statute and eligible for inclusion in the Tribe's Funding Agreement, then the Tribe would not be entitled to the benefits and protections of the ISDEAA in carrying out those activities. But assuming this Court does agree that the proposed PSFAs are statutorily authorized, then by definition the Tribe is entitled to those protections and benefits, and there is no basis for the IHS to argue that the cost of providing them "exceeds the applicable funding level to which the [Tribe] is entitled" under the ISDEAA.

Notably, the IHS routinely allows tribes to include in funding agreement scopes of work programs that fall within the Agency's statutory authority even if Congress appropriates no funds to pay for the programs themselves. Yet, it has never before argued that access to benefits under the ISDEAA in the performance of those programs might somehow exceed the applicable funding level to which a Tribe is entitled to under the ISDEAA. Long-term care programs, which are often included in funding agreements despite the fact that the agency does not provide programmatic funding for such PSFAs, are excellent examples of how this works.[3] In some cases, tribes have negotiated Section 105(*l*) leases for long-term care facilities, and those funds are a critical source of funding to ensure that long-term care facilities are adequate for purposes of delivering long-term care service programs. In this case, the Tribe itself operates certain long-term care PSFAs pursuant to its Funding Agreement, AR at USA000031-69, and has entered into one such Section 105(*l*) lease for its Conners IRA Home Long Term Care Facility, despite the fact it receives no program funding from the IHS for the long-term care PSFAs carried out in that

[3] The agency has historically not received Congressionally appropriated program funds for long-term care programs and it cannot, as a result, provide any program funding to tribes for these programs. For many years, however, IHS has allowed tribes to include these programs in funding agreements and use their reallocation authority to fund and operate them, as well as benefit from other ISDEAA features such as FTCA coverage. In 2010, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 amended the IHCIA to include an express authorization for the provision of long-term care services in IHCIA Section 822, codified as 25 U.S.C. §1680*l*; however, Congress still does not allocate appropriations for those services. *See* Consolidated Appropriations Act, 2024, Pub. L. No. 118-42, 138 Stat. 25 (2024).

facility. *See* AR at USA000105-109. This arrangement demonstrates that even if the Tribe requests no program funding or there is no program funding made available for PSFAs, the Tribe remains legally entitled to receive Section 105(*l*) funds for those eligible facilities subject to Section 105(*l*)'s requirements. Likewise, tribes that have included long-term care programs and facilities in funding agreements have for many years relied on FTCA coverage and access other ISDEAA benefits while they provide those services.

The IHS also asks this Court to make a negative inference based on the Tribe's proposed language, asserting that because the Tribe supposedly failed to distinguish between sanitation facilities construction "project" activities and construction "program" activities, it must be requesting additional funds under the IHS's Sanitation Facilities Construction Program. Dkt. 29-1 at 36. This inference ignores the plain language of the Tribe's proposal, which proposes to include only construction activities "approved by" the IHS or other funding sources, and does not include a proposal for any Sanitation Facilities Construction (*or any other*) funds for routine operation and maintenance. AR at USA000026-27.

The self-governance authorities in the ISDEAA were designed by Congress to allow tribes to re-allocate the limited funding available to address the health needs of their beneficiaries in accordance with their own priorities. The IHS has chosen not to utilize its authority or allocate its discretionary funding to provide routine operation and maintenance of sanitation facilities, even though it is authorized to do so. That may be the agency's prerogative; however, by unlawfully rejecting the Tribe's proposal to include a program for the routine maintenance and operation of sanitation facilities in its funding agreement, the IHS is also here seeking to curtail the Tribe's authority under the ISDEAA to choose to reallocate some of its limited

funding to operate these programs. This court should not allow the IHS to circumvent congressional legislative and policy goals in such a manner.

III. The Tribe's proposal does not purport to define agency authority for sanitation PSFAs.

The Tribe's proposal does not assume an inherent federal function. The IHS asserts that the Tribe seeks to "usurp those federal functions by creating a new health program authorization for IHS to administer." Dkt. 29-1 at 38. These assertions are misleading and wrong. As IHS acknowledges, "[o]nly 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 . . . ." *Id.* The Tribe's position is that Congress *has* authorized IHS to perform the PSFAs identified in the Tribe's Final Offer as discussed *supra*. The fact that the IHS has chosen not to carry these activities out does not mean that the Tribe, through its proposal to carry these activities out in an ISDEAA funding agreement, is attempting to unilaterally define the agency's authority.

IV. The Tribe's proposed effective date does not prevent the IHS and the Tribe from executing severable portions of the proposed amendment.

If the Tribe's proposed effective date is not accepted, the IHS can still enter into the amendment for the other severable portions of the proposal. The IHS argues that it properly 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. § 5387(c)(1)(A)(i)–(ii). Dkt. 29-1 at 38–39. Although those arguments are wrong, the IHS need not accept the Tribe's proposed start date in order to enter into the substantive proposal. 25 U.S.C. § 5387(c)(1)(D) allows an Indian tribe to enter into severable portions of a final proposed funding agreement, or provision thereof, that is not rejected. If the effective date

is determined to be the date on which the "parties execute the several portions of amendment [sic]," Dkt. 29-1 at 39, the Tribe and IHS may still agree to the other provisions in the proposal, including the proposal to include a program for the routine operation and maintenance of sanitation facilities on the Reservation.

CONCLUSION

The IHS has the 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. In its cross motion and opposition, IHS asks this Court to ignore the ISDEAA's statutory rules of construction in its interpretation of the Sanitation Facilities Construction Act and the IHCIA, and instead to narrowly construe relevant legal authority against the Tribe. It also misconstrues the benefits available to the Tribe under the ISDEAA. These flawed arguments diminish the flexibility of self-governance to which the Tribe is entitled, and improperly impede on the tribe's right to fully implement the self-governance authorities contained in Title V of the ISDEAA. For these reasons, the Court should deny IHS's cross motion, grant the Tribe's motion for summary judgment, and enter judgment in the Tribe's favor.

Respectfully Submitted,

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