

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

**SHOALWATER BAY
INDIAN TRIBE**

2373 Old Tokeland Road
(P.O. Box 130)
Tokeland, WA 98590

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. _____

COMPLAINT

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

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 Shoalwater Bay Indian Tribe (“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 years 2005–2011.

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 years 2005–2011 and reported to Congress.

4. The Supreme Court found the same practice unlawful as carried out by the Bureau of Indian Affairs (“BIA”), holding that the agency 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, "[t]he 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). The *Ramah* decision applies equally to IHS. *Arctic Slope Native Ass'n v. Sebelius*, 501 Fed. Appx. 957 (Fed. Cir. 2012).

5. The Tribe's claims are indistinguishable from those in *Ramah*. The IHS received sufficient funds in fiscal years 2005–2011 to fully pay the Tribe's CSC, including full indirect costs as determined by the negotiated indirect cost rate. The shortfall in CSC paid 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. In addition, the Government exacerbated the shortfalls by employing unlawful methods to artificially reduce the Tribe's indirect cost rate, in further violation of the ISDEAA's full-funding mandate.

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 23, 2011, the Tribe requested an IHS contracting officer's decision on claims for underpaid CSC for fiscal years 2005–2008. The Tribe received no decision from

the IHS on this request and no notification of any extension of the 60 day statutory time frame for the IHS to issue a decision. 41 U.S.C. § 7103(f)(2). On September 24, 2012, the Tribe submitted a letter supplementing its fiscal year 2006 claim and again requesting a decision on that claim. Though the Director of IHS responded on November 9, 2012, stating that she “anticipate[d] that [she] would issue a final awarding official’s decision by February 22, 2013[.]” IHS failed to meet that deadline, never issuing a final decision on that claim. On April 19, 2013, the Tribe submitted letters supplementing its FY 2007 and FY 2008 claims and again requesting final decisions, as well as letters requesting decisions on claims for fiscal years 2009-2011. The Tribe received no decision or notice of extension from the IHS in response to any of the letters submitted on April 19, 2013.

8. For each of the claims at issue the IHS failed to issue a final decision either within 60 days or within a reasonable amount of time specifically identified by the IHS prior to the expiration of those 60 days, as required by statute. 41 U.S.C. § 7103(f)(5). Therefore, the claims are deemed denied. *Id.*; *SCM Corp. v. United States*, 225 Ct. Cl. 647 (1980) (contractor may deem claims denied if contracting officer fails to respond within 60 days); *Claude E. Atkins Enter’s, Inc. v. United States*, 27 Fed. Cl. 142, 145 (1992) (contractor may deem claims denied if contracting officer attempts to extend period to issue a decision a second time after the initial 60 day period has expired). Accordingly, the Tribe has exhausted its administrative remedies, as required by the CDA. 41 U.S.C. § 7104(b).

9. This Court has jurisdiction to review the IHS’s decision denying the Tribe’s claims for fiscal years 2005–2011 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).

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

PARTIES

11. Plaintiff Shoalwater Bay Indian Tribe is a federally recognized Indian tribe located in Washington. The Tribe operates a Wellness Center which provides various health care services including medical services, dental services, social work and mental health services, substance abuse counseling, and diabetes care. The Tribe has contracted with the IHS under the ISDEAA to carry out these functions.

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

13. 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.

14. 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

15. During the years at issue in this complaint, fiscal years 2005–2011, 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.*

16. 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”).

17. 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* 25 U.S.C. § 450j-1(a)(3)(A).

18. 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.

19. 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

20. 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 Portland 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.

21. 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.

22. 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.

23. 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.*, Department of the Interior, Environment, and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-54, 119 Stat. 499, 513–14 (2005) (“not to

exceed \$134,609,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing [ISDEAA] contracts”).

24. 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.

25. 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.*

26. The Tribe was one of the tribal contractors underpaid in fiscal years 2005–2011 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 years 2005–2011. For example, in FY 2005, IHS calculated the total CSC requirement to be \$931,639, yet paid the Tribe only \$868,241, for a shortfall of \$63,398. In subsequent years, the shortfalls, as calculated by IHS and memorialized in the CSC shortfall reports to Congress, were \$70,213 in 2006, \$114,676 in 2007, \$153,864 in 2008, \$194,337 in 2009, \$152,575 in 2010, and \$178,542 in 2011.

27. The shortfall figures above reflect the additional amount each year that IHS would have paid the Tribe had Congress appropriated sufficient funds to fully pay CSC nationally. Congress did not, so IHS chose to underfund the Tribe's CSC and thereby breach the Tribe's contracts. *See Ramah*, 132 U.S. at ____.

28. The Tribe's initial claims filed on September 23, 2011, were based on IHS's calculations in the shortfall reports, and the FY 2005 claim incorporated into this complaint remains the IHS shortfall report figure cited above: \$63,398, plus associated damages and interest. Subsequent legal and financial analysis revealed additional IHS improprieties not captured in the shortfall reports. These additional claims and damages were included in the supplemental claim letters for FY 2006 dated September 24, 2012, and the supplemental claim letters for FYs 2007 and 2008 and new claims for 2009-2011 filed on April 19, 2013. The factual basis of the claims in these letters is described in further detail below.

The Tribe's Claims and Associated Damages

Shortfall Claim: Underpayment of Indirect Costs at NBC-Awarded Rate

29. The ISDEAA requires that CSC, including indirect costs, be paid in full each year. 25 U.S.C. § 450j-1(g); *Ramah*, *supra*. Under IHS policy and pursuant to agreements with the federal government, the "full" indirect cost requirement is determined by multiplying the applicable indirect cost rate by the direct cost base. In each year at issue, the Department of Interior's National Business Center ("NBC") was the cognizant federal agency that calculated the Tribe's single, government-wide indirect cost rate. As discussed below, NBC miscalculated the rate significantly through unlawful practices. But IHS failed to pay full indirect costs even at the artificially and unlawfully reduced rates awarded by NBC.

30. As detailed in the Tribe's supplemental claim letters and attached calculations for FYs 2006-2008 and its claim letters and attached calculations for FYs 2009-2011, IHS underpaid indirect costs by \$73,452 in FY 2006, \$50,014 in FY 2007, \$69,805 in FY 2008, \$92,584 in FY 2009, \$66,340 in FY 2010, and \$170,882 in FY 2011.

Indirect Cost Rate Miscalculation – Inclusion of Non-Paying Agencies in Base

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 NBC. 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 years employed the diluted NBC indirect cost rate, thus reducing the Tribe's indirect cost funding.

34. As detailed in the Tribe's claim letters and attached calculations for fiscal years 2006-2011, 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 \$57,528 in FY 2006; \$132,695 in FY 2007; \$104,205 in FY 2008; \$110,448 in FY 2009; \$132,788 in FY 2010; and \$140,589 in FY 2011.

Wrongful Carryforward Adjustment: Double-Dipping

35. Further exacerbating the indirect CSC shortfall, certain carryforward adjustment practices used by the IHS have illegally reduced the amount of indirect CSC paid to the Tribe to an even greater extent. First, the Tribe employs fixed-with-carryforward rates, and in this system, over- and under- recoveries are factored into the calculation of future year rates. Over-recoveries in a preceding period are deducted from the indirect cost pool, reducing the subsequent period's rate to compensate the Government.

36. Under NBC's template (instructions), however, over-recoveries were deducted from the Tribe's indirect cost pool not once, but twice – “double-dipped” into two successive rate cycles. This procedure repaid the Government twice for a single year's over-recovery.

37. As detailed in the Tribe's claim letters and attached calculations for fiscal years 2006, 2008, 2010, and 2011, the Tribe estimates that this practice of “double-dipping” resulted in underpayments of indirect CSC in the amounts of \$61,967 for FY 2006; \$34,020 for FY 2008; \$66,121 for 2010; and \$3,996 for FY 2011.

Wrongful Carryforward Adjustment: Shortfall Column

38. NBC's carryforward template resulted in repeated underpayments of indirect CSC in a second way. The Tribe's under-recoveries in past years were not added to the indirect cost pool for purposes of subsequent rate calculations, as they should have been under the fixed-with-carryforward system described above to raise the rate and compensate the Tribe. Instead, over-recoveries were shifted into a “shortfall column,” a device created by NBC solely for Indian

tribes and tribal organizations due to the CSC appropriations “caps.” In light of the Supreme Court’s ruling in the *Ramah* case cited above, this maneuver illegally increased the Tribe’s CSC shortfalls.

39. As detailed in the Tribe’s claim letters and attached calculations for fiscal years 2006-2011, the Tribe estimates that NBC’s use of the shortfall column resulted in additional shortfalls of \$98,899 in 2006; \$89,712 in 2007; \$49,874 for 2008; \$77,963 for 2009; \$60,672 in 2010; and \$78,286 in 2011.

Indirect Costs on Direct CSC

40. 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).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 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.”).

41. Underpayments of direct CSC, therefore, lower the Tribe’s indirect cost funding as well. The Tribe’s calculations of the Shortfall Claim described in ¶¶ 29-30 above do not include direct CSC in the direct cost base, so an additional calculation is required for indirect cost shortfalls associated with these sums.

42. As detailed in the Tribe’s claim letters and attached calculations for 2007-2011, the Tribe calculates that payment of indirect costs on direct CSC would have resulted in

¹ *See* 25 U.S.C. § 450j-1(a)(3)(A).

additional indirect cost funding of \$119,852 for FY 2007; \$114,573 for FY 2008; \$118,461 for FY 2009; \$126,799 for FY 2010; and \$155,525 for FY 2011.²

Expectancy Damages: Lost Third-Party Revenues

43. 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.

44. 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.

45. 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 fiscal year 2007, for every dollar of IHS funding spent, the Tribe recovered 52 cents in third-party billings—revenue used to provide further health care services to members of the Tribe 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. *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).³ Using these calculations, as detailed in the Tribe's claim letters and

² The Tribe did not present a claim for unpaid indirect costs on direct CSC for FY 2006.

³ Available at <http://www.nmcourt.fed.us/Drs-Web/view-file?unique-identifier=0005253589-0000000000>.

attached calculations for fiscal years 2006-2011, the Tribe claims expectancy damages for loss of third-party revenue in the amount of \$98,352 for FY 2006; \$203, 982 for FY 2007; \$175,064 for 2008; \$175,761 for FY 2009; \$194,670 for FY 2010; and \$291,117 for FY 2011.

46. 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.⁴

47. The Tribe's claims are summarized in the following table:

Table 1: Summary of All Claims

	Shortfall	Indirect Cost Rate Mis-calculation	"Double-Dipping"	Use of Shortfall Column	Indirect Costs on Direct CSC	Lost Third-Party Revenues	Totals
2005	63,398	---	---	---	---	---	63,398
2006	73,452	57,528	61,967	98,899	---	98,352	390,198
2007	50,014	132,695	---	89,712	119,852	203,982	596,255
2008	69,805	104,205	34,020	49,874	114,573	175,064	547,541
2009	92,584	110,448	---	77,963	118,461	175,761	575,217
2010	66,340	132,788	66,121	60,672	126,799	194,670	647,390
2011	170,882	140,589	3,996	78,286	155,525	291,117	840,395
Totals	586,475	678,253	166,104	455,406	635,210	1,138,946	
							3,660,394

CAUSE OF ACTION – Breach of Contract

48. All prior allegations are adopted by reference.

49. The Tribe's Compact and FA incorporate the statutory duty to fully fund CSC. 25 U.S.C. § 450j-1(a) & (g); 25 U.S.C. § 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

⁴ *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).

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.

50. Instead, the IHS paid significantly less than its full CSC requirement in fiscal years 2005–2011, as acknowledged in IHS’s own shortfall reports. 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).

Claim 1: 2005

51. As indicated in the IHS’s own shortfall report, the Tribe’s indirect cost requirement for 2005 was \$931,639, yet the IHS paid only \$868,241. Therefore, the Tribe asserts a claim under the ISDEAA and the Contract in the amount of **\$63,398**, plus indirect costs on direct CSC, plus expectancy and other damages in an amount to be established by the evidence.

Claim 2: 2006

52. The Tribe’s indirect cost requirement for 2006 was \$711,826, yet the IHS paid only \$638,374. Therefore, the Tribe asserts a claim under the ISDEAA and the Contract in the amount of \$73,452; plus additional damages as specified in the 2006 claim letter: \$57,528 for indirect costs not paid to the Tribe due to IHS’s indirect cost rate miscalculation, \$61,967 for wrongful carryforward adjustment (“Double-Dipping”), \$98,899 for wrongful carryforward adjustment (use of the shortfall column), and \$98,352 in expectancy damages for a total FY 2006 claim of **\$390,198**.

Claim 3: 2007

53. The Tribe's indirect cost requirement for 2007 was \$688,388, yet the IHS paid only \$638,347. Therefore, the Tribe asserts a claim under the ISDEAA and the Contract in the amount of \$50,014; plus additional damages as specified in the 2007 claim letter: \$132,695 for indirect costs not paid to the Tribe due to IHS's indirect cost rate miscalculation, \$89,712 for wrongful carryforward adjustment (use of the shortfall column), \$119,852 for indirect costs on direct CSC, and \$203,982 for expectancy damages for a total FY 2007 claim of **\$596,255**.

Claim 4: 2008

54. The Tribe's indirect cost requirement for 2008 was \$702,689, yet the IHS paid only \$632,884. Therefore, the Tribe asserts a claim under the ISDEAA and the Contract in the amount of \$92,584, plus additional damages as specified in the 2008 claim letter: \$104,205 for indirect costs not paid to the Tribe due to IHS's indirect cost rate miscalculation, \$34,020 for wrongful carryforward adjustment ("Double-Dipping"), \$49,874 for wrongful carryforward adjustment (use of the shortfall column), \$114,573 for indirect costs on direct CSC, and \$175,064 for expectancy damages for a total FY 2008 claim of **\$547,541**.

Claim 5: 2009

55. The Tribe's indirect cost requirement for 2009 was \$725,432, yet the IHS paid only \$632,848. Therefore, the Tribe asserts a claim under the ISDEAA and the Contract in the amount of \$92,584, plus additional damages as specified in the 2009 claim letter: \$110,448 for indirect costs not paid to the Tribe due to IHS's indirect cost rate miscalculation, \$77,963 for wrongful carryforward adjustment (use of the shortfall column), \$118,461 for indirect costs on direct CSC, and \$175,761 for expectancy damages for a total FY 2009 claim of **\$575,217**.

Claim 6: 2010

56. The Tribe's indirect cost requirement for 2010 was \$762,216, yet the IHS paid only \$695,876. Therefore, the Tribe asserts a claim under the ISDEAA and the Contract in the amount of \$66,340, plus additional damages as specified in the 2010 claim letter: \$132,788 for indirect costs not paid to the Tribe due to IHS's indirect cost rate miscalculation, \$66,121 for wrongful carryforward adjustment ("Double-Dipping"), \$60,672 for wrongful carryforward adjustment (use of the shortfall column), \$126,799 for indirect costs on direct CSC, and \$194,670 for expectancy damages for a total FY 2010 claim of **\$647,390**.

Claim 7: 2011

57. The Tribe's indirect cost requirement for 2011 was \$866,782, yet the IHS paid only \$695,900. Therefore, the Tribe asserts a claim under the ISDEAA and the Contract in the amount of \$170,882; plus additional damages as specified in the 2011 claim letter: \$140,589 for indirect costs not paid to the Tribe due to IHS's indirect cost rate miscalculation, \$3,996 for wrongful carryforward adjustment ("Double-Dipping"), \$78,286 for wrongful carryforward adjustment (use of the shortfall column), \$155,525 for indirect costs on direct CSC, and \$291,117 for expectancy damages for a total FY 2010 claim of **\$840,395**.

PRAYER FOR RELIEF

58. The Tribe therefore respectfully requests that the Court grant relief as follows:

- A. Award the Tribe **\$3,660,394** in damages for unpaid indirect costs, as detailed in Table 1, and paragraphs 51-57 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,

s/ Caroline Mayhew
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