UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMESTOWN S'KLALLAM TRIBE	)	
	)	
PLAINTIFF,	)	
	)	
v.	)	Civ. No. 1:19-cv-02665-JEB
	)	
ALEX M. AZAR, et al.,	)	
	)	
DEFENDANTS.	)	
	)	
	)	
	)	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff, the Jamestown S'Klallam Tribe ("Tribe"), proposed to enter into a lease with the Indian Health Service ("IHS") for the Tribe's Health Clinic under the authority of 25 U.S.C. § 5324(*l*). During negotiations, the parties agreed on reasonable compensation for the facility, as determined by the applicable leasing regulations: $476,123. But IHS then sought to impose a pro-rata discount that would reduce that amount to $66,322. The reduction was necessary, IHS argued, to account for services the Tribe provides to "non-beneficiaries" (primarily non-Indians) at the Health Clinic—even though these services are deemed as a matter of law to be within the scope of the Tribe's agreement with IHS under the Indian Self-Determination and Education Assistance Act ("ISDEAA"). The issue before the court is whether this non-beneficiary discount is allowable.

Resolution of that issue turns on the plain language of two statutes: (1) 25 U.S.C. § 1680c(c)(2), which authorizes the Tribe to provide health care services to non-beneficiaries and deems those services to be provided under the Tribe's ISDEAA agreement; and (2) 25 U.S.C. § 5324(*l*), which requires negotiation of full funding of reasonable costs for facilities owned by a tribe and "used by the Indian tribe or tribal organization for the administration and delivery of services under [the ISDEAA]." The Tribe serves both eligible Indians and non-beneficiaries at the Health Clinic under the ISDEAA, and the parties negotiated full funding of reasonable lease compensation for the facility, as required by the *Maniilaq II* decision.[1] The issue before the court is whether IHS's unilateral pro-rata reduction of the negotiated amount runs afoul of the statutory and regulatory scheme governing lease compensation. IHS has failed to meet its heavy

[1] *Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243 (D.D.C. 2016) ("*Maniilaq II*").

burden of proof to show that its rejection of the Tribe's final offer was justified. *See* 25 U.S.C. § 5387(d).

Defendants seek to evade the plain language of Congress and the Secretary's regulations, first, by substituting IHS's sense of what was "reasonable" compensation for the judgment of Congress that section 105(*l*) should apply to services to non-beneficiaries just as it does to beneficiaries. Defendants then argue that even though the statute deems services to non-beneficiaries to be provided under the ISDEAA agreement, on these facts the Tribe's services were not *really* provided under the ISDEAA agreement because of the way the Health Clinic revenues were accounted for. Again, the plain language of the statute precludes this argument. The Tribe does not have to "prove" that these services are "actually" provided under the ISDEAA agreement because they are *deemed* to be provided under the ISDEAA agreement as a matter of law under section 1680c(c)(2). Moreover, all revenues associated with services to non-beneficiaries were collected and expended in accordance with the requirements of the ISDEAA and the Tribe's funding agreement.

I. Defendants bear a heavy burden of proof.

In order to prevail, Defendants must demonstrate by "clear and convincing evidence the validity of the grounds for rejecting" the Tribe's final offer. 25 U.S.C. § 5387(d). This requires showing that the rejection letter, Defendants' Exhibit ("Defs. Ex.") A, "contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority," that the amount of compensation the Tribe proposed exceeded the applicable funding level. 25 U.S.C. § 5387(c)(1)(A). Defendants argue that the Tribe has "conflated" the procedural requirements of the final offer letter with the burden of proof on appeal and that "the rejection letter itself is not at issue, but rather the underlying basis of the rejection." Defs. Mem. Supp. Defs. Combined [1]

Opp'n to Pl's Mot. Summ. J. and [2] Defs. Cross Mot. Summ. J. 13-14, ECF No. 20 ("Defs. Mem."). But the underlying basis of rejection—the "specific finding" or the "controlling legal authority"—must be provided in the rejection letter. Courts must review agency decisions based on the reasoning underlying those decisions and not on the basis of post hoc rationalizations. *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 544 (D.D.C. 2014) (explaining that IHS argument not made in declination letter cannot be used as post hoc justification for agency's decision).

II. This case is controlled by the plain language of § 1680c(c)(2), which deems services to non-beneficiaries as provided under the ISDEAA, and § 5324(*l*), which requires negotiation of full compensation for facilities used to administer and deliver services under the ISDEAA.

This court has held that Section 5324(*l*) requires lease compensation, consisting of full funding of reasonable costs, when two conditions are met: (1) the facility is owned by the Tribe, which is not in dispute here, *see* Compl. ¶ 4, ECF No. 1; Answer ¶ 4, ECF No. 16; and (2) the facility is "used by the Indian tribe or tribal organization for the administration and delivery of services under [the ISDEAA]."[2] As discussed below, both these conditions are met with respect to the entire Health Clinic (less 883 square feet leased to a third party).

Section 813 of the Indian Health Care Improvement Act ("IHCIA"), as amended, specifies that services to non-beneficiaries are "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).

The Tribe's final offer proposed reasonable compensation for space used to provide services to both beneficiaries and non-beneficiaries under the Tribe's ISDEAA agreement. The

[2] 25 U.S.C. § 5324(*l*)(1); *Maniilaq II*, 170 F. Supp. 3d at 246.

amount was agreed to by both parties in negotiations on appropriate compensation for the entire facility. The Tribe's proposal conformed to the statutes quoted above, as well as the leasing regulations. IHS's later imposition of a non-beneficiary discount, however, did not.

A. The parties agreed on reasonable, non-duplicative compensation for the Health Clinic space.

The Tribe's proposal sought compensation for the entire Health Clinic since all of the Tribe's activities in that facility related to the administration and delivery of services under the ISDEAA agreement. (The Tribe later acknowledged that it leases 883 square feet of the Health Clinic to a third party, the Olympic Medical Center, and that this portion of the Health Clinic would need to be excluded from the 34,632 total square feet in a lease to IHS under section 105(*l*). Pl. Mem. Supp. Summ. J. 14-15, ECF No. 13-2.[3]) The Tribe initially proposed annual compensation of $981,402, based on the cost elements in the ISDEAA leasing regulations. *See* 25 C.F.R. § 900.70 (setting forth cost elements to be included in lease compensation); 25 U.S.C. § 5324(*l*)(2) (requiring compensation for "reasonable expenses that the Secretary determines, by regulation, to be allowable"). The parties entered into negotiations, and eventually agreed on $514,826. The parties further agreed on an offset of $38,703, reflecting duplicative costs already paid in the Tribe's funding agreement, resulting in annual lease compensation of $476,123. Reducing that amount by $13,126 for the lease of 883 to the Olympic Medical Center yields $462,997 as the annual amount for the IHS lease under § 5324(*l*).

At that point, the parties had completed the process set forth in the statute and regulations, as elucidated in *Maniilaq II*. Through negotiation, the parties had identified the

[3] The Tribe has proposed a pro rata reduction in compensation to reflect this exclusion. Pl. Mem. 20 n.2.

reasonable compensation based on the cost elements in the regulations, and the parties had eliminated duplicative costs. But IHS then insisted on an additional step not contemplated or authorized by the statute and regulations: imposing the non-beneficiary discount. The agency repeats that the discount is a "reasonable" step, in the agency's judgment. But that judgment is foreclosed by the plain statutory language, and the agency is not permitted to rewrite the ISDEAA and IHCIA—or even its own regulations—to conform to its own opinions about reasonableness. Section 5324(*l*) requires compensation for space used to carry out an ISDEAA agreement. Section 1680c(c)(2) deems services to non-beneficiaries to be provided under the ISDEAA agreement. Therefore, the entire Health Clinic (less the 883 feet of non-ISDEAA space) qualifies for 105(*l*) lease compensation. IHS was not entitled to impose its *ultra vires* non-beneficiary discount under the cover of "reasonableness."

There is no dispute that the agreed-on amount of $476,123—less a small additional offset for the non-ISDEAA space—is reasonable if the Tribe's reading of the statutes is correct. As shown above, the statutes require compensation for the space employed in administering and providing services under the ISDEAA, so the Tribe is entitled to summary judgment.

B. The IHS's pro rata reduction lacks any statutory or regulatory warrant.

Defendants argue that IHS's proposal of $66,322 was permissible because "the method applied by IHS to establish lease compensation is based on the leasing regulations." Defs. Mem. 1 (citation omitted); *see also id*. at 17-18. But the regulations require compensation for space used to carry out ISDEAA agreements, and they do not incorporate the "supportable space" formula that IHS used to generate its pro rata reduction. This formula derives not from the ISDEAA leasing regulations but from a chapter in a manual produced by the IHS Office of Environmental Health and Engineering ("OEHE"). Defs. Ex. N. This chapter establishes

guidelines for IHS "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*. § 77-1.1.A ("Purpose"). This chapter does not purport to apply to 105(*l*) lease compensation, which is distinct from M&I and equipment funding and even comes from a different appropriation account: the IHS "Services" appropriation rather than the "Facilities" appropriation account. *See, e.g.*, Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 248 (2019) (appropriating $36,000,000 for leases of facilities carrying out ISDEAA agreements);[4] *id*., 133 Stat. 249 (appropriating, to Indian Health Facilities account, funding for "construction, repair, **maintenance, improvement, and equipment** of health and related auxiliary facilities") (emphasis added).

More important, the ISDEAA expressly states that tribes "shall not be subject" to such agency manuals unless expressly agreed to by the tribe. 25 U.S.C. § 5397(e). That is not the case here. *See* Defs. Ex. D (ISDEAA Compact of Self-Governance); Defs. Ex. E (FY 2015-2017 funding agreement, which remained in effect in FY 2018 under 25 U.S.C. § 5385(e)).

In *Maniilaq II*, IHS attempted to impose a similar IHS circular to govern lease compensation. 170 F. Supp. 3d at 245 (discussing Alaska Area Native Health Service Circular 91-75 (1991)). The court rejected this approach, holding that the leasing regulations "determine the amount of compensation that must be paid under a section 105(l) lease." *Id.* at 255; *id*. at n.8 (rejecting IHS's proposed lease compensation "based on the factors set out in the Secretary's 1991 circular"). This court should also reject Defendants' attempts here to impose an agency circular with no grounding in the controlling law and regulations.

[4] *See also* Defs. Ex. C (Indian Health Service Services Appropriation & ISDEAA § 105(*l*) Lease Costs).

Despite IHS's attempt to import an agency policy manual to buttress its sense of what is "reasonable," IHS is bound by the statute and leasing regulations instead. Those authorities do not distinguish between services to beneficiaries and non-beneficiaries; rather, they require compensation for facilities used to provide services "under the Act." *E.g.*, 25 C.F.R. § 900.69; *id*. § 900.70. IHS's decision to refuse compensation for facility space used to support services deemed by law to be provided under the ISDEAA was unlawful and should be vacated.

C. IHS's pro rata reduction is contrary to Maniilaq II.

IHS claims that its "supportable space" discount is consistent with "the framework set forth in *Maniilaq II*," Defs. Mem. 19, but nothing in that decision supports the unilateral imposition of an extra-regulatory formula to drastically reduce the reasonable compensation negotiated by the parties.

As Defendants acknowledge, "[u]nder *Maniilaq II* the applicable funding level is determined by section 105(*l*) and its implementing regulations." Defs. Mem. 17 (citing *Maniilaq II*, 170 F. Supp. 3d at 251). Compensation must be reasonable and non-duplicative, and is subject to negotiation by the parties. In Defendants' words, "*Maniilaq II* interpreted the applicable law as providing a framework for negotiation, not a one sided arrangement in which a Tribe can propose a lease that the Secretary must accept—no questions asked." Defs. Mem. 16. Despite Defendants' gratuitous and inaccurate suggestion that the Tribe argued for such a "one sided arrangement," the parties here conducted extensive negotiations. The Tribe ultimately agreed to reduce its compensation from $981,402 to $514,826, and to accept an additional offset of $38,703 as duplication, resulting in total compensation of $476,123. Defs. Ex. A, at 1-2. This is where IHS departed from the framework of *Maniilaq II*, which is anchored in the statute and

regulations, by importing a "supportable space" formula from the OEHE manual to deny funding for space associated with the provision of services to non-beneficiaries.

Nothing in the *Maniilaq II* decision supports such a unilateral and "one sided" departure from the regulatory framework. In summarizing its holdings, the court said that Maniilaq had put forward a reasonable argument that the regulations "fully determine" the amount of compensation, while the Secretary claimed that these same regulations "commend the amount of lease compensation to her discretion" subject only to the floor provided by 25 U.S.C. § 5324(a)(1). *Maniilaq II*, 170 F. Supp. 3d at 254. "Mindful of its obligation to construe the Act and its regulations 'liberally in favor of' Maniilaq," the court granted summary judgment in its favor. "The 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 [Maniilaq] is entitled.'" *Id.* at 255. By reaching beyond the regulations to an un-promulgated agency manual, IHS departed from the *Maniilaq II* framework, and its resulting decision must be overturned.[5]

III. The Tribe's proposal is reasonable and accords with the policies underlying the ISDEAA.

IHS argues that it is not reasonable for the agency to provide compensation for space used for the "General Public." Defs. Mem. 20. As discussed above, the plain language of the controlling statutes requires payment of facility costs associated with carrying out the ISDEAA agreement for beneficiaries and non-beneficiaries alike. However unreasonable this may seem to

[5] *Maniilaq II* does not require the parties to negotiate the reasonableness of applying the deeming language in § 1680c(c)(2), which is a matter of statutory construction, as informed by the ISDEAA rules of construction at 25 U.S.C. § 5392(f). It is not a matter to be determined by the parties through negotiation.

IHS, it is consistent with the letter of the ISDEAA and the policies underlying it. In deeming services to non-beneficiaries to be provided under the ISDEAA agreement, Congress encouraged such services by extending to them a number of critical benefits afforded by the ISDEAA.

A. The legislative history of the "deeming" clause indicates Congress intended Tribes to be able to generate revenues by serving non-beneficiaries under the ISDEAA.

As part of the IHCIA reauthorization in 2010, Congress added the deeming language to 1680c(c)(2). Prior to reauthorization, the statute contained two considerations that had to be met before the IHS or a tribe could serve non-eligible individuals under § 1680c. The first was that doing so would not deny or diminish services for eligible Indians. That consideration remains. The second was that the non-eligible individuals had no alternate resources for health care. In other words, the IHS or tribal facility was the only facility reasonably available for the non-Indians. This consideration was deleted from § 1680c(c)(1) and (2) in the reauthorized IHCIA. The statute now deems the services provided at tribally operated facilities to non-beneficiaries under § 1680c(c)(2) to be provided under the ISDEAA as a matter of law; the issue is not one for factual determination by IHS or a court. The benefits of the ISDEAA apply to these services—benefits like Federal Tort Claims Act (FTCA) coverage, 25 U.S.C. § 5321(d),[6] and access to federal sources of supply, 25 U.S.C. § 5324(k). Access to lease compensation under section 105(*l*), 25 U.S.C. § 5324(*l*), is no different.

Removing the no-alternative-resource consideration and adding the deeming language allowed Tribes to leverage their ISDEAA agreements, and ISDEAA benefits, like FTCA coverage and 105(*l*) leasing, to serve non-eligible individuals residing in the tribal facility's

[6] Incorporated into Title V by 25 U.S.C. § 5396(a).

service area. Doing so does not lead to a "windfall" unintended by Congress, but rather a purposeful opportunity for tribes to generate additional revenues that help supplement IHS-provided funding to enhance health care to Indian beneficiaries.

It is critical to underscore that revenues from services to non-beneficiaries must be spent on the Tribe's health care delivery system. *See* 25 U.S.C. § 5388(j) (requiring that all "program income" earned by a tribe must be treated as supplemental to IHS funding in the funding agreement, and must not result in any offset or reduction in IHS funding); Gange Decl. ¶ 7 (affirming that "all program income from the Clinic has been used to provide health care and to cover associated administrative costs"). These additional resources allow tribes to provide more and better health care services to eligible Indians as well as other community members.

B. Services to non-beneficiaries are "subject to charges," but those fees are not required to cover all facilities costs, and lease funding is not duplicative.

Defendants argue that the Tribe must recoup all costs of serving non-beneficiaries, citing the recurring appropriations act language stating that "non-Indian patients may be extended care at tribally administered . . . facilities, subject to charges . . . ." Defs. Mem. 20. Defendants extrapolate this "subject to charges" language into a "statutory full cost recovery mandate," *id*., but that is an unwarranted stretch. The Tribe does charge non-beneficiaries for care, but these services also require additional facility space and expense. For private payers the Tribe can use its fee schedule, but for patients with insurance coverage payment is limited by contracts with insurers. Gange Decl. ¶ 5. Total expenses for the health care program consistently exceed total revenues, requiring tribal funds to cover costs such as depreciation on the facility. Gange Decl. ¶¶ 6- 7; *id*. Attach. 1 (health program funding balance showing "Accumulated Depreciation" of $1,998,527.61 through September 20, 2017, and "FY 18 Depreciation" of $225,938.00). IHS

agreed that depreciation of $217,937.80 was reasonable and justified for the Clinic as a whole in FY 2018. Defs. Ex. Q, at 4.

Section 1680c(c)(3)(A) says that, when serving non-beneficiaries, *IHS* must provide such services "under a schedule of charges [that] . . . results in reimbursement in an amount not less than the actual cost of providing the health services." This requirement pointedly does not apply to tribes and, in any event, does not require recovery of facilities costs. There is nothing in the law applicable to tribes that requires fees to cover not only the costs of services, but also facilities costs such as depreciation, utilities, and insurance. Payment of these costs through 105(*l*) lease funding would not be duplicative.[7]

C. The services at issue are provided under § 1680c(c)(2), and thus under the ISDEAA.

Defendants state that "[w]hether a Tribe's services to non-beneficiaries are carried out under § 1680c appears to be a question of first impression for any court." Defs. Mem. 22. It is an easy question, answered by the text of § 1680c(c)(2). The Tribe has enacted a resolution that makes clear that the provision of services to non-beneficiaries will not result in the denial or diminution of health care services to eligible Indians—on the contrary, it would improve and enhance those services. By law, these services are "deemed to be provided under the agreement entered into by [the Tribe] under the [ISDEAA]." 25 U.S.C. § 1680c(c)(2).

Despite this clear language, Defendants posit that the Tribe is not "actually" serving non-beneficiaries under the ISDEAA and the agreement with IHS. "Jamestown has presented no

[7] IHS says that the "statutory full cost recovery mandate" is also incorporated into the Tribe's resolution authorizing services under § 1680c(c)(2), but the resolution, like the statutes, refers to "the actual costs of providing *such services*," not facilities (emphasis added). Def. Mem. 20 (citing Def. Ex. R).

evidence that its services to non-beneficiaries are actually provided pursuant to the Compact or Funding Agreement." Defs. Mem. 21. This argument is unavailing. Not only does the Tribe have no such burden of proof, the statute by its own terms deems the services to be provided under the ISDEAA as a matter of law, so the issue is not one for factual determination by IHS or a court.

Even so, Defendants argue that "the evidence"—the Tribe's FY 2016 audited financial statements—demonstrates that the Health Clinic operates "outside ISDEAA" because the Tribe employs a "bifurcated accounting" system in which revenues from serving non-beneficiaries is tracked in a "proprietary fund." Defs. Mem. 15, 22-24; *see also* Defs. Ex. A. First, it is not clear how the Tribe's accounting for revenues from the services could change the fact that the services themselves are provided under the ISDEAA agreement. Second, the Tribe includes all direct activities of the Clinic operation in the Tribe's audit as a "proprietary" fund, because the Tribal government has directed that the Clinic be run like a business so that operations can be analyzed and decisions made based on results. Gange Decl. ¶ 3. Defendants' "evidence" is inconclusive and, more important, completely irrelevant to the status of services to non-beneficiaries under §1680c(c)(2).

Similarly, IHS argues that the Tribe treats program income generated through services to non-beneficiaries as "unrestricted," pointing to a balance sheet in the Tribe's audit where Clinic profits are combined with other revenues to produce the Tribe's "total net position" of $29,366,793.43. Defs. Mem. 23 (citing Defs. Ex. S, at 4, 11). But the inclusion of clinic revenues in a balance sheet does not "demonstrate[] that Jamestown is not providing services to non-beneficiaries pursuant to 25 U.S.C. § 1680c." Again, Defendants confuse accounting for the revenues after the fact with the status of the services themselves as deemed by the statute. Nor is

the Tribe "violating federal law requiring it to return those funds to the federal health program." Defs. Mem. 24. The Tribe expends all Clinic revenues *and more* on the health program. The Clinic regularly operates at a net loss, with the accumulated deficit through FY 2018 totaling $5,106,448.50. The Tribe covers these funding shortfalls with its own funds. Gange Decl. ¶ 7 and Attach 1. Any Clinic revenues transferred to the General Fund are more than repaid from that fund.

D. The FTCA provides no guidance in construing the controlling statutes.

In a further confusion of these issues, Defendants suggest that the court should look to FTCA cases as a guide to inquiring into whether the Tribe is "actually" serving non-beneficiaries under the ISDEAA. Defs. Mem. 22. As noted above, the FTCA is a good example of the benefits accruing to tribes thanks to the deeming clause of § 1680c(c)(2). There is no question that FTCA coverage, like 5324(*l*), applies to services the Tribe provides to non-beneficiaries under § 1680c(c)(2). The deeming language makes the ISDEAA applicable. In turn, § 5321(d) of the ISDEAA provides FTCA coverage by deeming the Tribe and its employees, for purposes of 42 U.S.C. § 233, to be part of the U.S. Public Health Service ("PHS") when providing medical services under the Tribe's ISDEAA agreement.[8] Subsection 233(a) makes the United States the exclusive defendant for tort claims arising from the performance of medical, surgical, dental, or related functions by any employee of the PHS while acting within the scope of his or her employment. Section 1680c(c)(2) also expressly extends FTCA coverage of non-medical torts to

[8] *See also* 25 C.F.R. § 900.200 ("Non-Indian individuals served under the contract whether or not on a fee-for-service basis, may assert claims under this Subpart"—i.e., Subpart M, Federal Tort Claims Act Coverage General Provisions); 25 C.F.R. § 900.186(b) (recommended contract clause stating that ISDEAA contractor's employee may "provide health services to non-IHS beneficiaries," either in the contractor's facilities or other facilities, and be protected by the FTCA); 42 C.F.R. § 137.220 (explaining that FTCA provisions of Title I statute and regulations extend to Title V agreements as well).

services to non-beneficiaries.[9] These are substantial benefits, as FTCA coverage makes comprehensive (and expensive) liability or malpractice insurance generally unnecessary. Given Congress's extension of FTCA coverage to services to non-beneficiaries, it is hardly unreasonable that 105(*l*) applies as well, despite IHS's opinion otherwise.

Beyond that, the FTCA has little relevance here, because the FTCA has a very different statutory framework than 5324(*l*). Nevertheless, Defendants suggest that FTCA cases support inquiring into whether the Tribe is "actually" serving non-beneficiaries under its ISDEAA agreement with the IHS despite the deeming language in § 1680c(c)(2). Defs. Mem. 22. Defendants cite *Shirk v. U.S. ex rel. Dep't of Interior,* 773 F.3d 999 (9th Cir. 2014) to support this argument. The question in the *Shirk* case was whether tribal police officers were acting within the scope of their employment in carrying out the Tribe's ISDEAA agreement with the Department of the Interior for law enforcement services when committing the allegedly tortious action. 773 F.3d at 1000-08. If they were, they would be deemed by § 314 of Public Law 101-512 to be employees of the Bureau of Indian Affairs (BIA), the federal government would step in as the defendant, and the tribe and its employees would be dismissed from the case. *Id.* at 1003. This is a deeming process unique to the FTCA and distinct from the section 1680c(c)(2) deeming provision making the ISDEAA generally applicable.[10]

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[9] "The provisions of section 314 of Public Law 101-512 (104 Stat. 1959), as amended by section 308 of Public Law 103-138 (107 Stat. 1416), shall apply to any services provided by the Indian tribe or tribal organization pursuant to a determination made under this subparagraph." 25 U.S.C. § 1680c(c)(2). Section 207 of the IHCIA, 25 U.S.C. § 1621f, allows tribes and tribal organizations to keep section 813 charges and authorizes their use under section 401 of the IHCIA, 25 U.S.C. § 1641.

[10] Section 314 provides in pertinent part that "[A]n Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees are deemed employees of the

The *Shirk* court applied a "two-step approach" to determine if the FTCA applied under § 314: (1) determine whether the alleged activity was encompassed within the scope of the ISDEAA agreement; and (2) "decide whether the allegedly tortious action falls within the scope of the tortfeasor's employment under state law." *Id*. at 1006. The court explained: "An employee's conduct is covered by the FTCA if, while executing his contractual obligations under the relevant federal contract, his allegedly tortious conduct falls within the scope of employment as defined by state law." *Id.* at 1005. The Defendants argue that the *Shirk* decision provides the legal framework for requiring that the Tribe show that it is actually carrying out its ISDEAA agreement when serving non-Indians, despite the deeming provision in § 1680c(c)(2). But determining whether the FTCA applies to a particular claim under the deeming provision in § 314 involves an entirely different statutory scheme, which does not apply to § 1680c(c)(2). Because neither the district court nor the parties provided the Ninth Circuit with an analysis of the facts in relation to Arizona scope-of-employment law, the appeals court declined to issue a ruling and remanded to the lower court. *Shirk*, 773 F.3d at 1007–08.

By contrast, section 5324(*l*) contains no such secondary deeming process. The factual predicate for leasing authority is straightforward and written into the federal statute itself: the Tribe must (1) hold an ownership, leasehold, or trust interest in the facility; and (2) use it to deliver or administer services under the ISDEAA. 25 U.S.C. § 5324(*l*). Here the first prong is satisfied as a matter of undisputed fact, and the second is deemed to be so as a matter of law

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Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement: *Provided*, That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any Indian tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act[.]"

under § 1680c(c)(2). The FTCA illustrates why Congress chose to deem services to non-beneficiaries as provided under the ISDEAA, but provides no guidance for applying § 1680c(c)(2) generally, let alone § 5324(*l*).

IV. The proper remedy is to order IHS to approve the lease as proposed in the Tribe's final offer.

Because IHS did not meet its burden to show, by clear and convincing evidence, that one of the final offer rejection criteria applied, the court should employ the remedy spelled out in the ISDEAA for improper declinations or rejections of final offers: "immediate injunctive relief to reverse a declination finding" by directing IHS to approve the lease as proposed in the final offer, less a small adjustment to remove funding for the 883 square feet of non-ISDEAA space. 25 U.S.C. § 5331(a); Pl. Mem. 32-33. With this adjustment, annual compensation would be $462,997. *See* Pl. Mem. 20 n.2.

Remand would be pointless, as the parties have already completed the reasonableness and duplication review. *See* Defs. Ex. A, at 1-2 (summarizing negotiations). The parties 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. Defs Ex. A, at 2. The court's decision on the pure questions of law posed here will leave nothing more for the agency to do but adjust the amount of annual compensation due under the lease. Remand is neither necessary nor appropriate.

V. Conclusion

The statutes and regulations are clear, and Defendants may not rewrite them by substituting the OEHE manual and their judgments of what is reasonable. Defendants have failed to meet their burden under the ISDEAA, and the Tribe is entitled to summary judgment.

Respectfully submitted,

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DATED: May 11, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this May 11, 2020, I caused service of the foregoing document by filing it with the clerk of the Court via the CM/ECF system, which will send a Notice of Electric Filing to all parties with an e-mail address of record who have appeared and consented to electronic service, including Diana Viggiano Valdivia, Attorney for Defendants. To the best of my knowledge, all parties to this action receive such notices.

By: s/ *Lisa M. Meissner*
Lisa M. Meissner