

### CIVIL COVER SHEET

JS-44 (Rev. 3/13 DC)

<b>I. (a) PLAINTIFFS</b> Eastern Band of Cherokee Indians  (b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF <u>88888</u> (EXCEPT IN U.S. PLAINTIFF CASES)	<b>DEFENDANTS</b> United States of America; Kathleen Sebelius (in her official capacity as Secretary, HHS); Yvette Roubideaux (in her official capacity as Director, Indian Health Service  COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____ (IN U.S. PLAINTIFF CASES ONLY) <small>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED</small>																																										
(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) Caroline P. Mayhew; Hobbs Straus Dean & Walker LLP 2120 L St. NW Suite 700 Washington, DC 20037 Phone: (202) 822-8282	ATTORNEYS (IF KNOWN)																																										
<b>II. BASIS OF JURISDICTION</b> (PLACE AN x IN ONE BOX ONLY)	<b>III. CITIZENSHIP OF PRINCIPAL PARTIES</b> (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) <b>FOR DIVERSITY CASES ONLY!</b> <table style="width: 100%; border: none;"> <thead> <tr> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> </tr> </thead> <tbody> <tr> <td> <input type="radio"/> 1 U.S. Government Plaintiff                             <input type="radio"/> 3 Federal Question (U.S. Government Not a Party)                         </td> <td style="text-align: center;"><input type="radio"/> 1</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td>Citizen of this State</td> <td style="text-align: center;"><input type="radio"/> 4</td> <td style="text-align: center;"><input type="radio"/> 4</td> </tr> <tr> <td> <input checked="" type="radio"/> 2 U.S. Government Defendant                             <input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III)                         </td> <td style="text-align: center;"><input type="radio"/> 2</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="radio"/> 5</td> <td style="text-align: center;"><input type="radio"/> 5</td> </tr> <tr> <td></td> <td style="text-align: center;"><input type="radio"/> 3</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="radio"/> 6</td> <td style="text-align: center;"><input type="radio"/> 6</td> </tr> <tr> <td></td> <td></td> <td></td> <td>Incorporated or Principal Place of Business in This State</td> <td></td> <td></td> </tr> <tr> <td></td> <td></td> <td></td> <td>Incorporated and Principal Place of Business in Another State</td> <td></td> <td></td> </tr> <tr> <td></td> <td></td> <td></td> <td>Foreign Nation</td> <td></td> <td></td> </tr> </tbody> </table>		PTF	DFT		PTF	DFT	<input type="radio"/> 1 U.S. Government Plaintiff <input type="radio"/> 3 Federal Question (U.S. Government Not a Party)	<input type="radio"/> 1	<input type="radio"/> 1	Citizen of this State	<input type="radio"/> 4	<input type="radio"/> 4	<input checked="" type="radio"/> 2 U.S. Government Defendant <input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III)	<input type="radio"/> 2	<input type="radio"/> 2	Citizen of Another State	<input type="radio"/> 5	<input type="radio"/> 5		<input type="radio"/> 3	<input type="radio"/> 3	Citizen or Subject of a Foreign Country	<input type="radio"/> 6	<input type="radio"/> 6				Incorporated or Principal Place of Business in This State						Incorporated and Principal Place of Business in Another State						Foreign Nation		
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#### IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

<input checked="" type="radio"/> <b>A. Antitrust</b>  <input type="checkbox"/> 410 Antitrust	<input type="radio"/> <b>B. Personal Injury/Malpractice</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Medical Malpractice <input type="checkbox"/> 365 Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Product Liability	<input type="radio"/> <b>C. Administrative Agency Review</b>  <input type="checkbox"/> 151 Medicare Act  <u>Social Security</u> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))  <u>Other Statutes</u> <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)	<input type="radio"/> <b>D. Temporary Restraining Order/Preliminary Injunction</b>  Any nature of suit from any category may be selected for this category of case assignment.  *(If Antitrust, then A governs)*
<input checked="" type="radio"/> <b>E. General Civil (Other)</b> <b>OR</b> <input type="radio"/> <b>F. Pro Se General Civil</b>			

<u>Real Property</u> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent, Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property  <u>Personal Property</u> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<u>Bankruptcy</u> <input type="checkbox"/> 422 Appeal 27 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157  <u>Prisoner Petitions</u> <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Conditions <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement  <u>Property Rights</u> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark  <u>Federal Tax Suits</u> <input type="checkbox"/> 870 Taxes (US plaintiff or defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609	<u>Forfeiture/Penalty</u> <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other  <u>Other Statutes</u> <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 430 Banks & Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions <input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organization	<input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)
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<input type="radio"/> <b>G. Habeas Corpus/ 2255</b>  <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee	<input type="radio"/> <b>H. Employment Discrimination</b>  <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation)  *(If pro se, select this deck)*	<input type="radio"/> <b>I. FOIA/Privacy Act</b>  <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act)  *(If pro se, select this deck)*	<input type="radio"/> <b>J. Student Loan</b>  <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> <b>K. Labor/ERISA (non-employment)</b>  <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> <b>L. Other Civil Rights (non-employment)</b>  <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education	<input checked="" type="radio"/> <b>M. Contract</b>  <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder's Suits <input checked="" type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> <b>N. Three-Judge Court</b>  <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)

**V. ORIGIN**  
 1 Original Proceeding  
  2 Remand from State Court  
  3 Remanded from Appellate Court  
  4 Reinstated or Reopened  
  5 Transferred from another district (specify)  
  6 Multi-district Litigation  
  7 Appeal to District Judge from Mag. Judge

**VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)**  
 41 U.S.C. 7101 - Contract Dispute Act; Suit for underpayment by HHS of contract support costs owed Tribal contractor

<b>VII. REQUESTED IN COMPLAINT</b>	CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 <input type="checkbox"/>	DEMAND \$ 2,345,968	JURY DEMAND: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
<b>VIII. RELATED CASE(S) IF ANY</b>	(See instruction)	YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>	If yes, please complete related case form

DATE: May 16, 2013	SIGNATURE OF ATTORNEY OF RECORD: <i>Caroline Mayhew</i>
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**INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44**  
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**EASTERN BAND OF  
CHEROKEE INDIANS** )  
88 Council House Loop )  
(P.O. Box 455) )  
Cherokee, NC 28719 )

PLAINTIFF, )

v. )

**UNITED STATES OF AMERICA;** )

**KATHLEEN SEBELIUS**, in her official capacity )  
as Secretary, )  
U.S. Department of Health & Human Services )  
200 Independence Ave, S.W. )  
Washington, DC 20201 )

**YVETTE ROUBIDEAUX**, in her official capacity )  
as Director, )  
Indian Health Service )  
801 Thompson Avenue, Ste. 400 )  
Rockville, MD 20852-1627 )

DEFENDANTS. )

Civil Action No. 1:13-cv-00723

**COMPLAINT**

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Served: The Honorable Eric H. Holder, Jr.  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530-0001

The Honorable Ronald C. Machen, Jr.  
United States Attorney for the District of Columbia  
Judiciary Center Building  
555 Fourth Street, NW  
Washington, D.C. 20530

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## COMPLAINT

The Plaintiff, for its cause of action against the Defendants named above, alleges as follows:

### INTRODUCTION AND SUMMARY

1. This is a suit against the United States for breach of contract and statute by the Indian Health Service ("IHS"), an agency in the Department of Health and Human Services ("HHS"). Plaintiff, the Eastern Band of Cherokee Indians ("the Tribe"), seeks money damages under the Contract Disputes Act, 41 U.S.C. § 7101 *et seq.* ("CDA"), based on the Secretary's repeated violations of the Tribe's contractual and statutory right to the payment of full funding of contract support costs ("CSC") for contracts entered under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), Pub. L. No. 93-638, as amended, 25 U.S.C. § 450 *et seq.*

2. Defendants breached the Tribe's contracts by failing to pay the full CSC owed to the Tribe under the ISDEAA and the Tribe's Compact and funding agreement ("FA") for fiscal year 2006.

3. Defendants paid only a portion of the CSC owed under the Tribe's contracts, due to their misapplication of federal contracting and appropriations law. In the appropriations acts each year, Congress imposed "caps" on aggregate CSC spending, which Defendants believed allowed them to underfund the Tribe's contracts. This resulted in CSC "shortfalls," which the IHS calculated for fiscal year 2006 and reported to Congress.

4. The Supreme Court found Defendants' practice unlawful, holding that the IHS is responsible for fully funding ISDEAA contracts—including all of the required CSC—without regard to congressionally instituted caps on CSC funding as a whole. *Salazar v. Ramah Navajo Chapter*, 567 U.S. \_\_\_, 132 S. Ct. 2181 (2012). As long as there are sufficient appropriations to

cover an individual contract's costs—even if there is not enough to fully fund all contracts—the Government's obligation to fully pay each individual contract remains. In the Court's words, "The agency's allocation choices do not affect the Government's liability in the event of an underpayment." *Ramah*, 132 S. Ct. at 2192, quoting *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 641 (2005).

5. The Tribe's claims are indistinguishable from those in *Ramah*. The IHS received sufficient funds in 2006 to fully pay the Tribe's CSC, although Congress limited the aggregate amount of funding for all CSC at the agency. The shortfall in CSC owed to the Tribe is a result of the agency's allocation choices, but the Government remains liable for payment of the full amount, plus additional damages arising from the failure to pay the full amount.

#### **JURISDICTION AND VENUE**

6. This controversy arises under agreements between the United States and the Tribe for operation of Indian health programs carried out pursuant to the ISDEAA. This Court has subject matter jurisdiction under the CDA, 41 U.S.C. § 7104(b), and the ISDEAA. *See* 25 U.S.C. § 450m-1(a) (providing original jurisdiction to United States district courts, concurrent with the Court of Federal Claims, over civil actions for money damages arising under ISDEAA contracts).

7. On September 27, 2012, the Tribe requested an IHS contracting officer's decision on claims for underpaid CSC for fiscal year 2006. The Tribe has received no decision from the IHS on this request. Since the IHS has not issued a decision on this claim within a reasonable time, it is deemed denied. 41 U.S.C. § 7103(f)(5). Accordingly, the Tribe has exhausted its administrative remedies, as required by the CDA. 41 U.S.C. § 7104(b).

8. This Court has jurisdiction to review the IHS's decision denying the Tribe's claims for fiscal year 2006 under the CDA and Section 110 of the ISDEAA. 41 U.S.C. § 7104(b); 25 U.S.C. § 450m-1(a); 25 U.S.C. § 450m-1(d).

9. Venue is proper because Defendant Kathleen Sebelius in her official capacity as Secretary of HHS is located in the District of Columbia.

### **PARTIES**

10. Plaintiff Eastern Band of Cherokee Indians is a federally recognized Indian tribe located in western North Carolina. The Tribe provides various health care services under its Health and Medical division, including community and public health services, nutritional and substance abuse counseling, diabetes care, dental services, women's wellness, and family-based medical care at the Cherokee Hospital. The Tribe has contracted with the IHS under the ISDEAA to carry out these functions.

11. Defendant United States is a party to every ISDEAA agreement, including the Tribe's. 25 U.S.C. § 450l(c), Model Agreement § 1(a)(1); Title V Compact of Self-Governance Between the Eastern Band of Cherokee Indians and the United States Department of Health and Human Services ("Compact").

12. Defendant Kathleen Sebelius is the Secretary of Health and Human Services, and is charged by law with the responsibility for implementing the ISDEAA, and other health laws benefiting Indians, on behalf of the United States. 25 U.S.C. § 450f(a)(1); 25 U.S.C. § 450b(i); 42 U.S.C. § 2001. Defendant Sebelius is sued in her official capacity.

13. Defendant Yvette Roubideaux is the Director of the IHS, the primary agency that carries out HHS's responsibility for implementing the ISDEAA, and other health laws benefiting

Indians, on behalf of the United States. *See* 25 U.S.C. § 1661. Defendant Roubideaux is sued in her official capacity.

## STATEMENT OF FACTS

### The ISDEAA

14. During the year at issue in this appeal, fiscal year 2006, the Tribe provided health care services to eligible Indians and other eligible beneficiaries pursuant to agreements entered into with the Secretary of the HHS and the IHS under Title V of the ISDEAA, 25 U.S.C. § 458aaa *et seq.*

15. The ISDEAA authorizes the Tribe, other tribes, and tribal organizations to assume responsibility to provide programs, functions, services and activities ("PFSAs") that the Secretary would otherwise be obligated to provide. In return, the Secretary must provide the Tribe two types of funding under Section 106(a) of the ISDEAA: (1) "program" funds, the amount the Secretary would have provided for the PFSAs had the IHS retained responsibility for them, *see* 25 U.S.C. § 450j-1(a)(1), sometimes called the "Secretarial amount" or the "106(a)(1) amount"; and (2) "contract support costs," the reasonable administrative and overhead costs associated with carrying out the PFSAs, *see* 25 U.S.C. § 450j-1(a)(2) and (3). *See also* 25 U.S.C. § 458aaa-15(a) (Title V provision stating that "[a]ll provisions of sections . . . 450j-1(a) through (k) . . . of [Title 25 U.S.C.] . . . shall apply to compacts and funding agreements authorized by this part").

16. There are three types of CSC: (1) start-up costs, which are one-time costs to plan, prepare for and assume operation of a new or expanded PFSA, *see* 25 U.S.C. § 450j-1(a)(5) & (6); (2) indirect costs, costs incurred for a common or joint purpose benefiting more than one PFSA, such as administrative and overhead costs, *see* 25 U.S.C. § 450j-1(a)(2); and (3) direct

CSC ("DCSC"), expenses directly attributable to a certain PFSA but not captured in either the indirect cost pool or the 106(a)(1) amount, such as workers compensation insurance or other expenses the Secretary would not have incurred because, for example, the Government is self-insured, *see id.* 25 U.S.C. § 450j-1(a)(3)(A).

17. The ISDEAA requires that, upon approval of the contract, "the Secretary shall add to the contract the full amount of funds to which the contractor is entitled [under section 106(a) of the ISDEAA]," including CSC. 25 U.S.C. § 450j-1(g) (emphasis added); *see also Cherokee Nation*, 543 U.S. at 634 ("The [ISDEAA] specifies that the Government must pay a tribe's costs, including administrative expenses."). As noted above, one component of the required CSC under section 106(a) is indirect cost funding, which covers administrative and overhead costs, allowing all program funds to be used to provide health care PFSA for tribal members and other beneficiaries.

18. For the Tribe, the "full amount" of indirect costs was (and is) determined by multiplying a negotiated indirect cost rate by the amount of the direct cost base. The Tribe's indirect cost rate, direct cost base, resulting indirect cost requirement, and any shortfall in funding were memorialized in the CSC "shortfall reports" IHS prepared for Congress each year in accordance with the ISDEAA, as discussed further below. *See* 25 U.S.C. § 450j-1(c).

#### The CSC Shortfalls and the *Ramah Case*

19. Despite the ISDEAA's requirements that the Secretary shall pay the full amount of CSC, the IHS has not done so. Since at least fiscal year 1993, IHS has underpaid the vast majority of ISDEAA contractors, as documented in the agency's annual CSC "shortfall reports" to Congress. IHS prepares the shortfall reports in compliance with ISDEAA section 106(c),



which requires that the agency submit to Congress an annual report on the implementation of the ISDEAA, including:

- (1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;
- (2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted . . . .

25 U.S.C. § 450j-1(c). Each IHS Area Office, including the Nashville Area (where the Tribe is located), prepares a shortfall report that shows how much each tribe and tribal organization in the Area was paid in CSC for the fiscal year, how much IHS would have paid had Congress appropriated sufficient CSC funding to pay every ISDEAA contractor in full, and the resulting shortfall. The reports reflect the data in the contracts, funding agreements, and indirect cost rate agreements of tribal contractors.

20. Though the form of the shortfall reports has varied somewhat over the years, the essential information in the reports used to calculate the shortfalls has remained the same: the total CSC requirement minus the actual CSC paid by the IHS equals the CSC shortfall, which is reported to Congress.

21. Prior to fiscal year 1998, Congress imposed no statutory restriction on availability of CSC, but IHS limited its payment to the amounts recommended in congressional committee reports. In 2005, the U.S. Supreme Court held this practice unlawful, ruling that the appropriations available to pay tribes the full CSC due under section 106(a) and their contracts included the IHS's entire unrestricted lump-sum appropriation. *Cherokee Nation*, 543 U.S. at 642-43 (2005). The Court held that IHS should have reprogrammed funds to pay the Cherokee Nation the full CSC due under its contracts.

22. Despite the *Cherokee* ruling, Defendants continued their practice of paying less than full CSC to ISDEAA contractors. Defendants justified the systematic underpayment of CSC by pointing to the CSC spending "caps" Congress has placed in the appropriations acts beginning in fiscal year 1998. *See, e.g.*, Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681–279 (1998) ("not to exceed \$203,781,000 shall be for payments to tribes and tribal organizations for contract or grant support costs associated with [ISDEAA] contracts").

23. In 2012, the U.S. Supreme Court considered the Government's responsibility to fully fund CSC during years when Congress placed a cap on the amount of funding available for CSC. Echoing its reasoning in *Cherokee*, the Court held that—even if Congress appropriates insufficient funds to cover the aggregate amount due to every contractor, but enough to pay any individual contractor's CSC—the Government is obligated to pay each contractor's CSC in full. *Ramah*, 132 S. Ct. at 2186.

24. The Court explicitly rejected arguments that the government is not liable for full CSC because Congress did not appropriate sufficient funding for all CSC, and that the ISDEAA states that the Secretary "is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe." *Ramah*, 132 S. Ct. at 2192, quoting 25 U.S.C. § 450j-1(b). The Court found this idea was "inconsistent with ordinary principles of Government contracting law," and that the "agency's allocation choices do not affect the Government's liability in the event of an underpayment." *Id.*

25. The Tribe was one of the tribal contractors underpaid in FY 2006 as a result of IHS's allocation choices. According to the agency's own CSC shortfall report, the Tribe suffered

a significant CSC underpayment in fiscal year 2006. Despite having a CSC requirement of \$5,241,021, the IHS paid only \$4,014,931 in CSC, resulting in a shortfall of \$1,226,090.

26. The Tribe's claim includes the above "shortfall claim" in the amount reported by HHS for FY 2006, but also additional claims described below.

Indirect Costs on Unpaid Direct CSC

27. The IHS CSC shortfall reports discussed above break out the shortfalls into underpayments of direct CSC and, in a separate column, indirect CSC. As discussed above, direct CSC is comprised of expenses directly attributable to a certain program or activity but not captured in either the indirect cost pool or the program amount due under section 106(a)(1). Direct CSC is part of the direct cost base, and thus generates indirect cost funding through application of the "rate-times-base" method described in paragraph 18 above. *See* IHS, Indian Health Manual § 6-3.4.E (2007) ("The DCSC, along with other Section 106(a)(1) funds, will be considered part of the recurring base of the award.").

28. Underpayments of direct CSC, therefore, lower the Tribe's indirect cost funding as well. The IHS shortfall reports, however, do not capture this additional indirect cost shortfall, because the agency added to the direct cost base column only the amount of direct CSC paid, not the amount from the "DCSC Negotiated" column.

29. The unpaid indirect costs on unpaid direct CSC must also be considered as damages. This amount can be determined each year by multiplying the negotiated indirect cost rate by the direct CSC shortfall memorialized in that year's CSC shortfall report. For the Tribe in FY 2006, this underpayment amounted to \$9,477.

IPA/MOA Conversions

30. The Tribe carries out its Compact and FA in part through federal employees provided under Intergovernmental Personnel Act ("IPA") Memoranda of Agreement ("MOA"). However, IHS failed to pay direct CSC on the salaries of these employees, both before and after their transfer from federal status, in violation of the ISDEAA. As detailed in the Tribe's claim letter, using available figures on the number of IPA/MOA employees, the average cost of such employees, and a 15% direct CSC burden on salaries, this underpayment amounted to \$115,185 in FY 2006.

Indirect Cost Rate Miscalculation

31. The shortfalls described above were exacerbated by IHS's failure to adjust the Tribe's indirect cost rate to account for systematic miscalculations on the part of the Department of Interior's National Business Center ("NBC"), the cognizant federal agency that calculates the Tribe's single, government-wide indirect cost rate. The NBC follows Office of Management and Budget Circular A-87, which states that indirect cost rates are calculated by dividing the indirect cost pool by the total amount of direct cost base funding for all programs the Tribe carries out, not just IHS programs.

32. Often, other federal or state funders pay little or no indirect costs. NBC's inclusion of these programs in the direct cost base inflated the denominator of the rate-making equation, resulting in a lower indirect cost rate.

33. When determining the amount of indirect costs owed to the Tribe, IHS employed this "diluted" indirect cost rate, resulting in a systematic underpayment of indirect costs and making it impossible for the Tribe to carry out IHS programs at the Secretarial level as mandated by the ISDEAA. The Tenth Circuit held this practice unlawful; the government is responsible

for fully funding a contractor's indirect costs. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). However, rather than adjust the artificially low rate by removing non-paying agencies from the direct cost base of the rate-making equation, IHS in the relevant year employed the diluted NBC indirect cost rate, thus reducing the Tribe's indirect cost funding.

34. As detailed in the Tribe's 2006 claim letter, the Tribe estimates that exclusion of non-paying agencies from the base would have produced a corrected rate entitling the Tribe to additional indirect cost funding of \$397,751 in FY 2006.

Expectancy Damages: Lost Third-Party Revenues

35. These described breaches of contract also damaged the Tribe through the loss of third-party revenues. The Tribe generates significant revenue from billing Medicaid, Medicare, and private insurance for health care services provided with IHS funding under the Tribe's ISDEAA agreements.

36. As a result of IHS's underfunding of CSC in each year, the Tribe was forced to divert program funds to cover fixed administrative and overhead expenses, reducing the amounts available to provide health care services, some of which could have been billed to third parties. The Tribe's third-party collection rate for each year can be determined by dividing the amounts collected—which can be determined from the annual audit—by the total IHS program funding for that year. For example, in FY 2006, for every dollar of IHS funding spent, the Tribe recovered 34 cents in third-party billings—revenue used to provide further health care services to members of the Tribe's constituent tribes and other eligible beneficiaries. The amount of lost third-party revenues for each year can be estimated by multiplying that year's collection rate by the CSC shortfall. For FY 2006, this figure amounts to \$597,465. *See Ramah Navajo School Bd. v. Sebelius*, No. 6:07-cv-00289, at 62 (D.N.M., May 9, 2013) (approving similar calculation

as "a reasonable and satisfactory methodology for estimating lost third-party reimbursements" and awarding damages to ISDEAA contractor accordingly).<sup>1</sup> Diversion of program money, and the resulting loss of third-party revenue, was a foreseeable consequence of the CSC underpayments. IHS has long known that CSC shortfalls force tribes to divert program funds.<sup>2</sup>

### **CAUSE OF ACTION – Breach of Contract**

37. All prior allegations are adopted by reference.

38. The Tribe's Compact and FA incorporate the statutory duty to fully fund CSC. 25 U.S.C. § 450j-1(a) & (g); *id.* § 458aaa-7(c) (section 508(c) of Title V, incorporating payment provisions of § 450j-1(a)); *see also* Compact, Art. II § 3 (promising payment in accordance with section 508). This duty was affirmed by the Supreme Court in *Ramah*, which other courts have followed. Despite this statutory and contractual duty, during the years in question, the IHS failed to provide the full funding due under the Contract.

39. Instead, the IHS paid significantly less than its full CSC requirement in fiscal year 2006, as acknowledged in IHS's own shortfall report. In doing so, the IHS violated the ISDEAA's requirement of full payment from available appropriations without regard to total appropriations or any congressionally imposed aggregate caps, as affirmed by the Supreme Court in *Ramah*, and breached its agreements with the Tribe, which incorporate the full-funding requirement of section 106(a), 25 U.S.C. § 450j-1(a).

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<sup>1</sup> Available at <http://www.nmcourt.fed.us/Drs-Web/view-file?unique-identifier=0005253589-0000000000>.

<sup>2</sup> *See, e.g.*, U.S. Gov't Accountability Office, GAO-99-150, Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed 40-41 (1999) (describing use of medical program resources to cover CSC shortfalls).

Claim

40. As indicated in the IHS's own shortfall report, the Tribe's CSC requirement for 2006 was \$5,421,021, yet the IHS paid only \$4,014,931. Therefore, the Tribe asserts a claim under the ISDEAA and the Contract in the amount of \$1,226,090, plus additional damages as specified in the 2006 claim letter: \$9,477 for indirect costs on unpaid direct CSC, \$115,185 for unpaid direct CSC on IPA/MOA conversions, \$397,751 for indirect cost rate miscalculations, and \$597,465 for lost third-party revenue, for a total FY 2006 claim of **\$2,345,968**.

**PRAYER FOR RELIEF**

41. The Plaintiff therefore requests that this Court:
- A. Award the Tribe **\$2,345,968** in damages, as detailed in paragraph 40 above.
  - B. Award such other damages as may be proven in this action;
  - C. Order the payment of interest on these claims pursuant to the CDA, 41 U.S.C. § 7109, and the Prompt Payment Act, Chapter 39 of Title 31, United States Code;
  - D. Award the Tribe its attorney fees and expenses pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 and 25 U.S.C. § 450m-1(c), and other applicable law; and
  - E. Grant the Tribe such other and further relief as the Court deems appropriate.

Respectfully Submitted,

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