IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NAVAJO HEALTH FOUNDATION-SAGE MEMORIAL HOSPITAL, INC., Plaintiff, v. SYLVIA MATHEWS BURWELL, *et al.*, Defendants.	No. 1:14-cv-958 JB/KBM

COMBINED RESPONSE TO PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT ON THE ISSUES OF DUPLICATION AND ALLOCATION

Pursuant to Rule 56 of the Federal Rules of Civil Procedure (FRCP), defendants respectfully submit this combined response to Plaintiff's Motion For Partial Summary Judgment On The Issue Of Duplication (Doc. 200) (the Duplication Motion), and Plaintiff's Motion For Partial Summary Judgment On The Issue Of Allocation (Doc. 199) (the Allocation Motion) (collectively, motions), both filed by plaintiff, Navajo Health Foundation – Sage Memorial Hospital, Inc. (Sage).

Defendants submit this as a combined response because both motions concern Sage's claim for increased contract support costs (CSC). Critically, Sage does not seek summary judgment upon its own claim; that is apparently reserved for trial.[1] Instead, Sage anticipatorily

[1] Sage, like all Contract Disputes Act claimants, bears the burden of proving all elements of its claim. *See J.C. Equip. Corp. v. England*, 360 F.3d 1311, 1318 (Fed. Cir. 2004); *Sociotechnical Research Appls. v. Whitman*, 29 F. App'x 578, 582 n.2 (Fed. Cir. 2002) ("The contractor will have the burden of proof to establish that it suffered actual damages, over and above the amount already paid by the government . . . ."). For claims of unpaid CSC, this includes the burden of proving that the claimed costs meet the ISDEAA definition of CSC and, therefore, are properly payable as CSC. *See Ketchikan Indian Cmty. v. Dep't of Health & Human Servs.*, Nos. CBCA 1053-ISDA, CBCA 1054-ISDA, CBCA 1055-ISDA, 2013-1 B.C.A.

seeks summary judgment upon two discrete legal issues that it assumes will be part of defendants' defense to Sage's CSC claim, based primarily upon information disclosed by the defendants' experts in discovery.

Sage's assumptions are not entirely off the mark. However, the defendants cannot accept Sage's strawman constructions of defendants' position on the proper construction of the Indian Self-Determination and Education Assistance Act (ISDEAA) as it pertains to CSC, so we will set forth that position here, then explain why Sage's position is incorrect.

As has been established in prior proceedings in this case, an ISDEAA contractor is entitled to receive, and the Government is obligated to pay, two types of funding: a Secretarial amount and CSC. 25 U.S.C. § 450j-1(a). Each of those amounts are defined in the ISDEAA itself, and they are generally intended to ensure that a tribal contractor will be able to assume responsibility for the Federal programs, functions, services, and activities (PFSAs) the Federal Government would have otherwise provided, without putting the tribe at a financial risk or diminishing the scope of the programs after tribal assumption. That said, they remain two distinct forms of compensation, primarily distinguishable by the types of activities that they are intended to cover.

In its Duplication Motion, Sage contends that the statute contains no such distinction, and CSC is actually a device by which a tribal contractor may supplement its Secretarial amount. This position is incorrect for a variety of reasons, not the least of which are the language of the statute (which explicitly distinguishes between the two types of funding by the "activities" that each covers), the structure of the statute (which defines the two types of funding in two separate

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(CCH) ¶ 35,436 (C.B.C.A. Sept. 4, 2013) (dismissing claims not presented to the contracting officer and finding that the facts relevant to CSC claims include "establishing that a particular cost is a CSC").

places), and other provisions in the statute (which provide separate and clearly applicable procedures for supplementing a tribal contractor's Secretarial amount, when appropriate).

In its Allocation Motion, Sage contends that the contracting agency, the Indian Health Service (IHS), is statutorily obligated to pay CSC for administrative costs based upon expanded expenses that consist of both the Secretarial amount and Sage's collections from third-party payers such as Medicare, Medicaid, the Children's Health Insurance Program (CHIP), and private insurers. This approach is contrary to the requirements of the ISDEAA and applicable cost-accounting principles, which require CSC to be based upon the proportional value of the ISDEAA contract (*i.e.*, the Secretarial amount awarded with the transferred Federal PFSAs) relative to all of the tribal contractor's sources of income.

Sage's position upon these two discrete issues of law is incorrect, and resolving them one way or the other will not dispose of Sage's CSC claim. Respectfully, the Court should deny both motions.

STATEMENT OF MATERIAL FACTS

I. Response To Movant's Statements Of Material Facts

A. Response To Sage's Statement Of Material Facts (Duplication)

Pursuant to Local Rule 56.1(b), defendants respectfully respond to Sage's enumerated statement of material facts as follows:

1. Undisputed.
2. Undisputed.
3. Undisputed.
4. Undisputed.
5. Undisputed.

6. Undisputed.

7. Undisputed.

8. Undisputed, except to clarify that the Fiscal Year (FY) 2009 Annual Funding Agreement (AFA) (FY 2009 AFA), also included other PFSAs such as Administrative Services, Financial Management, Human Resources, Property and Supply, Housekeeping, and Laundry. A11-13.[2] Defendants refer the court to the AFA for the full list PFSAs. A7-13.

9. Undisputed.

10. Plaintiff's Proposed Fact No. 10 is a legal, not a factual, conclusion. On that ground, defendants dispute it.

11. Undisputed.

12. Undisputed.

13. Undisputed, except to clarify that the referenced letter was a contract claim for overpayments made to Sage, issued under the Contract Disputes Act, that Defendants identified the overpayments as a counterclaim in this action, and that Defendants subsequently withdrew the counterclaim. *See* Docs. 84, 84-1, 165.

14. Undisputed that the expert report includes the following note: "IHS identified costs and/or activities (and by extension, the activities' associated costs) included in Sage's claim that it considered to be duplicative, unreasonable, unallowable, or unsupported. IHS headquarters reviewed Sage's claimed costs and activities and highlighted those that did not meet the CSC definition for one or more of these reasons and that IHS therefore believes are not eligible to be considered for CSC funding." Doc. 200-1 at 4.

15. Undisputed that the document contains the quoted language.

[2] "A" refers to the Appendix to this response, which is 57 pages long. Counsel for Sage has consented to the submission of exhibits in excess of 50 pages.

16. Undisputed that the document contains the quoted language.

17. Undisputed that the document contains the quoted language.

18. Undisputed that the document contains the quoted language, except that the last sentence of the quotation should read: "Other *examples of* specific cost areas . . . ." Doc. 200-1, at 9 (emphasis added to highlight language omitted from Sage's proposed finding).

B. Response To Sage's Statement Of Material Facts (Allocation)

Pursuant to Local Rule 56.1(b), defendants respectfully respond to Sage's enumerated statement of material facts as follows:

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Undisputed.

5. Undisputed.

6. Undisputed.

7. Undisputed.

8. Undisputed, except to clarify that the FY 2009 AFA also included other PFSAs such as Administrative Services, Financial Management, Human Resources, Property and Supply, Housekeeping, and Laundry. A11-13. Defendants respectfully refer the Court to the AFA for the full list PFSAs. A7-13.

9. Undisputed.

10. Plaintiff's Proposed Fact No. 10 is a legal, not a factual, conclusion. On that ground, defendants dispute it.

11. Undisputed.

12. Undisputed.

13. Undisputed.

14. Undisputed.

15. Undisputed, except to explain that "third party resources" refers not to third party collections but to staff that: "(1) [e]stablishes liaison and coordinates Medicare/Medicaid activities with States agencies; (2) plans and coordinates the third-party activities of [Navajo Area Indian Health Service (NAIHS)] facilities, develops policy pertaining to third-party activities, and coordinates and develops overall policy and plans for the implementation of Title IV, Public Law (Pub. L.) 94-437, Indian Health Care Improvement Act; and (3) provides technical assistance and guidance to service unit third-party staff." Navajo Area Indian Health Service (GFJ); Organization, Functions, and Delegations of Authority (NAIHS Organization, Functions, and Delegations of Authority), Fed. Reg. 69,570, 69,571 (Dec. 1, 2006).

16. Undisputed.

17. Undisputed, except to clarify that the referenced letter was a contract claim for overpayments made to Sage, issued under the Contract Disputes Act, that Defendants identified the overpayments as a counterclaim in this action, and that Defendants subsequently withdrew the counterclaim. *See* Docs. 84, 84-1, 165.

18. Undisputed that the expert report contains the quoted language.

19. Undisputed that the document contains the quoted language.

20. Undisputed that the document contains the quoted language.

21. Undisputed that the expert report contains the quoted language.

22. Undisputed that the expert report contains the quoted language.

23. Undisputed that the expert report contains the quoted language.

24. Plaintiff's Proposed Fact No. 24 is in part a legal, not a factual, conclusion. On that ground, defendants dispute it. Further, Plaintiff's Proposed Fact No. 24 is a characterization of the Department of Health and Human Services's (HHS) annual budget justifications. Defendants dispute the characterization to the extent Sage is suggesting third-party collections are considered for determining the IHS appropriation (which covers ISDEAA contracts). Defendants also respectfully refer the Court to 25 U.S.C. § 1641(a), which prohibits the Agency and Congress from taking into consideration Medicare, Medicaid, and Children's Health Insurance Program (CHIP) collections when determining IHS's appropriations.

II. Defendants' Statement Of Material Facts (Both Allocation And Duplication)

Pursuant to Local Rule 56.1(b), defendants respectfully assert the following additional facts other than those which respond to Sage's enumerated material facts on its motion for partial summary judgment concerning the issues of "duplication" and "allocation":

A. Plaintiff itself repeatedly proposed that its CSC be calculated using ratios to allocate its administrative costs, consistent with Office of Management and Budget (OMB) cost principles. A14-16 (Sage's FY 2009 CSC Proposal); A17-18 (Sage's FY 2010 CSC Proposal); A19-21 (Sage's FY 2011 CSC Proposal).

B. On average, IHS funding accounts for approximately 55% of Sage's health expenditures in each year. Second Am. Compl. with Supp. Claim ¶ 31 (May 3, 2016) (Doc. 180).

C. The ISDEAA contracts include the following provision:

> SECTION 5 – LIMITATION OF COSTS. Sage shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, Sage has reason to believe that the total amount required for performance of this Contract would be greater than the amount of funds awarded under this Contract, Sage shall provide reasonable notice to the Secretary of HHS. If the Secretary does not take such action as may

> be necessary to increase the amount of funds awarded under this Contract, Sage may suspend performance of the Contract until such time as additional funds are awarded.

A2; A4.

ARGUMENT

I. Legal Standard

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the non-movant. "[T]he burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

II. The Government Is Obligated To Pay, And Sage Is Entitled To Receive, CSC For Activities That Must Be Carried On To Directly Support The Federal PFSAs Transferred To Sage In Its Contract And That Do Not Duplicate The Activities Covered By The Secretarial Amount

The ISDEAA directs the Government to enter into self-determination contracts, upon receipt of a proper request from an Indian tribe, that transfer to the tribe or designated tribal organization one or more of the PFSAs normally administered by the Government. 25 U.S.C. § 450f(a)(1). Assuming a contract is entered into, the Government becomes obligated to pay, and the tribal contractor becomes entitled to receive, two types of funding: a Secretarial amount and CSC. 25 U.S.C. § 450j-1(a). Each of those amounts are defined in the ISDEAA itself, *id.*, and they are generally intended to ensure that a tribal contractor will be able to assume responsibility for the transferred Federal PFSAs without putting itself at a financial risk or diminishing the scope of the programs after their transfer. S. Rep. No. 100-274, at 8-9 (1988),

reprinted in 1988 U.S.C.C.A.N. 2620, 2627-28 (discussing how failure "to fully fund tribal indirect costs has resulted in financial management problems); 140 Cong. Rec. H11140-01, H11144 (daily ed. Oct. 6, 1994) ("the Committee's objective has been to assure that there is no diminution in programs resources when [PFSA] are transferred to tribal operation").

A. The Secretarial Amount

The first type of funding available to an ISDEAA contractor is the Secretarial amount. The statute defines this type of funding as:

> The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

25 U.S.C. § 450j-1(a)(1). Because the Secretarial amount is limited to "funds . . . [that] the appropriate Secretary would have otherwise provided," and as the attributive name suggests, the Government's payment obligation is circumscribed by the appropriated funds that would have been used for the operation of the PFSAs. *Id.*; 25 U.S.C. § 450j-1(b) (listing a reduction in the appropriations as one of five statutory grounds for reducing the Secretarial amount in subsequent years; *see Williams v. Taylor*, 529 U.S. 420, 431 (2000) (statutory analysis begins with the plain language of the statute); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1460 (10th Cir. 1997) (same). *See also Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1341 (D.C. Cir.1996) (stating that the Secretarial amount is "the amount of funding that would have been appropriated for the federal government to operate the program[] if [it] had not been turned over to the Tribe"); *Cherokee Nation of Oklahoma v. Thompson*, 311 F.3d 1054, 1056 (10th Cir. 2002)

(citing *Ramah v. Babbitt* favorably), *rev'd on other grounds*, 543 U.S. 631 (2005), *and vacated on remand*, 404 F.3d 1263 (10th Cir. 2005); *Southcentral Foundation v. Roubideaux*, 48 F. Supp. 3d 1291, 1293 (D. Al. 2014) (citing *Ramah v. Babbitt*); *Maniilaq Association v. Burwell*, --- F. Supp. 3d ----, 2016 WL 118256, at *5 (D.D.C. March 22, 2016) (same).

When the ISDEAA was first enacted, the Secretarial amount was the only type of funding available to an ISDEAA contractor. *See* Pub. L. No. 93-638, tit. I, § 106(h), 88 Stat. 2203, 2211-12 (1975). However, experience in the first several years of the ISDEAA contracting regime revealed that the Secretarial amount was not sufficient to meet Congress' original intent, which was to "require[] the Federal agencies to make available the same amount of funding to operate a program under contract as would have been available if the Federal Government were operating the program." S. Rep. 100-274, at 8-9 (1988), 1988 U.S.C.C.A.N. at 2628. In particular, the Secretarial amount alone was proving insufficient to cover costs for certain activities that a tribe or tribal contractor must perform, but the Federal Government normally does not perform itself, such as performing expensive independent audits, purchasing liability insurance, and complying with Government-required contract reporting. *See* S. Rep. No. 100-274, at 9, 1988 U.S.C.C.A.N. at 2628. Congress also recognized that agencies were not providing full indirect cost funding or transferring all of the appropriate resources in the Secretarial amount. *Id.* Therefore, Congress amended the ISDEAA to authorize a new category of funding, CSC, the original provision for which stated:

> (2) There shall be added to the amount required by paragraph (1) [the Secretarial amount] contract support costs which shall consist of the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which —
>
> > (A) normally are not carried on by the respective Secretary in his direct operation of the program; or

> (B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

Pub. L. No. 100-472, tit. II, § 205, 102 Stat. 2285, 2292 (1988), codified at 25 U.S.C. § 450j-1(a)(2).

Under the plain meaning of this provision, CSC was additional to the Secretarial amount ("[t]here shall be added to the amount required by paragraph (1)"). 25 U.S.C. § 450j-1(a)(2). This statute also plainly defined CSC as "the reasonable costs" of certain "activities," which themselves are identifiable by two characteristics: *first*, they "must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management"; *second*, they either "normally are not carried on by the respective Secretary in [her] direct operation of the program," or they "are provided by the Secretary in support of the contracted program from resources other than those under contract." *Id.* Accordingly, from the moment it authorized CSC funding, Congress was clear that the two types of funding authorized by an ISDEAA contract are distinguishable based upon the activities that the Government normally carries on in its operation of the PFSAs.[3]

In the years following the 1988 introduction of CSC, it became apparent that further clarification was necessary. Recognizing that its prior addition of CSC to the funding scheme had not completely eradicated the problem of "diminution in program resources when [PFSAs] are transferred to tribal operation," 140 Cong. Rec. H11140-01 (1994), Congress amended the

[3] Although not relevant to the present motions, the ISDEAA also authorizes CSC only for actual, or "incurred," costs, §§ 450b(f) (defining indirect costs as "costs incurred"), 450j-1(a)(3)(A) (referring to CSC as the "costs of reimbursing each tribal contractor for reasonable and allowable costs"), 450j-1(a)(5), (6) (defining startup costs as those costs "that have been incurred or will be incurred" in the first year of the ISDEAA contract and pre-award costs as those incurred prior to the award). As the Court has already recognized, Sage concedes that CSC is limited to its actual costs. Doc. 73 at 10.

ISDEAA again in 1994. Congress first clarified that the Secretarial amount must include the appropriated funding that the Government used for administrative functions in support of the transferred PFSAs, thus strengthening the requirement that the Secretarial amount include the Government's resources for all activities it carried on in its operation of the PFSAs. Pub. L. No. 103-413, tit. I, § 102, 108 Stat. at 4257-59. For example, IHS has both Area offices and a Headquarters office that perform activities, including some managerial and administrative support in carrying out PFSAs at the IHS hospitals and clinics. Historically, that included items such as mail, phone, and printing costs that were centrally-managed and not transferred in the Secretarial amount. IHS CSC Policy, Indian Health Manual (IHM), part 6, chapter 3, ex. 6-3-H at 20 (copy at A29-47). At that time, such activities were funded as CSC since IHS resources were not transferred in the Secretarial amount. *Id.* Once the resources were made available as part of the Secretarial amount, however, they were no longer eligible for CSC. *Id.*; *see also* 25 U.S.C. § 450j-1(a)(2)(B). With respect to CSC, Congress left section 450j-1(a)(2) largely intact,[4] but added a new subsection (a)(3):

> (3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of--
>
> > (i) direct program expenses for the operation of the Federal program that is the subject of the contract, and
> >
> > (ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,
>
> except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

[4] The phrase "an amount for" was inserted before "the reasonable costs." Pub. L. No. 103-413, tit. I, § 102, 108 Stat. 4250, 4257, codified at 25 U.S.C. § 450j-1(a)(2).

Pub. L. No. 103-413, 108 Stat. at 4257–59,[5] codified at 25 U.S.C. § 450j-1(a)(3). Sub-sections (a)(3)(A) (i) and (ii) were intended to clarify that, from an accounting perspective, CSC (as defined in section (a)(2)) could include both indirect and direct types of costs. *Compare* S. Rep. No. 100-274, at 8-9, 1988 U.S.C.C.A.N. at 2627-28 (discussing Congress' concerns about full funding of tribal *indirect costs*); *with* 140 Cong. Rec. H11140-01, H11144 (emphasizing that, under subsection (a)(3), CSC would cover not only administrative (or indirect) but also "'direct' type expenses"). The final concluding statement – "except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section" – grammatically modifies the broad cost-types specified in subsections (i) and (ii), and serves to reinforce the distinction between CSC and the Secretarial amount. In other words, just because Congress had clarified subsection (a)(1) and introduced a new subsection of the statute to disabuse any misconception that the Secretarial amount was synonymous with direct-type costs and CSC was synonymous with indirect costs, that did not mean that the distinction between the two types of funding had been eliminated. *Compare* S. Rep. No. 100-274, at 8-9, 1988 U.S.C.C.A.N. at 2627-28; *with* 140 Cong. Rec. H11140-01, H11144. Subsection (a)(2) was still on the books, and its activity-based means of distinguishing the Secretarial amount from CSC was still in effect. Finally, Congress included in the ISDEAA a "model contract" which, among other things, contained a limitation-of-costs clause that affords tribal contractors specific remedies (such as ceasing performance) when they believe that the Secretarial amount is insufficient for their purposes. *Id.*, tit. I, § 103,

[5] Congress also added the authority to provide CSC for one-time costs incurred by a tribal contractor prior to contract performance ("pre-award costs") and in the first year of contract performance ("startup costs"). Pub. L. No. 103-413, 108 Stat. 4257–59, codified at 25 U.S.C. § 450j-1(a)(5) and (6). Sage's claims and complaint do not identify unpaid pre-award or startup costs and, therefore, those specific costs and the authorizing provisions are not at issue in this case.

108 Stat. at 4262, codified at 25 U.S.C. § 450l(c).

In 1997, the Tenth Circuit held that the ISDEAA was ambiguous with respect to whether it required the Bureau of Indian Affairs (BIA) to fund more than BIA's share of indirect costs as negotiated under the Office of Management and Budget (OMB) Circular A-87. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). This decision was emblematic of general confusion (from Congress's perspective) among the ISDEAA contracting community concerning the statutory rules regarding the scope of an agency's obligation to pay CSC for indirect costs, and, in 1998, Congress amended the statute again. This time, it added a new provision to the ISDEAA to clarify the legislative intent that an agency's CSC obligation only extended to the eligible costs for programs that the agency had transferred to the tribe or tribal organization, and the agency was not required to provide CSC or indirect costs for PFSAs "for any entity other than the [IHS]." H.R. Rep. No. 105-609, at 110 (1998); *see also id.* at 57 (stating the Appropriations Committee's "belie[f] that the court in [*Ramah Navajo Chapter v. Lujan*] made an erroneous decision and that the Administration erred by failing to appeal."). This resulted in the addition of section 450j-2 to the ISDEAA, which provides:

> Before, on, and after October 21, 1998, and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act or any other Act for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act [25 U.S.C.A. § 450f et seq.] and no funds appropriated by this or any other Act shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service.

Pub. L. No. 105-277, div. A, tit. II, 112 Stat. 2681-231, 2681-280–81 (1998); codified at 25 U.S.C. § 450j-2.

Therefore, under the plain language of the ISDEAA, a tribal contractor is entitled to two forms of payment. First is the Secretarial amount, which is paid from the agency's appropriation in the amount that the agency would have used to operate the transferred PFSAs; this amount covers activities that tribes treat as both direct and indirect. Second is CSC, which is distinguishable from the Secretarial amount by the types of activities it covers, but still covers both indirect and direct costs.

As relevant to Sage's present motions, this statutory scheme means that tribal contractors claiming entitlement to CSC must also de-duplicate their claimed CSC to eliminate all of the activities transferred as part of the Federal program that is funded with the Secretarial amount. This statutory scheme also means that CSC claims must properly allocate responsibility for costs among all sources of revenue that the tribal contractor receives to ensure that no single revenue provider (in this case, IHS) bears an undue burden of supporting an entity's administrative costs, especially when the scope of its programs vastly exceeds what the agency would have provided (*e.g.*, the Federal PFSAs).

III. "Duplication"

The ISDEAA authorizes CSC funding to cover only the reasonable costs of activities that must be carried on for contract compliance and prudent management of the Federal PFSAs, and those activities must be ones that IHS normally does not carry on using the Secretarial amount. 25 U.S.C. § 450j-1(a)(2). The ISDEAA also provides that costs for those CSC-eligible activities can be either direct or indirect in nature, but stresses that CSC "funding shall not duplicate any funding provided under [the Secretarial amount]." 25 U.S.C. § 450j-1(a)(3).

Sage's "duplication" argument ignores all of this, save the language about reasonable costs in section 450j-1(a)(2) and the prohibition against duplication between CSC and the

Secretarial Amount in section 450j-1(a)(3). *See, e.g.*, Duplication Motion at 17 ("The additional funding Sage seeks is for increased costs it incurred above the amounts IHS provided.") (emphasis in original). From this limited perspective, Sage asserts that there are only two limitations upon its statutory entitlement to funding: (1) a lower boundary consisting of the Secretarial amount and CSC that IHS has already paid under the terms of its ISDEAA contract (it does not seek to be paid twice for funds that it has already received); and (2) an upper boundary of its total operating costs of its hospital (with CSC covering all of the hospital's costs that IHS has not yet funded, regardless of whether or not IHS already provided for those activities through the Secretarial amount).

Sage's position is unsound because its narrow focus ignores the majority of the statutory language that defines CSC. Consideration of all the relevant statutory provisions, which notably include a compartmentalized funding structure and the conspicuous use of the word "activities" in the definition of CSC, leads to the inexorable conclusion that there is an activity-based distinction between the Secretarial amount and CSC, and Sage's entitlement to CSC must be determined in light of these plain statutory requirements. Accordingly, the Court should deny Sage's Duplication Motion.

A. The Plain Language of the ISDEAA Limits CSC Funding to Activities That Must Be Carried on by Sage But That IHS Does Not Normally Carry On Using the Secretarial Amount

When Congress added CSC to the ISDEAA in 1988, it used the phrase "reasonable costs for activities" as the introduction to the definition of the then-new component of ISDEAA contract compensation, and it followed the word "activities" with two subordinate relative clauses: "which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management," and "but which – (A) normally are not

carried on by the respective Secretary in [her] direct operation of the program; or (B) are provided by the Secretary in support of the contracted program from the resources other than those under the contract." 25 U.S.C. § 450j-1(a)(2)(A)–(B). Thus, the ISDEAA distinguishes the Secretarial amount from CSC by the activities unique to each: the Secretarial amount is identifiable as covering costs for those activities that the Secretary normally carries on in her operation of the program (using the Secretarial amount), and CSC is identifiable as covering only activities not attributable to the Secretary's normal operation of the program.

Further, Congress specified that CSC is available only "for activities which *must* be carried on . . . to ensure compliance with the terms of the contract and prudent management . . . ." 25 U.S.C. § 450j-1(a)(2) (emphasis added). Combined with the fact that level of effort required to perform a Federal PFSAs is coterminous with the Secretarial amount, 25 U.S.C. § 450j-1(a)(1), as well as remedies available to a tribal contractor if it believes it cannot perform the Federal PFSAs with the Secretarial amount, 25 U.S.C. § 450*l*(c), it is clear that a tribal contractor need not expend more than the Secretarial amount to prudently manage and comply with its contractual and statutory obligations to perform the transferred PFSAs. Accordingly, any discretionary expenditures above the Secretarial amount are not "activities which must be carried on," and are not eligible for CSC.

Later, Congress revised the statute again to provide additional guidance about the nature of both the Secretarial amount required by section 450j-1(a)(1) and the activities eligible for CSC under section 450j-1(a)(2). First, Congress amended section (a)(1) to clarify that the Secretarial amount must include funding "without regard to any organizational level within . . . [HHS] . . . at which the [PFSA] or portion thereof, including *supportive administrative functions* that are otherwise contractable, is operated." (Emphasis added). Congress also added a new subsection

– (a)(3) – which clarified that CSC was available to reimburse the reasonable and allowable costs of both "*direct* program expenses for the operation of the Federal program that is the subject of the contract," and "any additional *administrative* or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract." 25 U.S.C. § 450j-1(a)(3) (emphases added). Along with these amendments, which clarified that both the Secretarial amount and CSC may cover activities that are both *direct* and *administrative* in nature, Congress included language reinforcing the distinction between CSC and the Secretarial amount reflected in the structure of subsection (a)(2): "such [CSC] funding shall not duplicate any funding provided under [the Secretarial amount]." *Id.*

Where, as here, the language of the statute is clear, courts should enforce the statutory requirements as-written. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981))). The language in 25 U.S.C. §§ 450j-1(a)(2) and (a)(3), when read together, is clear: activities that IHS normally carries on in its operation of a PFSA are covered by the Secretarial amount, they are not eligible for CSC, and any activity funded in the Secretarial amount cannot also be funded as CSC.

B. Sage's Approach To Duplication Is Not Reasonable

Sage disagrees, asserting that the proper focus should be upon only selected words within § 450j-1(a)(2) and the "shall not duplicate any funding" language of § 450j-1(a)(3). With respect to subsection (a)(2), Sage asserts that CSC is defined only as "overhead and administrative costs in whatever amount is 'reasonable' for activities that 'must be carried on' in order to 'ensure compliance with the terms of the contract and prudent management.'" Duplication Motion at 18

(citing 25 U.S.C. § 450j-1(a)(2), but only selectively quoting from it). With respect to the "duplication" language at the end of subsection (a)(3), Sage asserts that it simply means that "'duplication' is avoided when the agency is given full credit for the amount of dollars it provided in the Secretarial amount for any particular function." Duplication Motion at 17. Read together, Sage asserts that it only "seeks [additional funding] for increased costs it incurred above the amounts IHS provided," and "[s]o long as the additional costs Sage claims are reasonable and necessary for Sage to prudently carry out the contract, then those additional costs are eligible CSC costs that 'shall' be added in full to the contract." Duplication Motion at 17-18. As summarized by Sage's accounting expert, Sage believes that CSC is intended "to reimburse ISDEAA contractors for incremental costs of contracted programs that are anticipated to be incurred in excess of the 'Secretarial amount' . . . ." A26.

Sage's approach ignores large swaths of the relevant statutory text, and, in doing so, contravenes the requirement to read the statute as a whole. *See Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1062 (10th Cir. 2011). Sage's approach is also incorrect, as we have demonstrated immediately above. The only plausible reading of the two CSC provisions – the entire two provisions – requires recognizing that: (1) subsection (a)(2) not only requires CSC to be reasonable and necessary to carry out and manage the contract, but also structurally distinguishes CSC from the Secretarial amount by the "activities" performed under each; and (2) subsection (a)(3) clarifies the nature of CSC-eligible activities as including both direct and indirect, and the concluding "duplication" admonition of subsection (a)(3) reinforces the importance of the ISDEAA's prohibition against funding activities through both the Secretarial amount and CSC. *Conn. Nat'l Bank*, 503 U.S. at 253 ("[r]edundancies across statutes are not unusual events in drafting" (citing *Wood v. United States*, 41 U.S. 342, 363 (1842) (instructing

that enactments which are repetitive of previously adopted legislation "may be merely affirmative, or cumulative or auxiliary"))).

Indeed, it is Sage's interpretation that would introduce meaningless surplusage to the ISDEAA, and it would do so by destroying the functional distinction between the Secretarial amount and CSC. Sage's ultimate position on the "duplication" issue is that it may charge the Government for any costs that it deems reasonable and necessary for the prudent management of its health care programs, even those costs for activities that IHS would otherwise carry on and transferred along with the Secretarial amount. Duplication Motion at 17-18. In other words, Sage seeks to expand the Secretarial amount by classifying all of its incremental expenditures on Secretarial-amount activities as CSC.

As demonstrated immediately above, this fails to consider, and thus renders meaningless, everything after the words "prudent management" in 25 U.S.C. § 450j-1(a)(2). Also, if Congress meant to increase funding for the activities already funded under the Secretarial amount, as Sage suggests, in 1988 it would have done so by amending the provision concerning the Secretarial amount, § 450j-1(a)(1), rather than creating an entirely new, distinct, and restricted category of funding called CSC through the enactment of § 450j-1(a)(2). But that did not happen, and when Congress amended the ISDEAA again in 1994, it left the requirements of § 450j-1(a)(2)(A)-(B) – including the activity-based distinction between the Secretarial amount and CSC – fully intact.[6] *See Rodriguez v. United States*, 480 U.S. 522, 524 (1987) ("repeals by implication are not

[6] In a similar case, a tribe (represented by Sage's former co-counsel) ultimately conceded that this interpretation is correct while making a similar argument to the one Sage makes here. *See* Reply in Support of Plaintiff's Motion for Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment, at 15, *Cook Inlet Tribal Council v. Mandregan*, No. 1:14-cv-01835-EGS (D.D.C. Apr. 24, 2015) (Doc. 18) (admitting that the plaintiff in that case "could not demand more program dollars as direct CSC . . . because that would be an expansion of the Federal program") (excerpt located at A56-57).

favored"). The statutory language – all the statutory language – clearly fits together and indicates that CSC is not a limitless source of funds for tribes to expand their Secretarial amount.[7]

Sage's interpretation also fails to consider the fact that the ISDEAA contains separate provisions addressing the means by which a tribal contractor may supplement the Secretarial amount (which, again, is what Sage states that it is seeking to do here). Section 450*l*(c) of the statute sets forth the model ISDEAA contract, which contains the following provision concerning the sufficiency of the Secretarial amount:

> The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

25 U.S.C. § 450l(c) (section (b)(5) of the model agreement); *see also* A2, A4. This provision explicitly provides that, rather than performing at a loss because the costs for activities covered by the Secretarial amount have exceeded that amount, a tribal contractor may request additional funding from IHS and discontinue services once the Secretarial amount is exhausted. This is the

[7] The Congressionally-approved amount for Indian health care is substantially below what tribes desire for their health care programs. For example, while Congress appropriated $3.6 billion for health services in FY 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2564 (2015), tribes identified a desired funding level of $28.7 billion, Nat'l Indian Health Bd., Test. of the Nat'l Indian Health Bd. for the U.S. Dep't of Health & Human Servs. 17th Annual Tribal Budget & Policy Consultation at 3 (Feb. 26, 2015), *available at* http://nihb.org/docs/02272015/NIHB%20Testimony%20for%20HHS%20Budget%20Consultation.pdf.

remedy Sage has available to it if it feels it needs more money attributable to its Secretarial amount. Such a remedy would be unnecessary if, as Sage suggests, 25 U .S.C. §§ 450j-1(a)(2) and (a)(3) require IHS to provide CSC funding to supplement activities covered by the Secretarial amount.[8]

In an attempt to create ambiguity where none exists, Sage offers an excerpt from Senate Report 103-374 that states "[i]n the event the Secretarial amount under [§450j-1(a)(1)] for a particular function proves to be insufficient in light of a contractor's needs for prudent management of the contract," then CSC should be used to fill that gap. Duplication Motion at 17. Notwithstanding Sage's reliance upon the legislative history and the discourse that immediately follows in this brief, statements in the legislative history cannot trump the plain language of the statute. *See City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 337 (1994) ("But it is the statute, and not the Committee Report, which is the authoritative expression of the law . . . ."); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981))). Even the canon of Indian deference will not apply where the statutory text is clear, as it is here.[9] *See Winters v. United States*, 207 U.S. 564,

[8] If a portion of Sage's concern is the adequacy of its Secretarial amount, then Sage also overlooks its ability to submit a contract proposal requesting the additional amount it believes the statute requires. 25 U.S.C. § 450f(a). If IHS agrees that an increase in the Secretarial amount is warranted, then it would add that amount to Sage's contract. *Id*. If IHS disagrees, then the statutory declination procedures are available to Sage. *Id.* Indeed, Sage did just that in its FY 2015 proposal that IHS declined. Doc. 180, ¶ 51.

[9] Even if the statutory language is ambiguous (it is not), the Indian canon still does not apply if this Court finds at trial that Sage's position on these CSC-related issues does not advance any tribal interest or that there are current and/or ongoing interests of Navajo Nation that are opposed to, conflict with, or compete with Sage's position. Indian deference "is inapplicable when 'the [competing] interests at stake both involve Native Americans.'" *Cherokee Nation of Okla. v. Norton*, 241 F.Supp.2d 1374, 1380 (N.D. Okla. 2002) (quoting *Utah v. Babbitt*, 53 F.3d 1145, 1150 (10th Cir. 1995)); *see also N. Cheyenne Tribe v. Hollowbreast*, 425

576 (1908) ("By a rule of interpretation of agreements and treaties with the Indians, *ambiguities* occurring will be resolved from the standpoint of the Indians." (emphasis added)); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) ("[T]hese canons do not determine how to read this statute.'" (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001))).

Even if the legislative history could be controlling in the place of the clear statutory language (and it is not), Sage does not acknowledge that the report upon which it relies accompanied a Senate bill that was not ultimately passed. *See* S. Rep. No. 103-374 (indicating that it is to accompany S. 2036); *but see* Pub. L. No. 103-413, 108 Stat. 4250 (passing H.R. 4842). Moreover, the statement upon which Sage relies is but one statement that is inconsistent not only with the text of the statute itself, but also with a long history of Congress describing CSC as being authorized for specific contract administration requirements. Congress originally specified that the purpose of CSC is to prevent tribes from having to divert funds that IHS would have used for the PFSAs to cover activities uniquely required of tribes – but not IHS – for contract administration and prudent management. S. Rep. No. 100-274, at 8-9, 13 (discussing examples of administrative requirements tribes were required to fund by diverting funds from the PFSAs); *see also* 140 Cong. Rec. H11140-01, H11144. An underlying concern was that self-determination would be hindered if, upon transfer of the PFSAs to a tribe, tribes necessarily had to reduce services because of such diversion. S. Rep. No. 100-274, at 8 (characterizing such underfunding as "[p]erhaps the single most serious problem with implementation of the Indian self-determination policy"). Such concern is not applicable to situations such as Sage's, where

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U.S. 649, 655 n.7 (1976) ("[This] canon has no application here; the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members."); *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 n.4 (9th Cir. 1990) ("[T]he question here is not whether to favor Native Americans, but which Native Americans to favor.").

the ISDEAA contractor is seeking CSC funding, not to avoid reducing its PFSAs, but instead to fund a health care program that it has grown to be much larger than what IHS previously provided or would continue to operate with the Secretarial amount. A28 (explaining that Sage "dramatically increase[d] both the quantity and quality of services . . . provided over the period 2008 to 2014"). Nothing in the ISDEAA requires CSC to expand the Secretarial amount and cover additional services beyond the Secretarial amount transferred by IHS.

Congress also expressly contemplated the types of activities that CSC should cover. For example, Congress discussed "federally-mandated" audits, as well as liability insurance that tribes were required to obtain before Congress extended the Federal Tort Claims Act to activities performed under ISDEAA agreements. S. Rep. No. 100-274, at 8–9. In addition, agencies initially required contract and program reporting that Congress did not want to be funded at the expense of the PFSAs. *Id.*; *see also* Indian Self-Determination and Education Assistance Act: Oversight Hearing on the Implementation of the Indian Self-Determination Act, and Development of Regulations Following Passage of the 1988 Amendments to the Act Before the Subcomm. on Native Am. Affairs of the H. Comm. on Natural Res., 103d Cong. 91 (1994) (ISDEAA Implementation Oversight Hearing) (testimony of Lloyd B. Miller) ("tribal contractors see their contract support costs driven up to pay for the preparation of often mindless reports that serve no essential tribal purpose"). As acknowledged by Sage's litigation accountant, the contract administration requirements discussed by Congress throughout the years are entirely distinct from activities for which Sage seeks CSC (*e.g.*, supplying bed linens), as IHS would normally carry on such activities if it operated the PFSAs itself. A24.

Finally, Congress and others expressed concern that PFSAs carried on by IHS must be funded through the Secretarial amount and not as CSC. *See, e.g.*, ISDEAA Implementation

Oversight Hearing at 88 (testimony of Lloyd B. Miller) (discussing how failure to transfer funding for activities normally carried on by the agencies would "lead[ ] to a higher tribal need for 'contract support costs' to perform these functions"). Congress addressed this concern by strengthening the Secretarial amount requirements. Pub. L. No. 103-413, tit. I, § 102(14)(A), 108 Stat. at 4257 (amending § 450j-1(a)(1) to affirm the requirements of the Secretarial amount); see also S. Rep. No. 100-274, at 23.

Sage also contends that the defendants have taken actions that are inconsistent with the statutory interpretation advanced here. Sage references the IHS CSC Policy and a letter from IHS Deputy Director Elizabeth Fowler to Ms. Sandra Hadley in its effort to create an ambiguity, *see* Duplication Motion at 21, but the IHS CSC Policy is replete with guidance consistent with the plain language of the statute, as is the referenced letter. Deputy Director Fowler explains that "whether a particular cost is funded through the Secretarial amount or as CSC turns primarily on whether the Secretary normally carries on the related activity and therefore transferred the associated funding for that activity through the Secretarial amount." Doc. 200-2 (3/29/2016 correspondence from L. Fowler) at 1. Similarly, the IHS CSC Policy is clear that all CSC – including both direct and indirect – must be evaluated to ensure that the Secretarial amount and CSC are not duplicative. *See* IHM § 6-3.2B, ex. 6-3-H at 3, ¶2(B) (copy at A30-31, A34). IHM exhibit 6-3-H provides detailed guidance on evaluating this issue for direct costs, identifying numerous activities that are funded in the Secretarial amount and therefore not eligible for CSC funding. IHM, ex. 6-3-H at 21-27 (copy at A41-47) (including, as examples, salaries, supplies, and drugs). The IHS CSC Policy establishes fringe benefits as the lone exception – from a process perspective, though not from a legal perspective. Fringe benefits is a group of "hybrid" activities, in that some are activities IHS normally carries on with the Secretarial amount (*e.g.*,

retirement), while others are not (*e.g.*, unemployment insurance). The IHS CSC Policy adopts the efficient approach of treating fringe benefits as such a group and applying an offset for the amount IHS has funded for the category. *Id.* at 19, 22-23 (copy at A39, A42-43). Deputy Director Fowler's letter, as well as the expert report produced by Ms. Hadley, similarly recognize this approach for fringe benefits, which is the primary activity funded as direct CSC. *Id.*; Doc. 200-1 (report of S. Hadley) at 9-10; Doc. 200-2 (3/29/2016 correspondence from L. Fowler) at 2-3. For all other activities discussed, IHM exhibit 6-3-H explains that CSC funding is authorized only if IHS does not normally carry on the activity or in rare situations where IHS did not transfer its resources for that activity as part of the Secretarial amount. IHM ex. 6-3-H, at 21-27 (copy at A41-47; *see also* Doc. 200-2 (3/29/2016 correspondence from L. Fowler) at 1, 2.

Since CSC was created, Congress has recognized, as a potential problem, that CSC could become "an open-ended uncontrollable, entitlement fund, the size and distribution of which depended solely on the initiative and ingenuity of each tribe." S. Rep. No. 100-274, at 10 n.10 (citing a report by the American Indian Law Center). In this case, Sage apparently seeks to transform that concern and cause for worry into the controlling interpretation of the statute. Defendants respectfully urge the Court to refrain from doing so, and request that Sage's Duplication Motion be denied.

IV. "Allocation"

A. The ISDEAA and OMB Cost Principles Require Allocation Of Costs Among A Tribal Contractor's Various Revenue Streams

As demonstrated above, the ISDEAA authorizes CSC funding only to cover the reasonable costs of unique activities not covered by the Secretarial amount and that must be carried on for contract compliance and prudent management of the Federal PFSAs. 25 U.S.C. §§ 450j-1(a)(2), (a)(3); § 450j-2. In practical terms, this means that costs must be allocated

proportionally among the various revenue streams that supply a tribe or tribal organization's operating budget so that the agency is not forced to fund all of its overhead costs through the ISDEAA contract when other programs benefit from those activities.

This concept is inherent in the statutory definition of CSC, and it is particularly emphasized by the restriction imposed by section 450j-2, which provides that "no funds appropriated by this or any other Act shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service." 25 U.S.C. § 450j-2. In passing this provision in 1998, Congress explained that IHS "funding may not be used to pay [costs] for any entity other than [IHS]," H.R. Rep. No. 105-609, at 108, 110, and it expressed dissatisfaction with the Tenth Circuit's decision in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), which had held that 25 U.S.C. § 450j-1(a), interpreted deferentially to the tribal contractor, did not require the allocation of indirect costs according to OMB Circular A-87, *id*. at 57.

The United States District Court for the District of Columbia examined the effect of section 450j-2 upon the question of indirect-cost allocation in *Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382 (D.D.C. 2008). In *Tunica-Biloxi*, the tribal contractors challenged the agency's use of OMB Circular A-87 to allocate their indirect costs on a *pro rata* basis among their various government contracts, contending, much as Sage does in this case, that 25 U.S.C. § 450j-1(a) required the agency to provide CSC to support the tribal contractor's entire program, regardless of the fact that the tribal contractor supports its health programs with revenues it obtains from other sources and that those other resources are benefitting from the administrative activities. 577 F. Supp. 2d at 414. The tribal contractors also contended that the

Government was collaterally estopped from challenging the favorable decision upon this issue that the tribes had achieved in the Tenth Circuit case *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). *Id*. at 414-15. The district court declined to apply the doctrine, holding that Congress' enactment of 25 U.S.C. § 450j-2, apparently in partial reaction to the Tenth Circuit's decision in *Ramah Navajo Chapter v. Lujan*, was sufficient to invoke the "change in the legal context" exception to the doctrine. *Id.* at 417-19. In coming to this conclusion, the district court observed that "the only plausible interpretation of § 450j-2 is . . . that the statute prevents the IHS from paying more than its *pro rata* share of the indirect costs incurred by contracting tribes and tribal organizations." *Id*. at 418.[10]

The specific challenge in this case is slightly different – Sage does not complain that IHS should provide CSC for revenue streams it obtains from other government awards; instead, it complains that IHS should provide CSC for revenue streams it obtains from Medicare and Medicaid and non-Federal entities (private insurers) – but the analysis from *Tunica-Biloxi* still applies: section 450j-2 requires an equitable distribution of a contractor's administrative costs and bars shifting costs to IHS that are not allocable to the Federal PFSAs funded by the Secretarial amount.[11] This challenge comes after years of Sage itself repeatedly proposing that its CSC be calculated using ratios to allocate its administrative costs, consistent with OMB cost

[10] The *Tunica-Biloxi* court also noted several references within the ISDEAA to the proportional allocation of indirect costs, which, taken together, "necessarily impl[y] a *pro rata* funding scheme for indirect costs." 577 F. Supp. 2d at 422.

[11] To be clear, Defendants' objection to Sage's position relates to the portion of Sage's administrative costs that support the portion of its health care programs funded with its collections (as opposed to the Secretarial amount). To the extent the PFSAs include salaries for personnel that actually process collections – because IHS normally performs that activity as well and transfers the funding for those personnel as part of the Secretarial amount – IHS agrees that CSC would be calculated on the Secretarial amount for such activities. *See* NAIHS Organizations, Functions, and Delegations of Authority, Fed. Reg. at 69,571.

principles. A14-16 (Sage's FY2009 CSC Proposal); A17-18 (Sage's FY2010 CSC Proposal); A19-21 (Sage's FY2011 CSC Proposal).

As Sage recognized in those proposals, allocation of indirect costs is also required by OMB Circulars A-87, which contains various cost principles applicable to Federal awards, including ISDEAA contracts. *See* OMB Circular A-87 § A(1) (stating that the purpose of the Circular is to "establish[] principles for determining the allowable costs incurred . . . under grants, cost reimbursement contracts, and other agreements with the Federal Government""); 25 U.S.C. § 450c (requiring ISDEAA contractors to comply with federal financial assistance reporting and audit requirements). One of the requirements of Circular A-87 is a Federal awardee's obligation to allocate indirect costs across multiple cost objectives, even when the awardee's operation has only one primary function. *See* Circular A-87 § C(3) (requiring allocation of indirect costs); Circular A-87 § B(11) (defining "cost objective");[12] Circular A-87 § F(1) (defining "indirect costs").[13] The Circular requires an "equitable distribution" of these indirect expenses to ensure that each revenue stream is paying for only the benefit it receives from the activity by bearing its own appropriate portion of the entity's total indirect expenses. *See* IHM, ex. 6-3-H at 6, ¶ C (incorporating the OMB Circular requirements regarding allocation of costs) (copy at A37).

[12] "Cost objective" means a function, organizational subdivision, contract, grant, or other activity for which cost data are needed and for which costs are incurred." Circular A-87 § B(11).

[13] "Indirect costs are those: (a) incurred for a common or joint purpose benefiting more than one cost objective, and (b) not readily assignable to the cost objectives specifically benefitted, without effort disproportionate to the results achieved. The term "indirect costs," as used herein, applies to costs of this type originating in the grantee department, as well as those incurred by other departments in supplying goods, services, and facilities. To facilitate equitable distribution of indirect expenses to the cost objectives served, it may be necessary to establish a number of pools of indirect costs within a governmental unit department or in other agencies providing services to a governmental unit department. Indirect cost pools should be distributed to benefitted cost objectives on bases that will produce an equitable result in consideration of relative benefits derived." Circular A-87 § F(1).

Thus, even when a tribal organization such as Sage only operates a health care program (rather than, for example, a tribal government operating many different types of programs), an allocation method must still be developed to assign the proper amount of indirect costs to any Federal award. *See* 2 C.F.R. pt. 200, app. VII, § C.2 (setting forth the current OMB regulations, which superseded Circular A-87 at the end of 2014, and describing the option of calculating a simplified rate or ratio in such situations). Otherwise, the Federal award (in this case, the ISDEAA contract) would be forced to shoulder all indirect costs, including those not associated with or attributable to the Federal PFSAs – a clearly inequitable result that is contrary to the regulations' intent to ensure each of the funding streams bears its part of the total expenses.

B. Sage's Non-Allocation Approach Is Not Reasonable

Sage disagrees with all of the above and takes the position that the administrative (or indirect) costs of its entire health care program (which, due to the additional revenue Sage receives from its third-party collections, is nearly double the Secretarial amount) should be allocated to IHS and funded with CSC. Allocation Motion at 20-25; Doc. 180 ¶ 31 (conceding that IHS funding, on average, is only 55 percent of Sage's health care programs). Sage is focused upon the substantial revenue stream it receives from third parties (Medicare, Medicaid, and private insurance), and its apparent dissatisfaction with its prior agreement, when it negotiated its contracts, that indirect costs should be allocated proportionally between IHS and non-IHS revenue streams. *Id*. Sage makes several compartmentalized arguments in favor of its position; we address each in turn.

(1) The ISDEAA's Restrictions Upon The Use Of Program Income Do Not Collaterally Increase Sage's Entitlement to CSC

Sage's defense of its position begins with its assertion that its third-party revenues constitute "program income," as that term is used at 25 U.S.C. § 450j-1(m), and that this same

section bars allocation of its indirect costs because doing so allegedly would reduce Sage's entitlement to CSC under its contract and the ISDEAA. Allocation Motion at 20.

Sage's approach misconstrues section 450j-1(m). That provision only restricts the use of "program income." Under that section, the tribal contractor may not use the additional funds it earns for anything it pleases; it must use them "to further the general purposes of the contract." 25 U.S.C. § 450j-1(m)(1). The Government, on the other hand, is prohibited from using Sage's collection of these additional funds as a "basis for reducing the amount of funds otherwise obligated to the contract." 25 U.S.C. § 450j-1(m)(2). This provision says nothing about a tribal contractor's entitlement to CSC in the first instance (which, as demonstrated in section II, above, is defined by 25 U.S.C. §§ 450j-1(a)(1) through (a)(3), and 450j-2), and Sage's motion avoids addressing that question.[14]

Sage complains that the Government's allocation approach would require "programs funded in part with third-party revenues [to be forced] to bear their own overhead expenses, thus reducing the amount of services that the Tribe can provide with those programs." Allocation Motion at 20. However, the allocation approach is required by the statute and applicable cost principles, so that the proportionate share of indirect costs generated through expenditures from additional revenue streams must be covered by those revenue streams. This allocation approach does not run afoul of 25 U.S.C. § 450j-1(m)(2), or IHS's responsibilities under the contract or the ISDEAA, because third party collections are not "obligated to the [ISDEAA] contract." Sage

[14] Sage's motion also summarily states that "[i]t is *undisputed* that Sage is using the third-party revenues 'to further the general purposes of the contract' . . .", Allocation Motion at 20-21 (emphasis added), without offering any evidence to support this allegation. Of course, the defendants have repeatedly indicated that they have concerns about Sage's use of its third-party revenues, so, to the extent that Sage's statement is intended to indicate that *all* of its third-party revenues are being used "to further the general purposes of the contract," that assertion is disputed.

cannot increase the contractual amount – for the Secretarial amount or CSC – to support these additional expenditures.

Moreover, Sage's complaint that it will have to "reduce the amount of services" is based upon the false assumption that it is somehow required to pour every dollar it receives from its third-party revenues into increasing only the activities funded from the Secretarial amount. It is not. For example, if a Tribe elects to directly bill Medicare, Medicaid, or CHIP, the collections must be used for one of the purposes listed in 25 U.S.C. § 1641(d), but those uses are not limited to the provision of additional health care services. The list includes a wide array of purposes, such as improvements that may be needed to comply with the terms of the Medicare, Medicaid, or CHIP program, which are not required by the terms of the ISDEAA contract with IHS. Indeed, tribes, at times, have statutory authority to expend such revenue on items and services, such as construction, that would otherwise be an impermissible use under an ISDEAA contract to provide health services. In other words, Sage's contract with IHS does not dictate how much Sage must collect in third-party revenues or specifically how it "must" expend those funds, so these permissible activities are not required by the ISDEAA contract. Sage's belief that its actions are "prudent" in no way satisfies the statutory requirements for CSC, particularly when Sage is neither required nor encouraged by the ISDEAA contract to generate additional costs chargeable to the contract, IHS has already disputed whether Sage engages in prudent management, and by the plain language of the ISDEAA, Sage is entitled to CSC only for the unique activities it *must* necessarily perform to operate the Federal PFSAs that are the subject of the ISDEAA contract. Accordingly, allocating Sage's indirect costs across its various revenue streams is consistent not only with the letter of the law, but also with the intended purpose of CSC, which is to prevent the reduction of the Federal PFSAs when they transfer from Federal to

tribal administration. *See* 140 Cong. Rec. H11140-01, H11144.

(2) Third Party Revenues Do Not Increase The Secretarial Amount

The second aspect of Sage's "allocation" argument asserts that the allocation of indirect costs is "inconsistent with [an]other provision[] of the ISDEAA," namely, the definition of the Secretarial amount. Allocation Motion at 21. According to Sage, the Secretarial amount "necessarily includes both appropriated funds and third-party revenues," so a tribal contractor's entitlement to CSC should be based upon a Secretarial amount that reflects both of these revenue streams. *Id*. This is not persuasive for a number of reasons.

First, the plain language of 25 U.S.C. § 450j-1(a)(1) limits the Secretarial amount to appropriated funds. The operative language describing the compensation component is the amount that the "appropriate Secretary would have otherwise provided," and appropriated funds (*i.e.*, taxpayer dollars) are the resource available to Federal agencies for the purpose of providing money to Government programs. *E.g.*, *Ramah v. Babbitt*, 87 F.3d at 1341 (stating that the Secretarial amount is appropriated funds). *See also Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (explaining the executive's discretion to administer the lump-sum appropriations); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2264-2266 (2015). Moreover, the ISDEAA does not require that the funding received will fund the level of services the tribe wishes to provide; instead, it requires only that the funding is equivalent to what the Government otherwise would have used from its appropriations. *Yerington Paiute Tribe*, 2007 WL 3146252 at *2 ("When a tribe agrees to take responsibility for dental services or any other [PFSA] . . . the tribe is not guaranteed that the funds it receives from IHS will be adequate to provide its desired level of service.").

Second, Sage's position also does not withstand the scrutiny of its own contractual

relationship with IHS or the demands it is making in this litigation (or elsewhere). By explicitly asserting that Sage's third-party collections are included in the Secretarial amount, Sage implicitly asserts that IHS is somehow required to pay that money to Sage. However, there is no such provision in Sage's ISDEAA contracts. Sage must instead seek such collections from third party payers through 25 U.S.C. § 1621e or through participation in Medicare, Medicaid, or CHIP. Sage can enter into provider agreements with third party payers, such as private insurance companies, and any recourse for failure to pay under such an agreement or the corresponding statute, 25 U.S.C. § 1621e, is against the third-party payer, not IHS. *See generally ANTHC v. Premera*, Case No. 12-CV-0065, Order re Cross-Motions for Partial Summary Judgment (D. Alaska Oct. 15, 2014); *see also* 25 U.S.C. § 450j-2 (prohibiting the use of CSC to support any agreement other than the ISDEAA contract). Even if IHS were collecting from third-party payers on a tribe's behalf, the collections would not be IHS funds, but rather would be "100 percent pass-through[s]" to the tribe. *See* 25 U.S.C. 1641(c)(1)(A). Also, based upon Sage's stated rationale, consistency demands that Sage claim entitlement to an upward contract modification of its Secretarial amount based upon its ability to collect third-party revenues – but Sage is not doing that in the years (2009-2013) covered by its CSC claim.[15]

Third, Sage is misguided in its insistence that third-party revenues should be added to the

[15] Nor should it, because Sage would not be successful. The remedy for an allegedly insufficient Secretarial amount is the ISDEAA proposal and declination process, whereby it controls its own proposal and is empowered to force IHS to decline the proposal and defend such declination under the ISDEAA. 25 U.S.C. § 450(f). Additionally, under the limitation-of-costs clause in the standard ISDEAA contract, Sage may cease performance if the IHS does not increase its funding. 25 U.S.C. § 450*l*; *see also* A2, A4 (excerpts from Sage's ISDEAA contracts). Both require a demonstration that more funds are needed – and required under the ISDEAA, since IHS cannot be required to arbitrarily increase the Secretarial amount for one tribe since doing so would necessarily reduce the resources available to serve other tribes, 25 U.S.C. § 450j-1(b) – to perform the transferred PFSAs; simply making a request to receive matching funds for the tribal contractor's third-party collections efforts would not meet this standard.

Secretarial amount for purposes of CSC because IHS sometimes supplements the operating budgets of IHS-operated facilities with third-party revenues, or because the Indian Health Care Improvement Act (IHCIA) contains directions to collect and use third-party revenues, or because Sage's contracts contain provisions encouraging the pursuit of and restricting the use of third-party revenues. Allocation Motion at 22-23. The general authority for IHS and contracting tribes to seek reimbursement from certain third-party payers is found, not in the ISDEAA, but in the IHCIA and the Social Security Act. Provisions relevant to this case are 25 U.S.C. § 1621e(a), which authorizes IHS and tribes "to recover from an insurance company, health maintenance organization, employee benefit plan, third-party tortfeasor, or any other responsible or liable third party;" § 1621f, which requires any third-party reimbursements to be credited to either IHS or the tribe, as appropriate; and 42 U.S.C. § 1395qq, 42 U.S.C. § 1396j, and 25 U.S.C. § 1641, which give IHS and tribes the option to seek reimbursement from Medicare and Medicaid for services provided to eligible patients. Both Sage and IHS must comply with these statutory provisions, which exist outside of the ISDEAA, to lawfully collect and expend third-party reimbursements.

Because Sage's use of third-party funds is not governed by the terms of the ISDEAA agreement, services provided from such income cannot be part of the Secretarial amount or Federal PFSAs for purposes of CSC. Accordingly, the collection and use of such monies does not involve activities that "must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the [ISDEAA] contract and prudent management . . . ." 25 U.S.C. § 450j-1(a)(2). Sage also suggests that provisions in its ISDEAA agreements should alter this reality, *see* Allocation Motion at 23-24, but Sage mischaracterizes the import of those provisions. While the ISDEAA contract acknowledges those legal authorities, such references do not make

collections part of the Secretarial amount or require CSC to support Sage's additional expenditures above that amount.

Above all of this, though, is the fact that Sage's insistence that the Secretarial amount must increase to support Sage's goal of obtaining additional CSC implicitly acknowledges that there must be a direct relationship between the Secretarial amount (*i.e.*, the value of this particular Federal award) and a tribal contractor's entitlement to CSC. This is the defendants' entire point, which Sage tacitly concedes.

(3) *Pyramid Lake* Is Not Dispositive

Sage concludes its motion by asserting that "the courts have considered and squarely rejected IHS's position concerning whether the reach of ISDEAA extends to programs supported by third-party revenues." Allocation Motion at 24. Sage then proceeds to discuss one case, *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534 (D.D.C. 2014), which provided an analysis that is more succinct than the paraphrased version that appears in Sage's brief:

> As alternative grounds, the declination letter also argued that the amounts IHS had been transferring from the clinic to the EMS program to make up the shortfall in operating revenues were not within the base funding under 450f(a)(2)(D) because those funds were not themselves a ''program, function, service, or activity available for contracting.'' Declination Letter at 5. But there is nothing in the ISDEAA that requires the *funding* for self-determination programs to themselves be a ''program, function, service, or activity available for contracting.'' As discussed above, the applicable funding level for a contract proposal under sections 450f(a)(2)(D) and 450j1(a)(1) is determined based on what the Secretary otherwise would have spent, not on the source of the funds the Secretary uses. If the Secretary chooses to augment its spending on a program with other funds available to her, nothing in the Act permits her to deduct those amounts from the tribe's funding under an otherwise acceptable ISDEAA contract. Accordingly, the Secretary improperly declined the proposal on that basis.

70 F. Supp. 3d at 543-44 (emphasis in original). The trial court's reference to its "discuss[ion]

above" concerning the appropriate funding level for an ISDEAA contract is, in its entirety: "The 'applicable funding level for the contract,' in turn, shall not be less than the amount the Secretary 'would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract[.]' *Id*. § 450j–1(a)(1)." *Id*. at 538 (brackets in original).

There are several reasons why the *Pyramid Lake* decision is distinguishable from the present case. To begin, *Pyramid Lake* involved the transfer of a program to a tribe that, in its operation of the program, IHS partially funded with third-party revenues IHS collected from the operation of a *separate* program that was not the subject of the transfer. *Id.* at 539. As noted above, the *Pyramid Lake* court held that the source of funding was immaterial in determining the Secretarial amount and that the determinative factor was what IHS would have otherwise "spent," regardless of which of its own resources the agency used. *Id.* at 544. In this case, Sage and IHS already agreed upon the Secretarial amount that IHS would have otherwise spent, and the dispute centers not on resources available to IHS but that Sage has generated from its own efforts to collect from third-party payers. Accordingly, Sage's pursuit of third-party funds that it uses to augment the contracted Federal PFSA does not increase the Government's obligation to provide CSC.

Also, and respectfully, the *Pyramid Lake* court's approach and resolution of the issue undercuts the persuasiveness of its conclusion. For example, it appears that the *Pyramid Lake* court conflated two separate assertions that the defendants were making in that case, then compounded this error by focusing upon the less-developed one. The defendants in the *Pyramid Lake* case actually took a position similar to the one taken by the defendants in this case, but their brief also contained one sentence stating that "[t]hese [third-party] revenues are not a program, function, service or activity available for contracting under the ISDEAA." *See*

Pyramid Lake Paiute Tribe v. Burwell, et al., No. 1:13-cv-01771-CRC, dkt. no. 14 (Defendants' Motion For Summary Judgment) (D.D.C. March 14, 2014), at 36-37. The trial court's decision in *Pyramid Lake*, however, focuses upon this sentence rather than the more developed argument concerning the proper composition of the Secretarial amount under 25 U.S.C. § 450j-1(a)(1). *Pyramid Lake*, 70 F. Supp. 3d at 543-44.

In sum, the *Pyramid Lake* court did not face the precise issue presented by this case. Respectfully, this Court should not find it persuasive.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court deny Plaintiff's Motion For Partial Summary Judgment On The Issue Of Allocation (Doc. 199) and Plaintiff's Motion For Partial Summary Judgment On The Issue Of Duplication (Doc. 200).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 25, 2016, defendants filed through the United States District Court CM/ECF System, "COMBINED RESPONSE TO PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT ON THE ISSUES OF DUPLICATION AND ALLOCATION," causing it to be served by electronic means on all counsel of record.

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