

**Bristol Bay Area Health Corporation**

P.O. Box 130  
Dillingham, Alaska 99576

Robert J. Clark, President/CEO ([rclark@bbahc.org](mailto:rclark@bbahc.org))

Testimony for the Senate Committee on Indian Affairs' Hearing on S. 2421

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The Bristol Bay Area Health Corporation (BBAHC) is pleased to submit this testimony in support of S. 2421, legislation introduced by Senators Murkowski and Sullivan which would require the Secretary of Health and Human Services to transfer certain Indian Health Service (IHS) property to BBAHC by warranty deed. The property is critically important to BBAHC's construction and operation of a new free-standing dental clinic. The BBAHC is in the process of constructing a new, modern, up-to-date facility that will be available later this year to provide significantly more dental services to BBAHC's 8,000 member service population. We note that Representative Don Young has introduced a companion bill, HR 4289, and we thank our entire delegation for their support on this matter. Both bills also include a warranty deed transfer provision for the Tanana Tribal Council.

BBAHC has for many years carried out a comprehensive health care delivery program at the federally owned Kanakanak Hospital compound in Dillingham. BBAHC has done so on behalf of its member villages in accordance with the Alaska Tribal Health Compact and Funding Agreements with the IHS under the Indian Self-Determination and Education Assistance Act (ISDEAA). These services include dental care.

The ISDEAA and BBAHC's agreements with the IHS give BBAHC the right to acquire fee title to all federal property that BBAHC uses to provide these health services. BBAHC requested that IHS transfer legal title to a 1.474 acre parcel of land within the Kanakanak Hospital compound so that BBAHC could use non-IHS funds to construct a new, larger dental facility on the transferred parcel. While the IHS agreed to the transfer, IHS treated the transfer as a discretionary donation of excess property under the Federal Property and Administrative Services Act (FPASA) and GSA regulations. Using FPASA and GSA rules allows the IHS to transfer the property by quitclaim deed and include whatever terms and conditions IHS wants in the deed.

The BBAHC reluctantly accepted the IHS quitclaim deed transferring title to the property in order not to miss last year's construction season. However, the quitclaim deed includes extensive terms and conditions that give IHS the right to approve mortgaging, encumbering, leasing, or otherwise transferring any interest in the property, or making major changes or capital improvements in the property. Any breach of these terms and conditions, such as not getting IHS permission for making changes in the property, triggers an immediate right of entry and reversion of title back to the IHS. These terms and conditions are characterized in the deed as covenants running with the land. Thus, for example, if BBAHC were to approach a bank for a construction or improvement loan, and as a consequence would have to enter into a deed of trust to secure the loan, IHS must give its permission. Even if BBAHC were to use its own funds or

other third party funds, the quitclaim deed requires IHS permission for any major change or improvement in the property.

IHS justifies its position by claiming that all transfers of federal property to ISDEAA contractors and compactors must be made under the FPASA and GSA rules. This position, however, is contrary to the GSA regulations at 41 C.F.R. § 102-75.110, exempting transfers of real property from the FPASA and GSA rules if the transfer is authorized by a special statute that directs or requires an Executive agency to transfer or convey title to specifically described real property in accordance with the provisions of the statute.

The ISDEAA is such a special statute. Sections 105(f) and 512(c) of the ISDEAA provide that the Secretary may donate excess property to Indian tribes and tribal organizations, “except that” title to real property furnished by the Federal Government for use in the performance of an ISDEAA agreement shall, unless requested otherwise, vest in the appropriate tribe or tribal organization. Thus, the ISDEAA requires the transfer of this specifically described property by vesting title in tribes and tribal organizations and specifically making this vesting of title an exception to the donation of excess property under GSA rules. S. 2421 is necessary to overcome IHS’ insistence that these transfers be treated as discretionary donations of excess property under the FPASA and GSA rules.

S. 2421 at Section 2 requires the Secretary of Health and Human Services to transfer the property for the new dental facility to BBAHC by warranty deed within 180 days of enactment. The transfer by warranty deed will supersede and render of no future effect the previous quitclaim to the property. Further, the conveyance of the property by warranty deed shall not: (1) require any consideration from the BBAHC for the property; (2) impose any obligation, terms, or condition on the BBAHC; and (3) allow any reversionary interest of the United States in the property. S. 2421 also includes language to protect BBAHC against any and all liability under Federal or State law for clean-up or other remedial action occasioned by the presence of environmental contamination or hazards, including petroleum-related hazardous substances.

The Secretary will retain any and all liability for environmental contamination in existence on the property prior to the transfer of title to BBAHC. Language is included to provide the Secretary with an easement and access to the property as reasonably necessary to satisfy any retained obligation or liability of the Secretary. Finally, the Secretary must comply with the notice of hazardous substance activity and warranty requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

There is precedent for S. 2421. Public Law 114-56, enacted on September 30, 2015, requires the transfer of certain property to the Yukon Kuskokwim Health Corporation using virtually the same language as S. 2421 except for the description of the property to be transferred. In addition, Congress has enacted property transfers via warranty deed from IHS to the Maniilaq Association (PL 112-263) and the Alaska Native Tribal Health Consortium (PL 113-68).

We thank you for scheduling a hearing on this legislation to transfer via warranty deed the 1.474 acre parcel of land site of our dental clinic. We urge that action be expedited on this bill, as the clock is ticking on this election year shortened session of Congress.