UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMESTOWN S'KLALLAM TRIBE 1033 Old Blyn Highway Sequim, WA 98382 PLAINTIFF, v. **ALEX M. AZAR, et al.,** DEFENDANTS.	)	Civ. No. 1:19-cv-02665-JEB **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** ORAL HEARING REQUESTED

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Legislative Materials

INTRODUCTION AND SUMMARY

The Jamestown S'Klallam Tribe ("Tribe") brings this action against the Secretary of Health and Human Services and the Principal Deputy Director of the Indian Health Service ("IHS") under the Indian Self-Determination and Education Assistance Act ("ISDEAA"). The Tribe is a participant in the Self-Governance program under Title V of the ISDEAA and has a Compact and Funding Agreement ("FA") with the IHS, under which the Tribe carries out health care programs, functions, services, and activities ("PFSAs") that would otherwise be carried out by the federal government.

This action appeals an IHS rejection of the Tribe's proposed lease under section 105(*l*) of the ISDEAA, 25 U.S.C. § 5324(*l*), for fiscal year ("FY") 2018, and accompanying FA amendment. To facilitate and enhance health programs provided by tribes, section 105(*l*) of the ISDEAA requires the IHS to lease tribally owned facilities used by the tribe "for the administration and delivery of services under [the ISDEAA]." 25 U.S.C. § 5324(*l*)(1). IHS must fully fund the reasonable costs of operating and maintaining the facility under the mandatory lease. 25 U.S.C. § 5324(*l*)(2); 25 C.F.R. § 900.69; *Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243, 254–55 (D.D.C. 2016) ("*Maniilaq II*").

As a participant in self-governance under the ISDEAA, the Tribe owns and operates the Jamestown Family Health Center ("Health Center"), a 34,632 square foot facility providing health care services to tribal members, other eligible Indians, and non-Indians in the Tribe's service area. Plaintiff's Exhibit ("Ex.") F (Decision Letter), at 1. This service population includes "non-beneficiaries," primarily non-Indians who are not automatically eligible for IHS services but who may be served by the IHS or tribal ISDEAA contractors under section 813(c) of the Indian Health Care Improvement Act ("IHCIA"), 25 U.S.C. § 1680c(c). Section 813(c)(2)

specifically authorizes the Tribe to provide health services to these non-beneficiaries and—crucially—deems such services to be provided under the Tribe's ISDEAA Compact and FA as a matter of law. 25 U.S.C. § 1680c(c)(2).

On August 30, 2018, the Tribe proposed to lease the Health Center to the IHS under section 105(*l*) of the ISDEAA, and to incorporate the lease into its FA by way of an amendment. Ex. C (proposed amendment). The proposed term of the lease spanned fiscal year 2018, from October 1, 2017 through September 30, 2018. Ex. C at 1; *id*. at 6, ¶ 4. The Tribe proposed that the lease be incorporated, by amendment, into the ISDEAA funding agreement in effect in FY 2018, which was the FY 2015-2017 multi-year funding agreement. *See* Ex. G. Because the parties were unable to conclude negotiation of a new funding agreement in FY 2018, the FY 2015-2017 agreement remained in effect, as specified by the ISDEAA and the Compact. *See* 25 U.S.C. § 5385(e) ("each funding agreement shall remain in full force and effect until a subsequent funding agreement is executed"); Ex. B (Compact), Art. II § 15(b).

During lease negotiations, the parties agreed that the valid operational costs of the facility for FY 2018 totaled $514,826. Ex. F (Decision Letter) at 2. Yet IHS proposed to pay only about 20.4% of this amount (less applicable offsets), based on its position that section 105(*l*) prohibits IHS from paying for space allocable to non-beneficiaries—even though section 813 of the IHCIA deems the Tribe's services to non-beneficiaries to be provided under the Tribe's ISDEAA agreements. *Id*.; 25 U.S.C. § 1680c(c)(2).

Due to the parties' fundamental disagreement over whether section 105(*l*) requires lease funding to support facility space used by the Tribe to serve non-beneficiaries under section 813(c)(2), the Tribe submitted a "final offer" under the ISDEAA Title V final offer provisions. *See* 25 U.S.C. § 5387(b); Ex. E (Final Offer Letter). The Tribe's final offer proposed that IHS

pay the full negotiated amount for the Health Center lease. Ex. E at 2. The Tribe pointed out that it is authorized to serve non-beneficiaries by section 813(c)(2) of the IHCIA and a tribal resolution adopted pursuant to that statute; that such services are deemed as a matter of law to be carried out under the Tribe's ISDEAA agreements with the IHS; and that section 105(*l*) requires the IHS to provide lease compensation for any facility owned by a tribe and used to carry out an ISDEAA agreement. *Id*.

In a Decision Letter dated July 11, 2019, the IHS rejected that final offer, citing the statutory rejection criterion that the amount requested by the Tribe exceeded the funding level to which the Tribe was entitled. *See* 25 U.S.C. § 5387(c)(1)(A)(i); Ex. F at 1, 7. Because the IHS did not meet its burden to show, by clear and convincing evidence, that the Tribe proposed lease compensation in excess of the applicable level, the Tribe brings this appeal. 25 U.S.C. § 5387(d). The Tribe respectfully asks this Court for relief under section 110 of the ISDEAA, 25 U.S.C. § 5331(a), including injunctive and mandamus relief to reverse the IHS's rejection of the Tribe's final offer lease proposal, and to compel the Defendants to enter into the FY 2018 lease and incorporate the lease into the Tribe's ISDEAA funding agreement as proposed by the Tribe. *See* 25 U.S.C. § 5391(a) ("contract," for purposes of Section 5331, includes compacts and funding agreements, such as the Tribe's, under Title V of the ISDEAA).

LEGAL FRAMEWORK

A. Self-Governance under Title V of the ISDEAA

The ISDEAA authorizes Indian tribes and tribal organizations to assume responsibility to administer certain PFSAs the Secretary would otherwise carry out directly through the IHS and other federal agencies. 25 U.S.C. § 5321(a)(1). The purpose of the ISDEAA is to reduce federal domination of Indian programs and promote tribal self-determination and self-governance. *See*

25 U.S.C. § 5302(b); *Cherokee Nation v. Leavitt*, 543 U.S. 631, 639 (2005). The ISDEAA reflects the United States' commitment "to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." 25 U.S.C. § 5302(b).

Title V of the ISDEAA, codified at 25 U.S.C. § 5381, *et seq*., established the "Tribal Self-Governance Program" and requires the Secretary of Health and Human Services to negotiate and enter into self-governance compacts and funding agreements with tribes and tribal organizations participating in the Self-Governance Program. 25 U.S.C. §§ 5384, 5385. Title V requires that each funding agreement shall, "as determined by the Indian tribe," include all PFSAs administered by the IHS under certain listed laws, including the IHCIA. 25 U.S.C. § 5385(b). Tribes are entitled to "plan, conduct, consolidate, administer, and receive full tribal share funding" for the PFSAs they elect to include in the agreement. *Id*.

Section 106(a)(1) of the ISDEAA, 25 U.S.C. § 5325(a)(1) ("section 106(a)(1)"), establishes that the amount of funds to be provided "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract[.]" This court has held that section 106(a)(1) does not cap lease compensation under section 105(*l*), which must be provided to a tribe in addition to funding that the IHS provides under section 106(a)(1). *Maniilaq II*, 170 F. Supp. 3d at 255. Title V of the ISDEAA provides for a "final offer" process if the IHS and an Indian tribe reach a stalemate in negotiations over the terms of a compact or funding agreement. This court has held that the "final offer" process applies to negotiation of a section 105(*l*) lease. *Maniilaq Ass'n v. Burwell*, 72 F. Supp. 3d 227, 237–39 (D.D.C. 2014) ("*Maniilaq I*"). When an impasse in negotiations occurs, the Title V "final offer" provisions are available at the tribal compactor's option. The

final offer provisions limit the Secretary's ability to reject a final offer unless certain criteria apply. The statute provides:

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

25 U.S.C. § 5387(b). If the Secretary rejects the final offer, the Secretary is required to provide "timely written notification to the Indian tribe that contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority," that one or more of the following four rejection criteria apply:

> (i) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under [the ISDEAA];
>
> (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.

25 U.S.C. § 5387(c)(1)(A). The statute does not allow the Secretary to reject a final offer for any other reason. *Id*. Moreover, the Secretary "shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer (or a provision thereof)[.]" 25 U.S.C. § 5387(d); *accord Maniilaq II*, 170 F. Supp. 3d at 247; *Cook Inlet Tribal Council v. Mandregan*, 348 F. Supp. 3d 1, 5 (D.D.C. 2018), *order vacated in part on reconsideration,* No. 14-cv-1835 (EGS), 2019 WL 3816573 (D.D.C. Aug. 14, 2019).

B. The IHCIA section 813

Among the PFSAs that may be included in a Tribe's self-governance compact and FA are those administered under the IHCIA, 25 U.S.C. § 1601, *et seq.* 25 U.S.C. § 5385(b)(2)(D).

Section 813 of the IHCIA authorizes the Secretary, as well as tribes and tribal organizations operating under ISDEAA agreements, to provide services to individuals who would not otherwise be eligible for IHS services—i.e., non-beneficiaries—provided certain conditions are met. 25 U.S.C. § 1680c(c).[1] For the Secretary to provide such services directly through the IHS, (1) the Indian tribe(s) served by the relevant IHS service unit must request it, and (2) the Secretary and the tribe(s) must jointly determine "that the provision of such health services will not result in a denial or diminution of health services to eligible Indians." 25 U.S.C. § 1680c(c)(1). Subject only to limited exceptions, section 813(c)(3) provides that "[p]ersons receiving health services provided by the Service under this subsection shall be liable for payment of such health services under a schedule of charges prescribed by the Secretary which, in the judgment of the Secretary, results in reimbursement in an amount not less than the actual cost of providing the health services." 25 U.S.C. § 1680c(c)(3)(A).

In the case of a tribe or tribal organization operating under an ISDEAA contract or compact, the governing body of the tribe or tribal organization alone—rather than jointly with the IHS—must determine whether non-beneficiaries should be served pursuant to section 813. 25 U.S.C. § 1680c(c)(2). Under section 813 as originally enacted, then enumerated section 713

[1] The population served under § 1680c(c) is distinct from other otherwise ineligible groups section 813 makes eligible for IHS services—for example, children of eligible Indians up to the age of 19, § 1680c(a), and spouses of eligible Indians, provided the tribal government has, by resolution, made spouses eligible, § 1680c(b). Congress has also authorized IHS to serve federal employees and their dependents at remote facilities, 42 U.S.C. § 251(b), and Commissioned Corps of the Public Health Service and their dependents, 42 U.S.C. § 253.

of the IHCIA, the tribal governing body was required (like the IHS) to consider two conditions in making that determination. Indian Health Care Amendments of 1988, Pub. L. 100-713, § 707(a), November 23, 1988 (102 Stat. 4784). The first was whether the provision of services to non-beneficiaries would result in a denial or diminution of health services to eligible Indians. The second was whether there were "no reasonable alternative health facility or services, within or without the service area of such service unit, available to meet the health needs of such individuals." *Id*. However, Congress later removed the requirement that no reasonable alternative health services be available to non-beneficiaries, and the current section 813(c)(2) requires only that the tribal governing body consider whether the provision of such services will "result in a denial or diminution of health services to eligible Indians." 25 U.S.C. § 1680c(c)(2); 25 U.S.C. § 1680c(c)(1)(B).

Further, as originally enacted the provision that is now section 813(c) simply authorized the governing body of the tribe or tribal organization "to determine whether health services should be provided under" the Tribe's ISDEAA contract. Indian Health Care Amendments of 1988, Pub. L. 100-713, § 707(a), November 23, 1988 (102 Stat. 4784). When Congress amended and reauthorized the IHCIA through the Affordable Care Act, P.L. 111-148, § 10221(a), March 23, 2010 (124 Stat. 119), it added new language explicitly providing that section 813(c) services to non-beneficiaries would be deemed to be provided under the ISDEAA as a matter of law. As a result, section 813(c)(2) now requires that "[a]ny services provided by the Indian tribe or tribal organization pursuant to a determination made under this subparagraph shall be deemed to be provided under the agreement entered into by the Indian tribe or tribal organization under the [ISDEAA]." 25 U.S.C. § 1680c(c)(2).

Because they are deemed to be provided under the ISDEAA agreement, services to non-beneficiaries under section 813 receive a number of critical benefits conferred by the statute, including Federal Tort Claims Act ("FTCA") coverage, 25 U.S.C. § 5321(d); *id.* § 5396(a); 25 C.F.R. Part 900, Subpart M; access to federal sources of supply, 25 U.S.C. § 5324(k); access to excess and surplus federal property, 25 U.S.C. § 5324(f); and flexibility in the use of funds, 25 U.S.C. § 5325(k). Yet another benefit of the ISDEAA that Congress made available through the deeming provision is leasing authority under section 105(*l*).

C. The ISDEAA section 105(*l*) mandatory leasing authority

The ISDEAA provides a mandatory leasing authority for facilities owned or leased by Indian tribes and tribal organizations and used to administer and deliver health care programs and services under the ISDEAA. Under section 105(*l*), Congress provided that the IHS is required (1) to agree to lease such facilities, and (2) to provide compensation for those leases. The statute provides as follows:

> (1) Upon the request of an Indian tribe or tribal organization, the Secretary shall enter into a lease with the Indian tribe or tribal organization that holds title to, a leasehold interest in, or a trust interest in, a facility used by the Indian tribe or tribal organization for the administration and delivery of services under this chapter.
>
> (2) The Secretary shall compensate each Indian tribe or tribal organization that enters into a lease under paragraph (1) for the use of the facility leased for the purposes specified in such paragraph. Such compensation may include rent, depreciation based on the useful life of the facility, principal and interest paid or accrued, operation and maintenance expenses, and such other reasonable expenses that the Secretary determines, by regulation, to be allowable.

25 U.S.C. § 5324(*l*).

The Secretary's regulations governing implementation of section 105(*l*) are codified at 25 C.F.R. Part 900, Subpart H, §§ 900.69-900.74. The regulation at § 900.70 lists various elements of lease compensation that may be included "to the extent that no element is duplicative." The

elements include rent, depreciation, principal and interest paid or accrued, various operation and maintenance expenses, repairs to buildings and equipment, alterations to meet contract requirements, other reasonable expenses, and fair market rental exclusive of any federal construction costs. *Id*.

Three specific compensation options for section 105(*l*) leases are set forth in the regulations at 25 C.F.R. § 900.74:

> **How may an Indian tribe or tribal organization propose a lease to be compensated for the use of facilities?**
>
> There are three options available:
>
> (a) The lease may be based on fair market rental.
> (b) The lease may be based on a combination of fair market rental and paragraphs (a) through (h) of § 900.70, provided that no element of expense is duplicated in fair market rental.
> (c) The lease may be based on paragraphs (a) through (h) of § 900.70 only.

D. *Maniilaq I* and *II*

In a pair of cases decided in 2014 and 2016, this court first considered the requirements and entitlements under section 105(*l*) and its implementing regulations. Prior to those decisions, the IHS had taken the position that: (1) a tribal contractor seeking a section 105(*l*) lease was not permitted to propose a lease for incorporation into the contractor's FA under the ISDEAA negotiation procedures, but rather must apply through the IHS's administrative "Lease Priority System"; and (2) that despite the implementing regulations setting out specific elements of lease compensation, the IHS retained authority to unilaterally determine the final lease compensation amount, which could consist of "'non-monetary' compensation" at the agency's discretion. *See Maniilaq I*, 72 F. Supp. 3d at 230.

In *Maniilaq I*, this court rejected the IHS's argument that an ISDEAA tribal contractor must utilize the IHS Lease Priority System and affirmed that a section 105(*l*) lease must be

incorporated into an ISDEAA funding agreement at the tribal contractor's request. *Id*. at 237–38. Moreover, where a section 105(*l*) lease is proposed as an amendment to an FA, the Title V final offer provisions apply, including the limited statutory rejection criteria and burdens of proof. *Id*. at 238, 239–40.

In *Maniilaq II*, this court affirmed that "[t]he regulations codified at 25 C.F.R. §§ 900.69–900.74 determine the amount of compensation that must be paid under a section 105(*l*) lease, and therefore also determine the 'applicable funding level to which [the tribal contractor] is entitled'" for the lease under the ISDEAA and for purposes of the final offer rejection criteria. 170 F. Supp. 3d at 255 (quoting the final offer rejection criterion at 25 U.S.C. § 5387(c)(1)(A), formerly 25 U.S.C. § 458aaa-6(c)(1)(A)(i)). In so holding, the court rejected the IHS's attempt to limit lease compensation to amounts already received through the tribal contractors' FA under section 106(a)(1) for associated programs—in that case, a discretionary leasing program that had previously (under)funded maintenance and operational costs of the facility proposed to be leased. "Using her statutory declination rights," the court held, "the Secretary was permitted to decline compensation requests that were 'duplicative,' [citing 25 C.F.R. § 900.70], or not 'reasonable,' [citing 25 U.S.C. § 450j(l)(2)]. But she was not entitled to use section 106(a) to cap the 'applicable funding level to which [the tribal contractor is] entitled'" under section 105(*l*) and its implementing regulations. *Id*.

FACTUAL BACKGROUND

On September 28, 2018, the IHS received the Tribe's proposed amendment to its FA to incorporate a section 105(*l*) lease for the Jamestown Family Health Center. Ex. C (FA Amendment and Lease Proposal). The Health Center is a 34,632 square foot facility owned by

the Tribe and used for the administration and delivery of health care services pursuant to its compact and funding agreement with the IHS.

Pursuant to section 813 of the IHCIA, the Tribe provides health care services to non-beneficiaries, as well as eligible Indians, at the Health Center. Ex. B at 9 (Compact at Art. III, § 9(b)). The Jamestown S'Klallam Tribal Council, in Resolution #34-16, determined that the provision of health care services on a fee-for-service basis to non-beneficiaries would not result in a denial or diminution of services to beneficiaries. In fact, the Council determined that providing services to non-beneficiaries "will result in an improvement to the efficiency and quality of the health care delivery system and the health care delivered to beneficiaries in the Tribe's Service Area." Ex. A (Resolution #34-16 (Aug. 30, 2016)). The Council therefore resolved that "the Tribe will extend all available health services, provided at a Tribal Medical Clinic, under its Compact and Annual Funding Agreements to non-beneficiaries, on a fee-for-service basis." *Id*. The Health Center has approximately 17,000 registered patients, 460 of whom are eligible Indian beneficiaries, and the remainder of whom are served pursuant to section 813(c)(2), Resolution #34-16, and the Tribe's ISDEAA Compact. Ex. F (Decision Letter) at 1.

The Tribe proposed that IHS lease the entire Health Center facility for $981,402. Ex. F (Decision Letter) at 1. The parties entered into lease negotiations, and eventually agreed that if IHS leased the entire Health Center, the compensation paid by IHS for the lease would be $514,826, offset by $38,703 for Maintenance and Improvement (M&I) and Facilities Support Account (FSA) funding available to the Tribe. Thus, the parties agreed that IHS compensation for leasing the entire facility would be $476,123. Ex. F (Decision Letter) at 2.

The IHS later determined that it would not lease the entire facility but only the square

footage necessary to service the eligible Indian population. In an email dated May 9, 2019, IHS explained that IHS had applied its "supportable space methodology" formula from the IHS Office of Environmental Health and Engineering ("OEHE") Technical Handbook—originally developed to allocate M&I and equipment funds in IHS's annual Indian Health Facilities appropriation—to calculate the square footage necessary to carry out the compacted IHS program for Indians only. Ex. D (email from Michael Weaver of IHS to Ron Allen (May 9, 2019)); IHS OEHE, Technical Handbook, Vol. VI, Part 77, Chapter 77-1, available at https://www.ihs.gov/oehe/handbook/volume6/. This chapter of the Handbook, entitled "Facilities Supportable Space," "establishes the [IHS] guidelines for determining the maximum health care facilities space that is supported for allocation of maintenance and improvement (M&I) and equipment funds through the annual Facilities Appropriations." *Id*.

The Tribe's Health Center measures 34,632 square feet. Applying its "supportable space methodology" in its Handbook, IHS determined that only a 7,060 square foot facility was necessary to serve the Indian service population—just 20.4% of the Tribe's Health Center. Ex. F (Decision Letter). IHS then applied this same percentage to the $514,826 agreed to by the parties for leasing the entire Tribal Health Center to determine that IHS would pay $105,025, less the agreed-on offset of $38,703, for total compensation of $66,322. *See* Ex. F (Decision Letter) at 2. Although IHS did not explain how it derived its "supportable space" of 7,060 square feet, it made clear in the May 9 email that the figure is such a small percentage of the Clinic's total size because of the large number of non-beneficiaries served by the Health Center. Mr. Weaver argued in the email that "IHS's determination that final lease compensation must reflect an offset of operational costs attributable to non-beneficiaries is supported by 25 U.S.C. § 5324(*l*)(2) requiring compensation only for 'reasonable' expenses and by statutory requirements

demonstrating that IHS funds are to be used for eligible IHS beneficiaries." Ex. D. (In the email, IHS mistakenly applied the offset twice, once before the pro rata reduction and again afterward, resulting in proposed compensation of $61,761. Ex. D.)

On May 30, 2019, the Tribe submitted a final offer to resolve the impasse over lease funding. Ex. E. The Tribe pointed out that it is authorized to serve non-beneficiaries by section 813 of the IHCIA and a tribal resolution adopted pursuant to that statute. *Id*. at 2; *see* 25 U.S.C. § 1680c(c)(2). The Tribe provides such services on a fee-for-service basis, rather than using IHS funds. The Tribe proposed final lease compensation of $476,123—the agreed-on operational costs of $514,826 less $38,703 for the M&I and FSA offset. *Id*.

In its Decision Letter dated July 11, 2019, IHS rejected the Tribe's final offer on the ground that the amount of funding proposed "exceeds the applicable funding level to which [the Tribe] is entitled." Ex. F (Decision Letter) at 1 (citing 25 U.S.C. § 5387(c)(1)(A)(i)). The Decision Letter stated that "[t]he parties have reached tentative agreement on the majority of the Tribe's proposal, but are at an impasse on one issue: whether the IHS must provide the [Tribe] with lease compensation associated with the provision of care to ineligible individuals." *Id*. The Decision Letter further explained:

> Because the Health Center is much larger than necessary for the operation of IHS programs and primarily serves ineligible individuals, the IHS proposed that the total lease compensation reflect only that space allocable to individuals eligible for IHS programs (IHS beneficiaries).
>
> To establish the square footage allocable to IHS beneficiaries for purposes of calculating lease compensation, the IHS proposed use of the IHS facilities supportable space methodology. Among other things, the supportable space methodology relies upon the active user population of IHS beneficiaries to be served at the facility to generate the square footage necessary to carry out IHS programs. Using the supportable space methodology, the IHS identified a total of 7,060 square feet necessary to operate IHS programs. Because 7,060 square feet is only 20.4 percent of the 34,632 square foot Health Center, the IHS proposed applying a pro-rata factor of 20.4 percent to the total of $514,826 to arrive at total

> operational costs associated with using the Health Center for IHS beneficiaries of $105,025. A final reduction of agreed-to duplicative costs already provided to the [Tribe] through its ISDEAA agreement results in total reasonable lease compensation of $66,322.

Ex. F (Decision Letter) at 2 (footnotes omitted). The IHS then concluded that the Tribe's higher proposed lease compensation amount "does not meet the reasonableness requirement of section 105(*l*)[,]" and "is therefore in excess of the level of funding to which the [Tribe] is entitled and is rejected by the IHS in accordance with 25 U.S.C. § 5387(c)(1)(A)(i)." Ex. F (Decision Letter) at 4-5.

The Decision Letter provided three arguments in support of its conclusion that lease funding to support facility space for services to non-beneficiaries is not reasonable under section 105(*l*):

(1) such funding would be "unreasonable and contrary to the ISDEAA" because "the ISDEAA mandates the transfer of IHS Programs and funds be for the benefit of Indians because of their status as Indians[,]" *id*. at 5;

(2) IHS funds are not available to support health care for ineligible individuals under section 813, and all costs associated with such care must be recovered from the non-beneficiaries themselves through the fee-for-service structure, *id*. at 6; and

(3) funding the proposed lease amount would result in "a prohibited diminution of services to eligible Indians" under section 813, *id*. at 7.

On September 5, 2019, the Tribe filed this lawsuit challenging the IHS's rejection of its final offer, as authorized by the ISDEAA Title V final offer provisions. 25 U.S.C. § 5387(c)(1)(C).

After the complaint was filed, the parties engaged in negotiations on the severable portion of the final offer that IHS would agree to enter into. *See* 25 U.S.C. § 5387(c)(1)(D). In this

discussion, the Tribe acknowledged that it leases 883 square feet of the Health Center to a third party, the Olympic Medical Center, and that this portion of the Health Center would need to be excluded from the 34,632 total square feet in a lease to IHS under section 105(*l*).

STANDARD OF REVIEW

A. Summary Judgment

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Arrington v. United States*, 473 F.3d 329, 333 (D.C. Cir. 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). The movant bears the initial burden of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Fed. R. Civ. P. 56(c); *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1179 (D.C. Cir. 2011) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

However, "'[t]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.'" *Theodus v. McLaughlin*, 852 F.2d 1380, 1382 (D.C. Cir. 1988) (citing *Anderson*, 477 U.S. at 247–248) (emphasis in original). A material fact is one that "might affect the outcome of the suit under governing law." *Hendricks v. Geithner*, 568 F.3d 1008, 1012 (D.C. Cir. 2009) (citing *Anderson*, 477 U.S. at 248–251). In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than "[t]he mere existence of a scintilla of evidence" in support of its position. *Id*. at 252. Rather, the nonmoving party must present

specific facts that would enable a reasonable jury to find in its favor. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249–250 (citations omitted).

B. Review of Agency Action Under the ISDEAA

This Court reviews an appeal of an agency rejection decision under the ISDEAA *de novo*. *Cook Inlet Tribal Council*, 348 F. Supp. 3d at 5 ("[The Tribe's] claim arises under the ISDEAA, not the Administrative Procedure Act. As such, the Court's review of IHS' declination decision is *de novo*.") (citing *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 542 (D.D.C. 2014)); *Maniilaq II*, 170 F. Supp. 3d at 247. *De novo* review comports with Congress's intent to reign in the agencies' "bureaucratic recalcitrance": "The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated …." *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306, 1315–16 (D. Or. 1997) (citing S. Rep. No. 100–274, at 37 (1987), *reprinted in* 1988 U.S.C.C.A.N. at 2619). Indeed, "[t]he ISDEAA is designed to 'circumscribe as tightly as possible the discretion of the Secretary[,]'" *Pyramid Lake Paiute Tribe*, 70 F. Supp. 3d at 542, and, as a result, the ordinary level of deference afforded under the Administrative Procedure Act would be inappropriate.

C. Statutory Interpretation Under the ISDEAA

For the same reasons, an agency's interpretation of statutory provisions of the ISDEAA is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Pyramid Lake Paiute Tribe*, 70 F. Supp. 3d at 542. Instead, "[t]he governing canon of construction requires that 'statutes are to be construed liberally in favor of

the Indians, with ambiguous provisions interpreted to their benefit.'" *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). In cases arising under the ISDEAA, therefore, "the court is to give IHS' views 'consideration,' but not deference[,]" and "the Court must construe any ambiguity or inconsistency in the ISDEAA or the self-determination contract in [the Tribe's] favor." *Cook Inlet Tribal Council*, 348 F. Supp. 3d at 6. *See also Maniilaq II*, 170 F. Supp. 3d at 247.

This canon of statutory construction is explicitly included in Title V of the ISDEAA, which provides the statutory basis for the Tribe's self-governance Compact and Funding Agreement with IHS:

> Each provision of [Title V] 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.

25 U.S.C. § 5392(f). As the U.S. Supreme Court wrote of a very similar rule of construction in Title I, when interpreting the ISDEAA "[t]he Government, in effect, must demonstrate that its reading is clearly required by the statutory language." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 194 (2012).

SUMMARY OF ARGUMENT

Section 105(*l*), as confirmed by *Maniilaq II*, requires IHS to enter and fully fund the proposed lease for the Health Center because the facility satisfies the two statutory conditions: it is owned by the Tribe and used to carry out its ISDEAA agreements. 25 U.S.C. § 5324(*l*)(1). Under the authority of Section 813 of the IHCIA, the Tribe's governing body decided that the Tribe would serve non-eligible individuals residing in the Health Center's service area. All such services are deemed to be provided under the Tribe's ISDEAA agreements. 25 U.S.C. § 1680c(c)(2). Because the Tribe's services to non-beneficiaries under section 813 are deemed

as a matter of law to be provided under the Tribe's ISDEAA agreements—and are, in fact, included in the Tribe's ISDEAA Compact, Ex. B at 9; *see also* Ex. A—they fall squarely within the scope of services for which facility lease funding is available under section 105(*l*).

None of the justifications offered by the IHS in its Decision Letter are sufficient to overcome the clear statutory language in section 105(*l*) and section 813(c) or to carry the Secretary's burden to show, by clear and convincing evidence, that its rejection of the final offer was justified. 25 U.S.C. § 5387(d). In this case, the IHS "fully reject[ed]" the Tribe's final offer "on the grounds that the amount of funds proposed by the [Tribe] '. . . exceeds the applicable funding level to which [the Tribe] is entitled.'" Ex. F (Decision Letter) at 1 (citing 25 U.S.C. § 5387(c)(1)(A)(i)). The IHS's argument that programs and funds transferred to Tribes under the ISDEAA are necessarily limited to those "for the benefit of Indians because of their status as Indians[,]" *id*. at 5, ignores the express deeming clause in section 813 requiring that all services provided under that section "shall be deemed to be provided under" the Tribe's ISDEAA agreement. The whole point of section 813 is to allow for an expansion of the IHS (or tribal) program beyond eligible Indians to non-Indians residing within the facility's service area. All are served as part of the IHS program under the ISDEAA agreement. That statutory language controls here, notwithstanding the case law cited by the IHS dealing with unrelated questions of program contractibility under different statutory provisions.

Moreover, section 105(*l*) and its implementing regulations provide an independent legal right to lease compensation and determine the "applicable funding level to which [the Tribe] is entitled" under the ISDEAA for purposes of the final offer. *Maniilaq II*, 170 F. Supp. 3d at 255. The IHS's argument that Congress did not provide any additional appropriations for services to non-beneficiaries, who are served on a fee-for-service basis, is therefore irrelevant because the

availability of or limitations on *program* funding are not a "cap" on section 105(*l*) *facilities* funding. *Id*. at 255. IHS applies its "supportable space" methodology from its Handbook to keep costs "reasonable" by excluding space attributed to services for non-beneficiaries. But IHS has no authority to imposed its own view of reasonable compensation outside of the regulations. Section 105(*l*)(2) says compensation may include "reasonable costs that the Secretary determines, *by regulation*, to be allowable." 25 U.S.C. § 5324(*l*)(2) (emphasis added). Thus Congress provided rulemaking authority to the Secretary to determine what costs are "reasonable" through promulgation of regulations, not through an unpromulgated handbook. Those regulations say nothing about imposing reductions for services to non-beneficiaries; rather, they require full payment of facility costs associated with carrying out ISDEAA agreements. *See, e.g.*, 25 C.F.R. § 900.70 (establishing elements of compensation for building used "for administration or delivery of services under the Act").

Finally, IHS's argument that fully funding the Health Center lease would result in diminution of services to eligible Indians within the service area is misplaced. In electing to provide services to non-beneficiaries, the Tribe complied with the statutory requirement to consider the impact to eligible beneficiaries. 25 U.S.C. § 1680c(c)(2). The Tribe determined that no diminution of services would result, but in fact that expanding services to non-beneficiaries on a fee-for-service basis would improve "the efficiency and quality of the health care delivery system and the health care delivered to beneficiaries in the Tribe's Service Area." Ex. A at 1 (Resolution #34-16 (Aug. 30, 2016)). The statute does not permit the IHS to substitute its own judgment for the Tribe's on this question, let alone to withhold facilities lease funding on that basis.

Under 25 U.S.C. §§ 5387(b) & (c), in the absence of any statutory rejection criterion, the IHS was required to approve the Tribe's final offer. Mandamus and injunctive relief is therefore appropriate to compel the Secretary to award and fund the Tribe's final offer lease proposal. 25 U.S.C. § 5331(a); 25 U.S.C. § 5391(a). The parties have negotiated and agreed on the full costs, so a remand would serve no purpose.

ARGUMENT

I. The ISDEAA requires IHS to pay full lease costs for that portion of the Health Center used to carry out the Tribe's ISDEAA agreements, not just the portion IHS designated "supportable space" under an inapplicable agency manual.

In negotiations, the IHS and the Tribe agreed that the total operational costs associated with the Health Center facility, less certain costs already funded in the Tribe's FA, amount to $476,123. Ex. F (Decision Letter) at 2. Nevertheless, the IHS rejected the Tribe's final offer proposing a section 105(*l*) lease for that amount on the basis that the Tribe serves non-beneficiaries at the Health Center. *Id*. at 7. According to the Decision Letter, it would be "unreasonable" for the IHS to provide lease funding in support of those services. *Id*.[2]

The agency's decision runs headlong into the governing statutory and regulatory language and cannot be sustained. Section 105(*l*)(1) provides that the IHS "shall enter into a lease" with an ISDEAA tribal contractor for any facility that the tribal contractor owns and uses "for the administration and delivery of services under this chapter [of the ISDEAA]." 25 U.S.C. § 5324(*l*)(1). Section 105(*l*)(2) further requires that "[t]he Secretary shall compensate each

[2] The Tribe proposes to reduce the amount proposed in the final offer to reflect the fact that the Tribe leases 883 square feet of the Health Center to a third party, the Olympic Medical Center. *See supra*, page 15. Applying a pro rata reduction, and subtracting the M&I offset, the total lease compensation would be as follows: $514,826 - ($514,826 x 883/34,632) - $38,703 = $462,997.

Indian tribe or tribal organization that enters into a lease under paragraph (1) for the use of the facility leased for the purposes specified in such paragraph." 25 U.S.C. § 5324(*l*)(2). Thus, both the leasing and the lease compensation requirements under section 105(*l*) extend to any facility space used for the administration and delivery of ***services under the ISDEAA***. The regulations at 25 C.F.R. Part 900, Subpart H, which "determine the amount of compensation that must be paid under a section 105(l) lease," *Maniilaq II*, 170 F. Supp. 3d at 255, likewise apply by their terms to "a building owned or leased by the tribe or tribal organization that is used for [the] administration or delivery of ***services under the Act***." 25 C.F.R. § 900.69 (emphasis added). *See also*, 25 C.F.R. § 900.70 ("What elements are included in the compensation for a lease entered into between the Secretary and an Indian tribe or tribal organization for a building owned or leased by the Indian tribe or tribal organization that is used for administration or delivery of ***services under the Act?***") (emphasis added).

These authorities are clear regarding the scope of the IHS's lease compensation obligations: the IHS must provide full lease compensation, as determined under the regulations, for any portion of a facility owned by a tribal contractor and used for the administration and delivery of services under the ISDEAA.

In this case, the Tribe is entitled to full lease compensation for the entire Health Center facility, less the 883 square feet leased to Olympic Medical Center, because the entire balance is utilized to administer and/or deliver services under the Tribe's ISDEAA agreements. As a component of those services, the Tribe has elected to serve non-beneficiaries on a fee-for-service basis pursuant to section 813(c)(2) of the IHCIA and Resolution #34-16. Ex. A (resolution); Ex. B at 9 (Compact at Art. III, § 9(b)). But that changes nothing: section 813(c)(2) expressly states that "[a]ny services provided by the Indian tribe or tribal organization pursuant to a

determination made under this subparagraph shall be deemed to be provided under the agreement entered into by the Indian tribe or tribal organization under the Indian Self-Determination and Education Assistance Act." 25 U.S.C. § 1680c(c)(2). The provision of services by the Tribe to non-beneficiaries is therefore deemed to be carried out pursuant to the ISDEAA as a matter of law, and is thus within the scope of the section 105(*l*) lease and lease compensation requirements.

The IHS cites no provision in the ISDEAA or the regulations for any pro rata adjustment to 105(*l*) lease funding based on who the Tribe serves. There is none: provided such services are rendered under the ISDEAA—which they are—section 105(*l*) and its implementing regulations make no such distinction. Congress, therefore, has specifically provided that the ability to serve non-beneficiaries on a fee-for-service basis is a benefit available to Tribes under the ISDEAA, and the IHS has no authority to reverse that legislative judgment.[3]

With no statutory authority to restrict the application of the ISDEAA, including section 105(*l*), to IHS beneficiaries, IHS falls back on its "supportable space" formula from the OEHE Technical Handbook. Mr. Weaver argues in his email that applying the "supportable space methodology" is necessary to keep costs "reasonable" and provide an offset for operational costs attributable to non-beneficiaries. Ex. D (email from Michael Weaver of IHS to Ron Allen (May 9, 2019)). However, the regulations, which govern lease compensation, do not require any such offset and IHS has no authority to impose its own view of reasonable compensation costs or

[3] A tribe is always free to offer health care or any other service or product to the general public as a freestanding "tribal enterprise," and does not need Congress's prior permission to do so. *See* Ex. F (Decision Letter) at 7 (characterizing the Tribe's health care services to the "general public as a Tribal enterprise"). What is noteworthy about section 813(c), therefore, is not that Congress has permitted tribes to serve non-beneficiaries, but rather that it has permitted them to do so *under their ISDEAA agreements*, provided the statutory considerations are met.

compensation outside the regulations. Section 105(*l*)(2) provides: "Such compensation may include rent, depreciation based on the useful life of the facility, principal and interest paid or accrued, operation and maintenance expenses, and such other reasonable expenses that the Secretary determines, by regulation**,** to be allowable." 25 U.S.C. § 5324(*l*)(2). Thus, Congress provided rulemaking authority to the Secretary to determine what costs are "reasonable" through promulgation of regulations, not through a Handbook policy. Those regulations do not distinguish between services to beneficiaries and services to non-beneficiaries; rather, they require full payment of facility costs associated with carrying out "services under the Act." *E.g.*, 25 C.F.R. §§ 900.69 and .70. In *Maniilaq I*, 72 F. Supp. 3d at 230 and n.4, IHS attempted a similar end run around the statute and regulations through application of its "lease priority system" from an agency handbook. That attempt failed, as should this one.

II. The IHS failed to justify its rejection of the Tribe's final offer lease proposal according to the statutory criteria.

The IHS rejected the Tribe's final offer on the ground that the funding amount requested "exceeds the applicable funding level to which [the Tribe] is entitled" under the ISDEAA. Ex. F (Decision Letter) at 1, 7 (citing the statutory rejection criterion at 25 U.S.C. § 5387(c)(1)(A)(i)). In its Decision Letter, the IHS appears to concede that section 105(*l*) and its implementing regulations—rather than any other provision of law or administrative policy—determine the amount to which the Tribe is entitled under the ISDEAA for a section 105(*l*) lease. Ex. F (Decision Letter) at 4; *see also Maniilaq II*, 170 F. Supp. 3d at 255. Still, the IHS attempts to use the "reasonableness" requirement in section 105(*l*) lease funding as a back door to impose its own non-statutory, non-regulatory limitation on lease funding for facility space associated with services under section 813(c). None of the arguments advanced by the IHS in its Decision Letter, however, are sufficient to escape the explicit statutory mandate that deems section 813(c)

services to be provided under a tribe's ISDEAA agreement or to establish that the stated rejection criterion applies.

Although the Tribe contends that the statutory requirements in section 105(*l*) and deeming clause in section 813(c)(2) are clear and controlling, to the extent the court finds that the "reasonableness" requirement in section 105(*l*)(1) is ambiguous, such ambiguities must be resolved in favor of the Tribe. *See supra*, page 17, citing 25 U.S.C. § 5392(f).

A. Section 105(*l*) lease funding is mandated by law to support programs and services provided *under the ISDEAA*, which are not limited to "IHS Programs" as determined by the IHS.

As its first ground for rejecting the Tribe's final offer, the IHS states generally that "the ISDEAA mandates the transfer of IHS Programs and funds be for the benefit of Indians because of their status as Indians[,]" concluding: "Therefore, the provision of funds under section 105(*l*) for Health Center space that is not necessary or used to carry out services for IHS beneficiaries is unreasonable and contrary to the ISDEAA." Ex. F (Decision Letter) at 5. The IHS relies on two cases to support its reasoning: *Navajo Nation v. Dep't of Health & Human Servs., Sec'y*, 325 F. 3d 1133, 1138 (9th Cir. 2003), for the proposition that IHS Programs and funds transferred under the ISDEAA are limited to those "for the benefit of Indians because of their status as Indians[,]" Ex. F (Decision Letter) at 5; and *Maniilaq I*, 72 F. Supp. at 238, for the proposition that a section 105(*l*) lease "describe[s] the funds provided in support of the IHS Programs transferred under the ISDEAA agreement and the responsibilities of the Secretary." *Id*. The IHS concludes:

> Under the framework of Navajo Nation and Maniilaq I, it follows that section 105(*l*) lease funds are only available to support IHS Programs, which are programs for Indians because of their status as Indians. No funds are due for the portion of the

> [Tribe's] Tribal enterprise serving ineligible individuals even if that Tribal enterprise is operated in conjunction with an ISDEAA agreement.

Id. at 5-6.

The IHS's piecemeal analysis completely ignores the clear and direct statutory provisions discussed above. The express deeming clause in section 813 requires that all services provided under that section "shall be deemed to be provided under" the Tribe's ISDEAA agreement as a matter of law, regardless of what other programs are or are not transferrable under the ISDEAA more generally. 25 U.S.C. § 1680c(c)(2). In turn, section 105(*l*)—itself a provision of the ISDEAA—clearly and specifically requires the Secretary to provide lease compensation to an ISDEAA tribal contractor for any facility used "for the administration and delivery of services ***under this chapter***"—i.e., under the ISDEAA. 25 U.S.C. § 5324(*l*)(1). Neither provision refers to "IHS Programs," however that term may be defined by the IHS. Rather, together they clearly establish that section 105(*l*) lease funds are available to support facility space used to provide services to non-beneficiaries under the terms of section 813, because those services are deemed to be provided under the ISDEAA.

This reading of the statutory requirements is supported by *Three Affiliated Tribes of the Fort Berthold Indian Reservation v. United States*, 637 F. Supp. 2d 25 (D.D.C. 2009), a decision addressing the interplay between the ISDEAA's Title I self-determination contract proposal declination procedures and a previous version of section 813(c). In that case, the IHS had rejected the Tribe's proposal to include services to non-beneficiaries under section 813(c) in its Title I ISDEAA contract. *Id*. at 28. The IHS argued in the district court that its decision was not reviewable as a declination decision under the ISDEAA, for essentially the same reasons that the IHS now argues that services under section 813(c) are not an "IHS Program" supportable with section 105(*l*) lease funding. As explained by the district court in *Three Affiliated Tribes*:

> Primarily, [the IHS] contend[s] that their decision to reject the IHCIA proposal was not a declination finding because it did not pertain to a mandatory term of Three Tribes' self-determination contract proposal. . . . They argue that the ISDEAA's waiver of sovereign immunity applies narrowly to required "duties," and the appropriate Secretary only has a duty to approve contract terms that are "for the benefit of Indians because of their status as Indians."

Id. at 34. The district court rejected that argument as an "unsuccessful[] attempt to circumvent the statutory language" of section 813(c) and the Title I declination provisions. *Id*. Finding that the issue "can be resolved by a straightforward analysis of the relevant statutes," the court explained:

> Declination findings—rejections in whole or in part of self-determination contracts based on enumerated criteria—are required if the appropriate Secretary chooses not to approve any part of a self-determination contract. 25 U.S.C. § 450f(a)(2), (4); *see also* 25 C.F.R. § 900.22. The IHCIA provides that the proposal at issue was part of Three Tribes' self-determination contract. 25 U.S.C. § 1680c(b)(1)(B) ("In the case of health facilities operated under a contract entered into under the [ISDEAA], the governing body of the Indian tribe or tribal organization providing health services under such contract is authorized to determine whether health services should be provided *under such contract* to individuals who are not eligible for such health services ....") (emphasis added). Hence, as part of Three Tribes' self-determination contract, the IHCIA proposal was entitled to a declination finding, which falls well within the ISDEAA's waiver of sovereign immunity.

Id. at 33. "In sum," the court concluded, "based on the language of the ISDEAA and the IHCIA, the IHCIA proposal was part of Three Tribes' proposed self-determination contract, and defendants' decision not to include this term in the contract was a declination finding that is reviewable under the ISDEAA." *Id*. at 34.

Section 813(c) has since been amended to specifically provide that services provided by a contracting tribe or tribal organization are deemed to be provided under the tribe or tribal organization's ISDEAA agreement as a matter of law. 25 U.S.C. § 1680c(c)(2). The amended deeming provision in section 813(c)(2) affirms the district court's holding in *Three Affiliated Tribes* that the various provisions and requirements of the ISDEAA apply with full force to services provided under that section. Therefore, these services enjoy the benefits Congress

conferred on tribes in the ISDEAA—from FTCA coverage to eligibility for federal sources of supply—in order to encourage tribes to expand and improve services to eligible tribal citizens and enhance services for the entire community. Among these ISDEAA benefits is lease funding under section 105(*l*).

In contrast, the case law cited by the IHS fails to provide any support for its analysis. *Navajo Nation* addressed whether a tribe could contract, under the ISDEAA, to carry out the Temporary Assistance for Needy Families ("TANF") program, a family welfare block grant for states and tribes administered by the Secretary of Health and Human Services. *Navajo Nation*, 325 F.3d at 1134 ("The specific question we address is whether an Indian tribe may administer TANF, a welfare grant program, through a self-determination contract under the ISDEAA."). The Navajo Nation argued that it could do so pursuant to section 102(a)(1)(E) of the ISDEAA, which allows tribes to enter into self-determination contracts for programs "for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed." *Navajo Nation*, 325 F.3d at 1135 (quoting 25 U.S.C. § 450f(a)(1)(E) (subsequently reclassified at 25 U.S.C. § 5321(a)(1)(E)). The Ninth Circuit determined that TANF is not contractible under that provision of the ISDEAA, because it is not a program "for the benefit of Indians because of their status as Indians." *Id*. at 1136, 1139. That holding is irrelevant to the question presented here, where there is no question of contractibility, as the services at issue are specifically deemed by Congress to fall under the contracting tribe's ISDEAA agreement. Indeed, the Ninth Circuit in *Navajo Nation* noted that Congress could have expressly permitted tribes to include TANF in their ISDEAA agreements, but chose not to, stating: "TANF references the ISDEAA only in two places and only in regard to the ISDEAA's fiscal

accountability provisions; notably absent is any reference to administration of the program under the ISDEAA." *Navajo Nation*, 325 F.3d at 1139 (footnotes omitted). Section 813, by contrast, specifically states that services provided under its terms "shall be deemed to be provided under the agreement entered into by the Indian tribe or tribal organization under the Indian Self-Determination and Education Assistance Act." 25 U.S.C. § 1680c(c)(2). The issue here is whether lease funding under section 105(*l*) is available for facility space used to carry out these services.

As for *Maniilaq I*, the district court in that case addressed the threshold question of whether a section 105(*l*) lease could be incorporated into an ISDEAA funding agreement even though, as the IHS argued, the lease is not itself a PFSA under the statute. *Maniilaq I*, 72 F. Supp. 3d at 237–39. The *Maniilaq I* court held that a section 105(*l*) lease can be incorporated into an ISDEAA funding agreement for a variety of reasons, including that a lease describes "the funds to be provided" and "the responsibilities of the Secretary" relating to the PFSAs included in the FA. *Id*. at 238 (quoting 25 U.S.C. § 458aaa(d)(2) (reclassified at 25 U.S.C. § 5385(d)(2)), identifying the terms that must be included in a self-governance funding agreement). The district court in *Maniilaq I* expressly declined to address the question of lease compensation under section 105(*l*), however, and it was never even asked to address the question of whether such compensation must be paid with respect to facility space for services provided under section 813(c). *Id*. at 231 n.4. The *Maniilaq I* holding, therefore, has no bearing on this case beyond establishing that the Tribe properly submitted its 105(*l*) lease proposal under the Title V final offer provisions of the ISDEAA.

B. Section 105(*l*) lease funding is governed by the section 105(*l*) implementing regulations, and is not limited by separate program funding amounts or restrictions.

The Decision Letter next argues that although Section 813 of the IHCIA authorizes ISDEAA contractors to provide services to non-beneficiaries, "Congress did not provide this expansion of authority with any corresponding expansion of authority to expend IHS appropriations for its implementation. Rather, the IHCIA, the [ISDEAA], and the annual appropriation act that funds the IHS all contemplate the recovery of actual costs from ineligible individuals." Ex. F (Decision Letter) at 6. Therefore, the IHS concludes, "Using a section 105(*l*) lease to fund the portion of the Health Center used to serve ineligible individuals is unreasonable and an unauthorized use of funds." *Id*.

The IHS does not cite any specific provision of the ISDEAA to support this conclusion. *See* Ex. F (Decision Letter) at 6. However, in section 105(*l*) of the ISDEAA Congress *did* in fact provide authority to expend IHS appropriations for facility leases to support services under section 813(c), which are deemed to be provided under the ISDEAA. None of the authorities cited by the IHS, including section 813(c)(3) of the IHCIA, contradict or overcome this clear statutory mandate and the express deeming clause in section 813(c)(2). Section 813(c)(3) of the IHCIA provides that "[p]ersons receiving health services provided *by the Service* under this subsection shall be liable for payment of such health services under a schedule of charges prescribed by the Secretary which, in the judgment of the Secretary, results in reimbursement in an amount not less than the actual cost of providing the health services." 25 U.S.C. § 1680c(c)(3)(A) (emphasis added). The IHS further cites to appropriations language, which simply states: "That in accordance with the provisions of the [IHCIA], non-Indian patients may be extended health care at all tribally administered or Indian Health Service facilities, subject to charges[.]" Consolidated Appropriations Act, 2019, Pub. L. No. 116-6; Ex. F (Decision Letter)

at 6. Nothing in either provision precludes section 105(*l*) lease funding for facility space used to carry out those services by ISDEAA tribal contractors, and indeed, section 813(c)(3) does not even, by its terms, apply to tribes and tribal organizations. The Decision Letter therefore fails to support its claim that a section 105(*l*) lease for facility space used to serve non-beneficiaries under section 813(c) would be an "unauthorized use of funds." *See* Ex. F (Decision Letter) at 6.

To the extent the IHS relies on the fact that Congress has not appropriated additional *program* funding to serve non-beneficiaries pursuant to section 813—which may be reasonably inferred from the statutory authority cited by the IHS in its Decision Letter—that is irrelevant to the question of funding for a facilities lease under section 105(*l*). The distinction between program funding and section 105(*l*) lease funding was made clear in *Maniilaq II*, the follow-up case to *Maniilaq I* that directly addressed the IHS's lease funding obligations under section 105(*l*). In that case, a discretionary leasing program for certain health facilities in remote Alaska villages provided only $30,921 to fund maintenance and operations costs for a clinic facility owned by the Maniilaq Association in Kivalina, Alaska. *Maniilaq II*, 170 F. Supp. 3d at 245–46. Congress had not designated any funding for the leasing program at issue since 1989, so the IHS allocated program funding out of its Hospitals and Clinics Budget Line Item on a discretionary basis. *Id*. at 245. However, the court held that Maniilaq was nevertheless entitled to full lease funding for the same facility under section 105(*l*) and its implementing regulations, and that the IHS could not use the section 106(a)(1) program amount to cap lease funding for the section 105(*l*) lease. *Id*. at 255. Acknowledging that "absent some separate statutory entitlement to funding, section 106(a)'s funding floor can double as a funding ceiling[,]" *id*. at 249, the *Maniilaq II* court held that in the context of a Section 105(*l*) lease "[t]he regulations codified at 25 C.F.R. §§ 900.69–900.74 determine the amount of compensation that must be paid . . . , and

therefore also determine the 'applicable funding level to which [the tribal contractor] is entitled'" under the ISDEAA. *Id*. at 255. The court therefore concluded that IHS failed to adduce the "controlling legal authority" or show by "clear and convincing evidence" that its rejection of the final offer was valid. *Id*. at 255.

In this case, there may be no section 106(a)(1) program funding amount at all associated with serving non-beneficiaries under Section 813, as such services are provided on a fee-for-service basis and the IHS is required to recoup its costs through those charges. 25 U.S.C. § 1680c(c)(3)(A). However, as established in *Maniilaq II*, section 105(*l*) creates an *independent* entitlement to lease funding for any facility owned and used by a contracting tribe for the administration and delivery of services under an ISDEAA agreement. This entitlement is not affected or overcome by funding or other limitations on associated program amounts, provided the programs are carried out under the ISDEAA. The Tribe's services to non-beneficiaries under section 813 are deemed to be carried out pursuant to the ISDEAA and are included in the Tribe's ISDEAA compact, and are therefore within the scope of services covered by section 105(*l*).

C. Section 813(c)(2) does not support the IHS's denial of the Tribe's section 105(*l*) lease proposal.

Finally, the Decision Letter argues that paying the full amount the Tribe requests would result in "denial or diminution of services" to eligible beneficiaries, in violation of section 813, because IHS would have to reprogram funds from elsewhere in its budget that otherwise would have been spent on eligible Indians. Ex. F (Decision Letter) at 7. Section 813(c)(2), however, entrusts the "denial or diminution" determination to the Tribe, not the IHS, as part of the decision whether to serve non-beneficiaries in the first place. 25 U.S.C. § 1680c(c)(2). The Tribe did make this determination, and it concluded that providing services to non-beneficiaries would not result in a diminution of services to IHS beneficiaries in the Service Area. On the contrary, the

Tribal Council determined that providing such services "will result in an improvement to the efficiency and quality of the health care delivery system and the health care delivered to beneficiaries in the Tribe's Service Area." Ex. A (Resolution #34-16 (Aug. 30, 2016)) at 1. This is a reasonable judgment given economies of scale, and in any event the IHCIA does not authorize IHS to substitute its own judgment for that of the tribal governing body. IHS's argument provides no support for the agency's declination of the Tribe's final offer lease proposal.

D. In the absence of any applicable statutory rejection criterion, the IHS was required to approve the Tribe's final offer, and mandamus and injunctive relief is appropriate to compel the Secretary to award the final offer.

Pursuant to the Title V final offer provisions, 25 U.S.C. § 5387(c)(1)(A), if the Secretary rejects a final offer he must do so on the basis of one of the four listed rejection criteria. If none of the statutory rejection criteria applies, the Secretary must approve the final offer. *Id.* The Secretary bears the burden of demonstrating, by clear and convincing evidence, that the grounds for rejecting a final offer are valid. 25 U.S.C. § 5387(d).

Though the IHS asserted in its decision letter that "the amount of funds proposed by [the Tribe], '. . . exceeds the applicable funding level to which [the Tribe] is entitled[,]" Ex. F (Decision Letter) at 1, 7, (the first of the listed rejection criteria under 25 U.S.C. § 5387(c)(1)(A)(i)), that determination was contrary to the ISDEAA and the Secretary's own regulations and cannot be sustained on appeal. Moreover, the IHS did not assert in the rejection letter that any of the remaining criteria apply. In the absence of any applicable rejection criterion, the Secretary was required to approve the Tribe's final offer.

This Court is explicitly authorized under the ISDEAA to:

> order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this

> chapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this chapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 5321(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

25 U.S.C. § 5331(a). *See also* 25 U.S.C. § 5391(a) ("For the purposes of section 5331 of this title, the term 'contract' shall include compacts and funding agreements entered into under this subchapter."). Since the IHS failed to identify the existence of any legitimate statutory grounds for rejecting the Tribe's final offer with respect to the section 105(*l*) lease proposal, mandamus and injunctive relief are appropriate to compel the Secretary to award and fund the final offer as part of the Tribe's FA. *See Fort McDermitt Paiute and Shoshone Tribe v. Azar, et al.*, Civ. No. 17-837 (TJK), 2019 WL 4711401 at *9 (D.D.C. Sept. 26, 2019) (memorandum opinion concluding that "the Court's conclusions lead to no suitable remedy other than the injunctive relief the Tribe requests—namely, an order requiring IHS to accept the recurring funding amount proposed in the Tribe's final offer"). Such relief is particularly appropriate here, where the parties have already agreed on the full operational costs associated with the lease and with the amount of the credit due to IHS for M&I and other facilities funding already included in the Tribe's funding agreement. Ex. F (Decision Letter) at 2.[4]

CONCLUSION

The Secretary's rejection of the Tribe's final offer proposal was contrary to the ISDEAA, the IHCIA, and the Secretary's own regulations. Because the Secretary cannot meet his burden of clearly demonstrating that his grounds for rejecting the Tribe's final offer are valid, the Tribe

[4] Again, the Tribe will accept a pro rata reduction of the agreed amount to account for the 833 square feet of the Health Center that the Tribe leases to the Olympic Medical Center, making the total FY 2018 lease compensation $462,997. *See supra* pages 14-15 and page 20 note 2.

respectfully requests that this Court grant the accompanying Motion for Summary Judgment in its favor.

Respectfully submitted,

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