# 105(*l*) Leasing

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# *Overview*

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3. *Maniilaq v. Burwell* Cases
4. Implementation of *Maniilaq* Decisions
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# *History of Funding for IHS/BIA Facilities*

- If IHS/BIA provide services directly they have adequate facilities.
- Tribal Facilities used for BIA/IHS FA programs are badly underfunded.
- Chronic problem that IHS/BIA created by not asking for enough appropriations.
- Section 105(*l*) of the ISDEAA in statute for decades.

# *Section 105(l) of the ISDEAA*

(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 Act.

(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.**

# *Maniilaq I: Ambler Clinic*

- Case was against the IHS.
- Maniilaq proposed full lease compensation for Ambler clinic based on the cost elements in the implementing regulations.
- Maniilaq proposed to incorporate lease and compensation into Funding Agreement.
- IHS rejected Maniilaq's final offer.

# *Maniilaq I: Ambler Clinic*

- Maniilaq prevailed on procedural grounds (IHS did not respond to the final offer on time) and the Ambler clinic is fully funded.
- The case established that:
  - 105(*l*) leases can be included in ISDEAA agreements, and
  - The final offer process applies to 105(*l*) proposals.
- The case did not settle whether 105(*l*) requires full compensation.

# *Maniilaq II: Kivalina Clinic*

- Maniilaq proposed a second lease for the Kivalina clinic.
- IHS again refused and rejected Maniilaq's final offer; Maniilaq challenged the decision in federal court.
- The issue was whether section 105(*l*) and its regulations require full compensation for the reasonable, non-duplicative costs of operation and maintenance of a clinic leased to IHS.

# *Maniilaq II: Kivalina Clinic*

- Court decided statute and regulations are ambiguous, as they use both mandatory and discretionary language (“shall” and “may”).
- Court construed the statute and regulations to benefit tribes, as required by the ISDEAA and the Indian canons of construction.
- Section 105(*l*) and the regulations require full funding of leases.
- Court orders parties to negotiate compensation: result is a funding increase of about 800% for the Kivalina clinic.

# *Implications of Maniilaq I and II*

- Section 105(*l*) leases are mandatory upon request of Indian tribe or tribal organization.
- Leases must be fully funded according to the regulatory criteria.
- IHS may decline unreasonable or duplicative costs.
- IHS did not appeal the ruling.

# *IHS Implementation of Maniilaq I and II Decisions*

http://bit.ly/IHSLeaseSupportingDocumentation

- Requirements for Section 105(l) to apply:
  - (1) Tribe must hold title to, have a leasehold interest in, or a trust interest in, a facility.
  - (2) The facility must be used for the administration and delivery of services under ISDEAA
- Options Available For Proposed compensation at 25 C.F.R. § 900.74:
  - FMR
  - Costs incurred
  - Combination of FMR and cost incurred
- Reasonable and non duplicative

# *Steps for Preparing and Submitting a Lease Proposal*

1. Determine which of the three options for lease compensation to use.
2. Develop and submit the lease proposal and amendment to FA.
3. Negotiate costs with the IHS.
4. Enter into a lease with IHS—or, if no agreement is reached, submit a final offer/declination proposal.

# *Financial Implications of Maniilaq I and II Decisions*

- Opportunity for tribes to secure significant increases in facilities funding.
- Major impact on IHS and BIA budget.
- Administration's first instinct was to ask Congress to change the law and undermine the *Maniilaq* decisions.
- President's FY 2018 Budget Request: lease compensation limited to 106(a)(1) amount and any additional amount committed entirely to Secretary's discretion.
- Provision was not included in final FY 2018 or FY 2019 Appropriations, nor has it appeared in any drafts of the FY 2020 appropriations bills.

# *FY 2017 and 2018 Funding*

- In FY 2017 and 2018, Section 105(*l*) lease compensation came from $11 million in tribal clinics appropriation.
  - IHS allocated $5 million of this to cover 105(*l*) leases and $6 million to provide VBC program funding.
- In July 2018, IHS issued a letter initiating tribal consultation on how to cover a $13 million shortfall in 105(*l*) lease funding.
  - IHS proposed to reprogram funding from inflation increases, which denied tribes needed program increases to keep pace with the cost of living.
- September 2018 – IHS announced it would need to reprogram $25 million to cover 105(*l*) leases.

# *FY 2019 Funding*

- Initial appropriations bills contained only modest increases for tribal clinic leases - despite a growing recognition that far more was needed.
- In a Senate Interior Appropriations Subcommittee hearing on the FY 2019 IHS budget, Subcommittee Chair Lisa Murkowski discussed these issues with the Acting IHS Director.
- With 105(*l*) leasing expanding from Alaska to the lower 48, IHS characterized the financial impact "increasing exponentially over time."
- Senator Murkowski agreed, stating in the FY 2019 budget hearing that "the budgetary impact of this [*Maniilaq*] decision nationwide is going to blow things out of the water."

# *FY 2019 Appropriation*

- As 105(*l*) leasing has expanded, so has appropriated funds for clinic leases.
- Funding has grown from $11 million in FY 2017 and FY 2018 to $36 million in FY 2019.
- But appropriation funds are still not sufficient.
- IHS will need to reprogram funding for FY 2019 from other discretionary budget categories.
- It isn't clear as of right now exactly how much IHS will need to reprogram for FY 2019 and what funds they plan to reallocate.

# *FY 2020 Appropriations*

- House recommended $53 million for 105(*l*) leases and village built clinic leases ($17 million over FY 2019).
- Senate recommended $97 million.
- The Senate marked its bill up several months later than House and it includes the most recent cost estimate.
  - The Senate recommendation was based on IHS's report that it had received over 170 lease proposals worth $97 million.
- It is not clear at this point how much of that cost would be attributable to FY 2019 versus FY 2020 appropriations

# *FY 2020 Appropriations*

Senate Report:

- directs the IHS to communicate regularly with the Committee on estimates of the costs of Section 105(*l*) leases;
- directs IHS to report on challenges to budgeting for the costs and on the rationale behind its decision to have 12-month lease agreements instead of leases on a prospective basis;
- directs IHS, DOI, DOJ, and OMB to formulate budget strategies and to discuss whether "in light of the *Maniilaq* decisions, these funds should be reclassified as an appropriated entitlement"; and
- directs that Section 105(*l*) lease requests should be accounted for separately from the village built clinics in the FY 2021 budget request.

# *The Solution:*
# *Separate Indefinite Appropriations*

- The House Report has also directed IHS to consider whether it would be appropriate to fund 105(*l*) lease costs like CSC with a separate, indefinite appropriation.
- This would ensure full funding of lease costs while protecting program funding from the annual threat of reprogramming.
- Section 105(*l*) lease costs share much in common with CSC: the legal mandate to pay in full, the difficulty in projecting the full need, and their central role in health program administration.

# *Current Challenges: Jamestown S'Klallam Tribe Litigation*

- Jamestown S'Klallam Tribe is challenging IHS's decision to reduce lease compensation by refusing to pay for space allocable to serving non-beneficiaries.
- IHS has insisted on a pro rata reduction to reflect that the Tribe serves many non-beneficiaries. IHS used its "supportable space" methodology from the OEHE Handbook to determine that the Tribe only needed 20.4% of the 34,632 square-foot Health Center to serve beneficiaries. Therefore, IHS would only pay 20.4% of the agreed-on operational costs.
- Tribe has legal right to serve non-beneficiaries under section 813 of the IHCIA.
- The Tribe recently challenged IHS's decision in court.

# ***Questions?***

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