UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SWINOMISH INDIAN TRIBAL COMMUNITY, PLAINTIFF, v. **ALEX M. AZAR, et al.**, DEFENDANTS.	Case No. 1:18-cv-01156-DLF **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** ORAL HEARING REQUESTED

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY

For more than two hundred years, the United States has acknowledged its obligation to provide health care to Native Americans. *Navajo Health Foundation—Sage Memorial Hospital, Inc. v. Burwell*, 263 F. Supp. 3d 1083, 1119–21 (D.N.M. 2016) ("*Sage Memorial*"). As recognized in the Indian Health Care Improvement Act of 2010 ("IHCIA"), "Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people." Pub. L. No. 111-148, Title X, § 10221(a), 124 Stat. 935 (2010) (codified at 25 U.S.C. § 1601). More specifically, in the 1855 Treaty of Point Elliott, to which the predecessor bands of the Plaintiff Swinomish Indian Tribal Community ("Tribe") are signatories, the United States promised "to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them …." Article XIV, Treaty of Point Elliott, 12 Stat. 927 (1855). The Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 *et seq*. ("ISDEAA")—the statute at issue in this litigation—furthers fulfillment of these Trust and Treaty obligations. The historical context and legislative history of the ISDEAA and its amendments are meticulously recounted by the Court in *Sage Memorial*, 263 F. Supp. 3d at 1121–46.

Despite the United States' Trust, Treaty and statutory responsibilities for Native health, it has repeatedly failed to meet those responsibilities. Wide disparities continue to persist between the health of Native Americans and that of the general United States

population.[1] As discussed below, tribes—including the Plaintiff Swinomish Tribe—have utilized the ISDEAA as one tool to address these persistent and pernicious health disparities. But even in this, the tribes have been required to engage in decades of litigation simply to obtain the full amount of health care funding mandated by their agreements with the United States and by applicable law. *See Cherokee Nation v. Leavitt*, 543 U.S. 631, 639 (2005); *see also Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 185 (2012) (related to a Department of Interior funding agreement). The present lawsuit represents yet another such instance.

The specific question in this case is whether the Indian Health Service ("IHS") paid the correct amount of contract support cost ("CSC") funding to the Tribe in calendar year 2010. The Tribe provides health care services to its members and other eligible beneficiaries through a compact (Plaintiffs' Exhibit (hereinafter "Pl. Ex.") A, "Compact of Self-Governance Between the Swinomish Indian Community and the United States of America", hereinafter "Compact") and funding agreement (Pl. Ex. B, "Funding Agreement Between the Swinomish Indian Tribal Community and the United States of America for Calendar Year 2010-2014", hereinafter "Funding Agreement" or "FA"). Under the ISDEAA, these instruments provide two main components of funding for health care services. First, the IHS provides the so-called Secretarial amount, or the amount the Secretary of Health and Human Services would otherwise have spent to

[1] The disparities in mortality rates and other indicia of health between the general population and American Indians and Alaska Natives peoples are well documented. *See, e.g.*, Indian Health Service, "Disparities," available at www.ihs.gov/newsroom/factsheets/disparities/. These disparities fully warrant Congress's finding, in the Indian Health Care Improvement Act, that "the unmet needs of the American Indian people are severe and the health status of the Indians is far below that of the general population of the United States." 25 U.S.C. § 1601(5).

provide health care services for the Tribe's members and other beneficiaries through the IHS, had the Tribe not assumed responsibility for them under its ISDEAA Compact and Funding Agreement. *See* 25 U.S.C. § 5325(a)(1) (requiring payment of full Secretarial amount). Second, the IHS provides funding for CSC, which are the administrative and overhead expenses associated with operating the health care programs and services funded by the Secretarial amount. *See* 25 U.S.C. § 5325(a)(3)(A)(ii); 25 U.S.C. § 5325(a)(2); *Ramah*, 567 U.S. at 185 (requiring payment of CSC in full). Providing CSC is essential, because without it, tribes are forced to redirect funds and reduce the level of health care programs to pay overhead expenses. The ISDEAA provides for full CSC funding in order to assure that there is no diminution in health program resources, which would otherwise occur when a tribe is compelled to divert program funds to prudently manage the contract. *Sage Memorial*, 263 F. Supp. 3d at 1145. The parties dispute what that full amount of CSC was in 2010, and whether it was paid by IHS.

IHS derives its funding to provide health care services to Indian people from Congressional appropriations together with third-party revenues collected primarily from Medicare, Medicaid, and private insurance companies. In fact, a large portion of the IHS budget for health care services provided to Indian beneficiaries comes from third-party revenues, and Congress has enacted a number of statutory provisions to enable and indeed to maximize collection of third-party revenues by IHS and tribal facilities. For instance, in 1976, Congress amended the Social Security Act to allow the Medicaid program to supplement admittedly inadequate IHS funding, and to explicitly authorize IHS and tribal facilities to collect reimbursements from Medicaid. 42 U.S.C. § 1396j.

Third-party revenues are therefore a Congressionally-intended and essential part of the Secretarial amount - the amount that "the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract," 25 U.S.C. § 5325(a)(1), had the Tribe not taken over the programs under the ISDEAA. Indeed, the Tribe's contracts with IHS specifically ***require*** the Tribe to bill and collect from third-party payers, just as IHS does, and federal law requires that such "program income" be used to carry out the purposes of those contracts. 25 U.S.C. § 5388(j).

The parties agree that the amount of indirect CSC owed must be calculated using a "rate-times-base" equation, in which the Tribe's negotiated indirect cost rate is multiplied by the direct cost base supporting the programs carried out under the funding agreement. The parties also agree on the applicable indirect cost rate. So the dispute here is about the size of the direct cost base. The Tribe contends that the direct cost base includes expenditures funded by third-party revenues used by the Tribe to provide services under the Funding Agreement in 2010. IHS disagrees, arguing that only expenditures covered by funding appropriated by Congress to IHS, then transferred to the Tribe through the Funding Agreement, may be included in the direct cost base. (Also at issue is a smaller amount of direct CSC, as discussed below.)

As will be discussed in more detail below, the IHS's position is contrary to law. In fact, this Court has previously held that the applicable funding level of the Secretarial amount "is determined based on what the Secretary otherwise would have spent, not on the source of the funds the Secretary uses." *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 544 (D.D.C. 2014) (holding that Secretarial amount includes third-party

funding). Inclusion of third-party funding in the Secretarial amount accords with the statutory definition of eligible CSC: the administrative or overhead costs "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. § 5325(a)(3)(A)(ii). Therefore these funds are part of the "Federal program" eligible for CSC. *Sage Memorial*, 263 F. Supp. 3d at 1164.

IHS's attempt to limit the Secretarial amount and the federal program to Congressionally-appropriated funding is contrary to law and Congressional intent, and the Tribe is entitled to summary judgment in its favor.

LEGAL AND FACTUAL BACKGROUND

A. Self-Governance Under Title V of the ISDEAA

The ISDEAA authorizes Indian tribes and tribal organizations to assume responsibility to administer programs, functions, services, and activities ("PFSAs") the Secretary would otherwise be obligated to provide under federal law to American Indians and Alaska Natives. 25 U.S.C. § 5321(a)(1). The purpose of the ISDEAA is to reduce federal domination of Indian programs and promote tribal self-determination and self-governance. *See* 25 U.S.C. § 5302(b); *Cherokee Nation v. Leavitt*, 543 U.S. at 639. The ISDEAA reflects the United States' commitment "to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." 25 U.S.C. § 5302(b).

Title V of the ISDEAA, codified at 25 U.S.C. §§ 5381-5399, established the "Tribal Self-Governance Program" and requires the Secretary of Health and Human

Services to negotiate and enter into self-governance compacts and funding agreements with participating tribes and tribal organizations. 25 U.S.C. §§ 5384-5385. Title V requires that each funding agreement shall, "as determined by the Indian tribe," include all PFSAs administered by the IHS under certain enumerated laws, including the Indian Health Care Improvement Act, 25 U.S.C. § 1601, *et seq.* 25 U.S.C. § 5385(b). Tribes are entitled to "plan, conduct, consolidate, administer, and receive full tribal share funding" for the PFSAs they elect to include in the agreement. *Id*.

As noted above, Section 106(a)(1) of the ISDEAA, 25 U.S.C. § 5325(a)(1), establishes that the amount of funds to be provided "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[.]" The amount the Secretary otherwise would have provided to operate the program as provided in § 106(a)(1) is commonly referred to as the "Secretarial amount" or the "106(a)(1) amount."

B. Contract Support Costs

The ISDEAA mandates that, in addition to the Secretarial or 106(a)(1) amount, IHS must include a second type of funding:

> **(2)** There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for 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.

25 U.S.C. § 5325(a)(2). This dispute involves funding for indirect CSC, the administrative and overhead expenses associated with carrying out the Tribe's health care program, and direct CSC. *See* 25 U.S.C. § 5325(a)(3)(A)(i)-(ii).

The U.S. Supreme Court has held—twice—that the ISDEAA requires full payment of CSC. *Ramah*, 567 U.S. at 185 ("[W]e hold that the Government must pay each tribe's contract support costs in full."); *Cherokee Nation v. Leavitt*, 543 U.S. at 634 ("The [ISDEAA] specifies that the Government must pay a tribe's costs, including administrative expenses.").

Congress funds CSC through a separate, indefinite appropriation—"such sums as may be necessary." Consolidated Appropriations Act, 2018, Pub. L. No. 115-141 (March 23, 2018). Therefore, increasing the amount of CSC paid to the Tribe will not reduce the amount of funding available to the IHS or to any other tribe. *Sage Memorial*, 263 F. Supp. 3d at 1163-1164. For the Tribe, as for most tribes, the full amount of indirect CSC is determined by multiplying a negotiated indirect cost rate by the amount of the direct cost base. The Tribe's 2010 indirect cost rate agreement with the Department of the Interior's Interior Business Center ("Indirect Cost Rate Agreement"), Pl. Ex. C, called for an indirect cost rate of 31.91% on a direct cost base comprised of "[t]otal direct costs, less capital expenditures and passthrough funds."

IHS accepts the Tribe's rate, as it must. The controversy is over the amount of the direct cost base. Specifically, the issue is whether total direct costs must include expenditures of third-party revenues on PFSAs within the scope of the 2010 Funding Agreement.

C. Third-Party Revenues

Given the enormous unmet health care needs in Indian country,[2] third-party collections are critical both when IHS provides services directly and when tribes provide services under ISDEAA agreements. When IHS provides direct services to eligible beneficiaries, the PFSAs are funded not only by funds appropriated by Congress, but by third-party revenues billed to and collected from Medicare, Medicaid, the Children's Health Insurance Program, private insurers, and others. *See generally* 42 U.S.C. §§ 1395 *et seq*., 1396 *et seq*., 1397aa *et seq*. Congress provided for Medicare and Medicaid reimbursement for IHS and tribally operated facilities through special Indian legislation. Title IV of the IHCIA, Pub. L. 94-437, 90 Stat. 1400 (1976), amended the Social Security Act by adding sections 1880 and 1911, 42 U.S.C. §§ 1395qq and 1396j respectively, to make IHS health care facilities, whether operated by the IHS or an Indian tribe or tribal organization, eligible for Medicare and Medicaid reimbursement. The legislative history in the House Report emphasizes that these revenues are intended to expand the federal-tribal programs: "It is the intent of the Committee that any Medicare and Medicaid funds received by the Indian Health Service program be used to supplement—and not supplant—current IHS appropriations. In other words, the Committee firmly expects that funds from Medicare and Medicaid will be used to expand and improve current IHS health care services and not to substitute for present expenditures." H.R. Rep. No. 94-1026, at 108 (1976) (Committee on Interior and Insular Affairs), *reprinted in* 1976

[2] *See generally*, U.S. COMMISSION ON CIVIL RIGHTS, BROKEN PROMISES: CONTINUED FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS, Ch. 2 (Health Care) (December 2018); U.S. COMMISSION ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY, at 5 (July 2003), https://archive.org/details/ERIC_ED480450.

U.S.C.C.A.N. 2746. Congress enacted these provisions because it recognized decades ago that IHS funding alone was inadequate to provide needed health care to Native Americans. Section 1911 was enacted "as a much needed supplement to a health care program which for too long has been insufficient to provide quality health care to the American Indian." H.R. REP. No. 94-1026, pt. III at 21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2782, 2796. It was intended "to enable Medicaid funds to flow into IHS institutions," *id.* at 20, and help address the chronically underfunded IHS system.[3]

Further, IHS and tribal providers are entitled to "wrap-around" payments from States in the event managed care plans do not pay them the full rate to which they are entitled. 42 U.S.C. § 1396u-2(h)(2)(C)(ii). American Indians and Alaska Natives are also exempt from enrollment fees, premiums, deductions, copayments, cost sharing or similar charges in the Medicaid program, and Medicaid plans may not reduce payments to Indian health care providers by the amount of any enrollment fee, premium, deduction, copayment, cost sharing or similar charge that would otherwise be due. *See, e.g.*, 42 U.S.C. § 1396o(g)(l)(A). All of these provisions further reflect Congress's intent to ensure third-party revenues are available to IHS and tribal health care facilities to fund, expand, and improve inadequate health services for Native Americans.

Each year in its budget request to Congress, IHS estimates how much third-party revenue will be collected and available to spend on services, based on past collections.

[3] The House Interior and Insular Affairs Committee noted that *per capita* spending on Indian health in 1976 was 25 percent less than the average American *per capita* amount. H.R. REP. No. 94-1026, pt. I at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2652, 2655. According to the U.S. Commission on Civil Rights, nearly thirty years later, IHS *per capita* spending for Indian medical care in 2003 had fallen to 62 percent lower than the U.S. per capita amount. U.S. COMMISSION ON CIVIL RIGHTS, BROKEN PROMISES: EVALUATING THE NATIVE AMERICAN HEALTH CARE SYSTEM (2004) at 98, *available at* www.usccr.gov/pubs/docs/nabroken.pdf.

See, e.g., Dep't of Health & Human Servs., *Indian Health Service FY 2018 Justification of Estimates for Appropriations Committees*, at CJ-143 (reporting that in FY 2016, IHS collected $1.194 billion from third-party insurers). "Public and private collections represent a significant portion of the IHS and Tribal health care delivery budgets." *Id.* The IHCIA requires IHS to spend third-party revenues on facility improvements or additional services. 25 U.S.C. § 1641(c)(1)(B).

Consistent with the statutory provisions discussed above, the Tribe, when carrying out PFSAs under its Compact and Funding Agreement, is ***required*** by law and contract to collect third-party revenues and use them to provide further services within the scope of the agreements with IHS. Title V of the ISDEAA mandates as follows:

> (j) PROGRAM INCOME.--All Medicare, Medicaid, or other program income earned by an Indian tribe shall be treated as supplemental funding to that negotiated in the funding agreement. The Indian tribe may retain all such income and expend such funds in the current year or in future years except to the extent that the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.) provides otherwise for Medicare and Medicaid receipts. Such funds shall not result in any offset or reduction in the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the program income is received or for any subsequent fiscal year.

25 U.S.C. § 5388(j). Thus, by law, these third-party revenue funds are a mandatory part of the federal program carried out by the Tribe under its ISDEAA agreements. *See Sage Memorial*, 263 F. Supp. 3d at 1166-67; *Pyramid Lake*, 70 F. Supp. 3d at 544.

Similarly, the Tribe's Compact provides as follows:

> All Medicare, Medicaid and other program income earned by the Tribe shall be treated as additional supplemental funding to that negotiated in the FA. The Tribe may retain all such income and expend such funds in the current year or in future years except to the extent that the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.) provides otherwise

> for Medicare and Medicaid receipts. Such funds shall not result in any offset or reduction in the amount of funds the Tribe is authorized to receive under its FA in the year the program income is received or for any subsequent fiscal year.

Compact, Art. III, § 5.

The Tribe's 2010 Funding Agreement with IHS also expressly obligates the Tribe to engage in third-party billing. Funding Agreement § 2.B.ix ("Obligations of the Tribe" include "maintain[ing] a system of third party payment collection for services provided to patients of the Swinomish Tribal Health Program").

Any third-party revenues collected by the Tribe are designated by statute and IHS regulations as "program income" that must be, and is, expended on PFSAs included in the Tribe's Funding Agreement with IHS. 25 U.S.C. § 5325(m) (program income "shall be used by the tribal organization to further the general purposes of the contract; and . . . shall not be a basis for reducing the amount of funds otherwise obligated to the contract"); 42 C.F.R. § 137.110 (2017) ("All Medicare, Medicaid, or other program income earned by a Self-Governance Tribe shall be treated as supplemental funding to that negotiated in the funding agreement.").

As documented in the Tribe's CY 2010 audit, Pl. Ex. D, the Tribe expended $664,151 in third-party revenues in CY 2010 on health care services provided under the IHS Compact and Funding Agreement: $553,888.34 in clinic revenues; $27,739.00 in interest; $79,991.44 in contract reimbursement from the Upper Skagit Tribe; and $2,542.25 for book sales. These expenditures for health care PFSAs created additional administrative expenses, enlarging the direct cost base by $631,446. Compl. ¶ 26.[4]

[4] This assumes that, of the $664,151 in third-party revenues, $32,705 was spent on exclusions and passthroughs that do not generate indirect CSC and therefore should not

However, IHS paid ***no*** CSC in support of those expenditures, giving rise to the damages described in the Complaint.

D. Procedural History: The Tribe's Claims and the IHS Response

In a letter dated December 20, 2016, the Tribe requested a contracting officer's decision under the Contract Disputes Act on claims for unpaid CSC in 2010. *See* December 20, 2016 Letter from Swinomish Chief Financial Officer Merril Burke to IHS Principal Deputy Director Mary Smith, Pl. Ex. E ("Claim Letter"). The Tribe presented claims for indirect CSC, direct CSC, and indirect costs on unpaid direct CSC totaling $245,867. *Id*.

IHS denied the Tribe's claims in a letter dated May 22, 2017. Pl. Ex. F ("Decision Letter"). IHS argued that it paid the Tribe's CSC in full—and, in fact, overpaid. IHS presented a counterclaim for the amount of the alleged overpayment of $78,133.

On May 17, 2018, the Tribe timely filed this action challenging the IHS contracting officer's decision. *See* 41 U.S.C. § 7104; 25 U.S.C. § 5331(a).

STANDARD OF REVIEW

A. Summary Judgment

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Arrington v. United States*, 473 F.3d 329, 333

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be included in the direct cost base. To obtain this figure, the Tribe took the total FY 2010 passthrough and exclusions from the 2010 audit ($212,977) and divided that by the total expenditures from the audit ($4,324,957) to get a ratio of passthroughs to expenditures (4.92%). The Tribe then multiplied that percentage by the total third-party expenditures from the audit ($664,151) to get $32,705. Subtracting this from the total third-party expenditures of $664,151 leaves a third-party direct cost base of $631,446.

(D.C. Cir. 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The movant bears the initial burden of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Fed. R. Civ. P. 56(c); *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1179 (D.C. Cir. 2011) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

However, "[t]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Theodus v. McLaughlin*, 852 F.2d 1380, 1382 (D.C. Cir. 1988) (citing *Anderson*, 477 U.S. at 247–48) (emphasis in original; internal quote marks omitted). A material fact is one that "might affect the outcome of the suit under governing law." *Hendricks v. Geithner*, 568 F.3d 1008, 1012 (D.C. Cir. 2009) (citing *Anderson*, 477 U.S. at 248–51). In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than "[t]he mere existence of a scintilla of evidence" in support of its position. *Id*. at 252. Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. If the evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249–50 (citations omitted).

B. Review of Agency Action Under the ISDEAA

This Court has joined others in determining that a *de novo* standard of review applies to an appeal of an agency rejection decision under the ISDEAA. *Pyramid Lake*, 70 F. Supp. 3d at 541–42; *Seneca Nation of Indians v. U.S. Dep't of Health and Human Services*, 945 F. Supp. 2d 135, 141–42 (D.D.C. 2013). *See also Cheyenne River Sioux Tribe v. Kempthorne*, 496 F. Supp. 2d 1059, 1066–67 (D.S.D. 2007); *Cherokee Nation of Okla. v. U.S.*, 190 F. Supp. 2d 1248, 1258 (E.D. Okla. 2001), *rev'd on other grounds* by *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306, 1318 (D. Or. 1997). Thus, the more deferential standard that often applies to review of agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, is not appropriate where, as here, a tribe or tribal organization brings claims solely under the ISDEAA. *Compare Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103 (D.D.C. 2009) (applying the APA "arbitrary and capricious" standard of review where an Indian tribe sought relief primarily under the APA, with a secondary claim based on the ISDEAA) *with Seneca Nation*, 945 F. Supp. 2d at 142 (D.D.C. 2013) (applying *de novo* review and distinguishing *Citizen Potawatomi* in part on the grounds that *Seneca Nation* involved only ISDEAA claims).

De novo review comports with Congress's intent to reign in the agencies' "bureaucratic recalcitrance": "The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated …."

Shoshone-Bannock Tribes, 988 F. Supp. at 1315–16 (citing S. Rep. No. 100–274, at 7–8 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2619).

C. Statutory Interpretation Under the ISDEAA

For the same reasons, an agency's interpretation of statutory provisions of the ISDEAA is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Pyramid Lake*, 70 F. Supp. 3d at 542. In this Circuit, *Chevron*-type deference is not applied where "[t]he governing canon of construction requires that 'statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit.'" *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). *See also S. Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1078 (10th Cir. 2011) ("If the ISD[EA]A can reasonably be construed as the Tribe would have it construed, it must be construed that way. This canon of construction controls over more general rules of deference to an agency's interpretation of an ambiguous statute.") (quotation and citation omitted); *Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 421 (D.D.C. 2008) (same) (quoting *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988)); *Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243, 247 (D.D.C. 2016).

This canon of statutory construction is explicitly included in Title V of the ISDEAA, which provides the statutory basis for the Tribe's self-governance Compact and Funding Agreement with IHS:

> Each provision of [Title V] and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe.

25 U.S.C. § 5392(f). As the U.S. Supreme Court wrote of a very similar rule of construction in Title I, when interpreting the ISDEAA "[t]he Government, in effect, must demonstrate that its reading is clearly required by the statutory language." *Ramah*, 567 U.S. at 194.

SUMMARY OF ARGUMENT

The ISDEAA requires full payment of CSC. *Id.* at 185. CSC must be paid on the Secretarial amount under section 106(a)(1), 25 U.S.C. § 5325(a)(1). The Secretarial amount includes all funds the agency would use to provide services to the Tribe had the Tribe not compacted to provide them under the ISDEAA. *Id*. The Secretary, when providing services through IHS, must use third-party revenues to supplement appropriations from Congress. These revenues are therefore part of the Secretarial amount.

When a Tribe supplements its health care program with third-party revenues, these revenues are likewise part of the "Federal program" that generates CSC requirements. *See* 25 U.S.C. § 5325(a)(3)(A)(ii). IHS's failure to pay CSC in support of the Tribe's 2010 third-party revenue-funded services violated the ISDEAA's guarantee of full payment of CSC and the contractual promises to fully fund CSC in accordance with the ISDEAA.

ARGUMENT

The ISDEAA requires payment of CSC for the reasonable, non-duplicative overhead and administrative costs incurred by the Tribe "in connection with the operation of the Federal program" in the funding agreement—the entire federal program, whether funded by IHS-appropriated funds or by third-party revenues. 25 U.S.C. §

5325(a)(3)(A)(i) & (ii). IHS's attempt to restrict CSC to appropriated funds conflicts with the ISDEAA's funding provisions in section 106, specifically the provisions defining the Secretarial amount, the "Federal program," and CSC.

I. Third-party funding is part of the "Secretarial amount" that generates CSC requirements.

A. Neither the language nor the logic of the ISDEAA exclude third-party funding from the Secretarial amount.

When the Tribe assumed responsibility to carry out IHS PFSAs under its Compact and Funding Agreement, it became entitled to at least the amount of funding IHS would otherwise have used to provide those PFSAs: "The amount of funds provided . . . 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." 25 U.S.C. § 5325(a)(1). This so-called "Secretarial amount" includes *all* funding the Secretary would otherwise have used to provide the services, not just funds appropriated by Congress. For example, IHS, when providing direct services, bills and collects from third-party payers such as Medicare, Medicaid, and private insurers, and uses these funds to improve facilities or provide further services. *See, e.g.*, 25 U.S.C. § 1641(c); 42 U.S.C. § 1396j. The statute says that the Secretarial amount is not less than "[t]he amount of funds . . . the appropriate Secretary would have otherwise provided"—not "the amount of appropriated funds" the Secretary would have otherwise provided as the IHS reads it here. As Judge Cooper of this Court put it in a case involving third-party funding, "the applicable funding level for a contract proposal under [the ISDEAA] is determined based on what the Secretary otherwise would have spent, not on the source of the funds the Secretary uses." *Pyramid Lake*, 70 F. Supp. 3d at 544. Thus, the Court held that IHS

acted unlawfully in declining to award the Tribe the full amount formerly used by IHS, including third-party funding. *Id*.

The ISDEAA further requires that "there shall be added to the [Secretarial] amount required by paragraph (1) contract support costs." 25 U.S.C. § 5325(a)(2). The full Secretarial amount generates CSC requirements; there are no qualifiers limiting CSC to appropriated funds. IHS argues repeatedly that "CSC is meant only to support the Secretarial amount," Decision Letter at 6, and that "CSC funding is calculated based on the Secretarial amount," *id*. at 6-7, but that merely begs the question of what the Secretarial amount includes. IHS never explains why § 5325(a)(1) does not mean what it says: that the Secretarial amount "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs" had IHS run them itself.

Similarly, IHS says the Secretarial amount includes only those resources "transferred" under an ISDEAA agreement, citing the Congressional Record. Decision Letter at 7. But section 106(a)(1) itself says the amount of funds "shall not be less than" what the Secretary would otherwise have "provided" had the agency carried out the services itself. Since IHS would have provided the services with both appropriated funds and third-party revenues, the Secretarial amount includes both categories of funding. Therefore, CSC "shall be added" to both. 25 U.S.C. § 5325(a)(1) & (2).

IHS's tortured reading of the statute requires adding language that Congress never intended, let alone used. Under the IHS reading, the Secretarial amount becomes what the Secretary would have otherwise provided *from Congressional appropriations only*, and CSC shall be added to the amount *transferred under* paragraph (1). By contrast, the

Tribe's reading is in full accord with the plain language of the statute—and, as discussed next, with its purpose and logic as well.

B. Payment of CSC on third-party revenue-funded services comports with the purpose of CSC and the goals of the ISDEAA.

The plain statutory language requiring payment of CSCs on expenditures paid with third-party revenues is fully consistent with and furthers the purpose of CSC and the goals of the ISDEAA. In 1988, Congress added the CSC requirement to level the playing field for contracting tribes and redress a "self-determination penalty." When IHS operates programs directly, it benefits from other agencies both within Health and Human Services (such as the Office of General Counsel and the Office of the Chief Technology Officer) and outside HHS (such as the General Services Administration and the Office of Personnel Management). Contracting tribes do not have access to such resources, and the costs of maintaining those federal resources are not included in the Secretarial amount because IHS does not pay for them. Tribes also have insurance costs and audit requirements that IHS does not have. Congress's purpose in requiring payment of CSC was to allow tribes to provide the same level of services as IHS with the Secretarial amount rather than diverting some of those funds to cover services that IHS either does not need or does not pay for. *See* S. Rep. No. 100-274 at 8-9 (1987).

When the Tribe supplements health program funding with third-party expenditures, it not only provides additional services in accordance with its Compact, Funding Agreement, and the ISDEAA, but it also creates additional administrative, overhead, and other expenses of the kind CSC was designed to fund. In other words, expenditures of third-party funding on health care PFSAs enlarge the direct cost base to which the indirect cost rate is applied, generating additional indirect CSC need. Without

that additional CSC, tribes are forced to cannibalize the third-party funding for administrative and overhead costs, reducing the level of health care services that can be provided. By contrast, when IHS uses third-party revenues to provide expanded health care services, it does not have to spend any of these funds on services provided by either HHS or outside agencies, or on costs it simply does not incur, like workers' compensation and liability insurance. To put tribes in the same position as IHS, which benefits from the extensive federal administrative support structure, tribes must be able to recover CSC on all third-party expenditures.

1. Indirect CSC

As discussed above, the 2010 indirect CSC requirement was calculated by multiplying the Tribe's negotiated indirect cost rate of 31.91% by the Tribe's total IHS direct cost base. The Tribe's indirect cost rate agreement, which is "for use on grants, contracts, and other agreements with the Federal Government," defines the direct cost base: "Total direct costs, less capital expenditures and passthrough funds." Indirect Cost Rate Agreement at 1.

The Tribe's collection of third-party revenues increased the amount of funding available to cover total direct costs for the health program, thus expanding the need for indirect CSC to support those costs. As set forth in the Tribe's claim letter, and as documented in the Tribe's 2010 audit, the Tribe expended $664,151 in third-party revenues on PFSAs during the year. Crediting IHS for $32,705 in capital expenditures and passthrough funds resulted in a third-party direct cost base of $631,446. IHS paid no indirect CSC in support of these expenditures, yielding a claim for $201,494 (the rate of 31.91% times $631,446).

2. Direct CSC

The ISDEAA requires that IHS (and BIA) pay direct CSC as well as indirect. *See* 25 U.S.C. § 5325(a)(3)(A)(i). Such costs include unemployment taxes, workers' compensation insurance and other employee benefits that IHS does not have to pay. *See Cherokee Nation v. Leavitt*, 543 U.S. at 635; S. Rep. No. 103-374, at 9 (1994). The lion's share of direct CSC are fringe benefits not included in the Secretarial amount. *See* Indian Health Manual § 6-3.2D & its Exhibit G. The additional health care services made possible by third-party revenues require additional staffing, and thus additional costs for fringe benefits. In order to meet the ISDEAA's requirement that the Tribe be able to provide the same level of services from the third-party revenues that the Secretary would have provided directly, IHS must provide additional direct CSC in support of these services. To quantify this amount, the Tribe divided the amount of direct CSC provided by IHS in the CY 2010 FA by the total IHS funding provided, resulting in a ratio of 5.065%. The Tribe then applied this ratio to the total third-party expenditures of $664,151, yielding a claim for $33,639 in unpaid direct CSC. Claim Letter at 3. Since this direct CSC would have become part of the direct cost base,[5] the Tribe must also be paid indirect CSC on this amount to be made whole: $33,639 times the indirect cost rate of 31.91%, for a claim of $10,734. *Id*.

In sum, the language and logic of the ISDEAA require that, when the Tribe supplements the Secretarial amount with third-party funding, direct and indirect CSC

[5] *See* IHS CSC Policy, in Indian Health Manual, Part 6, Chapter 3, § 6-3.2E(1)(a)(i) (for purpose of determining indirect cost need, rate will be applied to total direct costs, consisting of "the Secretarial amount plus the DCSC [direct CSC] funding").

must be made available to support the full amount, not just the portion comprised of appropriated funds.

II. Third-party funding is part of the "Federal program" that generates CSC requirements.

Section 106(a)(3) defines "eligible" CSC as "the 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. . . ." 25 U.S.C. § 5325(a)(3)(A) (emphasis added). The key consideration is whether the costs can be traced to "the Federal program". The Tribe's Compact and Funding Agreement with IHS require the Tribe to collect third-party revenues, and federal law requires the Tribe to expend those revenues on further services within the scope of the funding agreement, all of which are part of "the Federal program". Doing so generates additional administrative, overhead, and other expenses of the kind CSC was designed to fund. In other words, as discussed above, expenditures of third-party funding on health care PFSAs enlarge the direct cost base to which the indirect cost rate is applied, generating additional indirect CSC.

A. The Tribe's contracts with IHS require the Tribe to bill third parties.

The Tribe's Compact and Funding Agreement with IHS require the Tribe to bill and collect from third parties, and federal law requires the Tribe to use those collections to provide additional services under the contracts. Therefore, these expenditures are part of the "Federal program" that generates CSC requirements to cover the additional administrative costs associated with these services.

When the Tribe bills and collects from third parties, it is not only supplementing its health care dollars provided with IHS appropriations, it is carrying out specific provisions of its ISDEAA agreements with the United States. Section 2.B of the 2010 Funding Agreement specifies the "Program Services" that the Tribe must perform. Among these is "Third-Party Billing." Funding Agreement § 2.B.ix. The Tribe must "maintain a system of third party payment collection for services provided to patients of the Swinomish Tribal Health Program." *Id*. Third-party billing and collection is a PFSA as integral to the funding agreement as the medical, dental, and other services described in the agreement. Just as performance of the contract requires billing and collection of third-party revenues, the expenditure of these funds likewise furthers the "Federal program." Thus, these funds are eligible for inclusion in the direct cost base that generates CSC. 25 U.S.C. § 5325(a)(3)(A).

The Tribe's Compact makes this all the more clear: "All Medicare, Medicaid and other program income earned by the Tribe shall be treated as additional supplemental funding to that negotiated in the FA." Compact, Art. III, § 5. Third-party revenues supplement the FA funding and must be used to carry out its purposes. For all practical purposes, the funds are interchangeable. For these reasons as well, services funded in whole or in part with third-party revenues are eligible for the support provided by CSC.

The Tribe's use of this "program income" to supplement services provided under the FA is not only a contractual but a statutory requirement. When IHS collects third-party revenues generated by direct services, the agency ***must*** use those revenues on health care facilities or additional services. 25 U.S.C. § 1641(c)(1)(B). Likewise, tribes ***must*** use program income to further the purposes of their ISDEAA agreements. 25 U.S.C. §

5388(j). This Title V provision, which is implemented by the Tribe's Compact language, states that "[s]uch funds shall not result in any offset or reduction in the amount of funds the Tribe is authorized to receive under its [funding agreement]." *Cf.* 25 U.S.C. § 5325(m) (program income must be used by the tribal organization to further the purposes of the contract and shall not be the basis for reduction of funds obligated to the contract).

The billing and collection of third-party revenues is an integral part of the Tribe's Compact and Funding Agreement with the United States, and the expenditure of these funds furthers the "Federal program" that CSC is meant to support.

B. In Sage Memorial*, the court correctly held that third-party funding is part of the federal program for the purpose of CSC calculation.*

In a thorough and well-reasoned decision, the U.S. District Court for the District of New Mexico addressed the question "whether funding that third parties such as Medicare, Medicaid, and private insurers provide is considered part of federal programming for the purposes of reimbursement [through CSC] under the ISDEAA." The court held that it is. *Sage Memorial*, 263 F. Supp. 3d at 1164.

Like this case, *Sage Memorial* involved claims for past-year underpayments of CSC under the Contract Disputes Act. The hospital presented claims for FY 2009 through FY 2013 in the amount of $62,569,681; IHS asserted a counterclaim for the same years for $4,218,357. The parties' radically different valuations resulted primarily from their divergent treatment of third-party revenues. Sage Memorial maintained, as the Tribe does here, that IHS owed CSC on all of the expenses of the total federal health care program provided under the IHS contract, including those paid with appropriated funds from IHS *and* those paid with third-party revenues expended for contract purposes. *Id*. at

1091–92. IHS insisted on an "allocation" process in which indirect costs were prorated between IHS and third-party funding. *Id*. at 1089–90.

The court granted summary judgment to Sage Memorial. The court first noted that the hospital's funding agreements established third-party billing and collections as firmly within the scope of the funding agreements with IHS. *Id*. at 1164–65. Not only were these activities written into the contracts, but Congress had included them in federal Indian health legislation—for example, when it authorized tribes to submit claims and recover directly from Medicare and Medicaid, *see* 25 U.S.C. § 1641(d), and when it made tribes payers of last resort, 25 U.S.C. § 1623(b). *Sage Memorial*, 263 F. Supp. 3d at 1165.

The court concluded with a detailed review of the ISDEAA's language and legislative history to show that "[t]he ISDEAA interprets CSCs broadly" and prohibits reducing the amount of funds made available to a tribe on the basis that the tribe received program income. *Id.* at 1166–67. By refusing to credit any CSC needs to third-party revenue expenditures, IHS's "allocation" method reduced the amount of funds that otherwise would be due. In short, "Sage Hospital's third-party funding falls within the scope of federal programming for purposes of reimbursement under the ISDEAA." *Id*. at 1168.

In its rejection of the Swinomish Tribe's claims, IHS did not press the "allocation" argument at issue in *Sage Memorial*, but the agency's rejection was based on the same underlying statutory interpretations held to be flawed in that case. IHS insists that no CSC is owed on third-party revenue expenditures, only on the Secretarial amount—by which IHS means the amount of appropriated funds transferred by IHS to

the Tribe. Decision Letter at 6-7. In *Sage Memorial*, the hospital argued that the ISDEAA defines the Secretarial amount broadly to include both appropriated funds and third-party funds. 263 F. Supp. 3d at 1092–93 (summarizing argument). The Tribe and Sage Memorial, like the Secretary, use both categories of funds to carry out the federal program. As *Pyramid Lake* taught, the *source* of the funds is irrelevant; the *use* of the funds for the federal contract's purposes establishes the funding as Secretarial. 70 F. Supp. 3d at 544. While the *Sage Memorial* court did not expressly address the parties' arguments on the Secretarial amount, the court held that IHS owed CSC on expenditures paid with third-party funds because they were part of the "federal program"—that is, part of the Secretarial amount that IHS concedes generates CSC requirements. The court was correct, and its holding fully supports the Tribe's position in this case.

III. In the event the Court finds the statute ambiguous, the Court must construe it in favor of the Tribe.

This case turns on interpretation of the ISDEAA, particularly sections 25 U.S.C. § 5325(a)(1), (2), and (3). The ISDEAA explicitly incorporates a rule of construction based on the longstanding common-law Indian canons of construction: "Each provision of this subchapter [Title V] and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe." 25 U.S.C. § 5392(f). This statutory language reiterates "[t]he basic Indian law canons of construction [that] require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 113 (Nell Jessup Newton, et al., eds., 2012).

The *Sage Memorial* court found that the Indian canon supported its conclusion that expenditures paid with third-party funding fell within the scope of the federal program and thus were entitled to CSC. 263 F. Supp. 3d at 1165-66. The court noted that in the Tenth Circuit, the Indian canon trumps ordinary *Chevron* deference to agency interpretations. The same rule applies in the D.C. Circuit. *See, e.g.*, *Cobell*, 240 F.3d at 1102.

This Court has recently employed the ISDEAA's rule of construction to decide close questions of statutory interpretation, including one involving CSC. In *Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243 (D.D.C. 2016), the court faced competing interpretations of the ISDEAA's leasing provision and its implementing regulations. *See* 25 U.S.C. § 5324(*l*); 25 C.F.R. Part 900, Subpart H (2018). Maniilaq, a tribal organization, argued that these provisions required IHS to enter into, and fully fund the reasonable costs of, a lease for its health clinic in Kivalina, Alaska. IHS argued that the funding scheme gave the agency discretion to limit compensation to a far lower amount. Judge Bates found the IHS reading "plausible" but not compelled by the statute and regulations. *Maniilaq*, 170 F. Supp. 3d at 252–53. "Mindful of its obligation to construe the Act liberally in favor of Maniilaq," *id*. at 255, the court adopted Maniilaq's reasonable interpretation, granted summary judgment to Maniilaq, and ordered the parties to negotiate a fully funded lease.

Even more recently, in *Cook Inlet Tribal Council v. Mandregan*, No. 14-cv-1835 (D.D.C. Nov. 7, 2018), this Court addressed a provision of the ISDEAA mandating that CSC must not duplicate funding included in the Secretarial amount.[6] The Cook Inlet

[6] *See* 25 U.S.C. § 5325(a)(3)(A)(ii).

Tribal Council ("CITC") sought $479,040 in direct CSC for facility funding. IHS refused, arguing that since the Secretarial amount contained $11,838 for facility-related costs, no CSC could be paid for facilities due to the prohibition on duplication. CITC argued that IHS must supplement the inadequate Secretarial amount for facility support with CSC, to the extent that the additional costs were reasonable, necessary, and did not duplicate the Secretarial facility funding. Judge Sullivan found the statute ambiguous, but held that CITC's interpretation was reasonable and thus prevailed thanks to the Indian canon incorporated into the statute. *Id.*, slip op. at 2, 12, 25–26.

In this case the Tribe's reading of the statute—that the Secretarial amount and the "Federal program" include third-party funds—is a reasonable interpretation that accords with the purposes of the statute as a whole and with Congress's policy "to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy." 25 U.S.C. § 1602. The IHS interpretation, by contrast, requires the court to read words into the statute, so that the Secretarial amount and the federal program are limited to funds "appropriated" to and "transferred" by IHS. In accordance with the Indian canon, as the Supreme Court has said, "[t]he Government, in effect, must demonstrate that its reading is clearly required by the statutory language." *Ramah*, 567 U.S. at 194. The IHS cannot do so here.

IV. Defendants' "counterclaim" is time-barred.

IHS argues that the Tribe was overpaid by $78,133 in CY 2010. Defs.' Answer and Counterclaim, Doc. 10, ¶¶ 53-61. The Tribe disputes this, but even if Defendants' claim had merit, the claim is time-barred by 25 U.S.C. § 5325(f).

Although IHS styles its claim as a "counterclaim" under the Contract Disputes Act, it could not be that. IHS could not be claiming that the Tribe breached its contract by spending the funds IHS specified in, and paid in accordance with, the CY 2010 funding agreement. How could this be a claim "relating to a contract" under the Contract Disputes Act? *See* 41 U.S.C. § 7103(a)(3). If the Tribe spent the "extra" funds on indirect costs associated with the IHS program, then there was no overpayment, notwithstanding the indirect cost rate, because tribes are entitled to "the full amount of 'contract support costs' incurred by tribes in performing their contracts." *Ramah*, 567 U.S. at 185. IHS's argument must be that the Tribe spent its "excess" IHS indirect cost funding on costs associated with *non-IHS* programs and services, and that IHS is now disallowing those costs.

Claims for disallowed costs relating to ISDEAA agreements, however, must comply with section 106(f), which reads in pertinent part as follows:

> **(f)** Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs shall be barred unless the Secretary has given notice of any such disallowance within three hundred and sixty-five days of receiving any required annual single agency audit report or, for any period covered by law or regulation in force prior to October 19, 1984, any other required final audit report. Such notice shall set forth the right of appeal and hearing to the board of contract appeals pursuant to section 5331 of this title.

25 U.S.C. § 5325(f). The 365-day window for bringing this claim closed long ago. The Tribe's CY 2010 audit was received by the Federal Audit Clearinghouse on August 10, 2011, as reported by the Department of Health and Human Services in a letter dated October 28, 2011 informing the Tribe that the agency had completed its review of the audit. Pl. Ex. G, Oct. 28, 2011 Letter from Patrick J. Cogley to Swinomish Tribal Senate. IHS would have had to notify the Tribe of its claim no later than October 2012, but it did

not do so and does not assert otherwise in this Court. Thus "[a]ny right of action or other remedy" is now barred.

CONCLUSION

The long, sad history of the United States' provision of health care to Native Americans is replete with failures to carry out Trust, Treaty and statutory obligations. *Sage Memorial*, 263 F. Supp. 3d at 1121-1146. Even in the recent era of tribal self-determination, tribes have been constrained to repeatedly request the assistance of the judiciary to compel the United States to fulfill its contractual and statutory obligations. *Cherokee Nation v. Leavitt*, 543 U.S. at 639; *Ramah*, 567 U.S. at 185. The present lawsuit represents another failure by the United States to acknowledge and carry out its statutory and contractual obligations to tribes, necessitating, yet again, enforcement of those critically important obligations by the Court. Only through requiring that the United States recognize and fulfill its obligations to fully fund contractual and statutory health care commitments will the persistent health disparities in Indian Country be eliminated.

The Secretary's failure to fully fund the Tribe's CSC in CY 2010 was contrary to the ISDEAA and constituted a breach of the agency's contractual obligations to pay full CSC in accordance with the ISDEAA. It represents, as well, a failure to recognize and carry out Congress's intent that third-party revenues like Medicare and Medicaid be available as resources for IHS and tribal health facilities to support and improve health care services to Native Americans. Congress's intentional reliance upon third-party revenues to supplement inadequate IHS appropriations represents a wise policy designed to address and ameliorate the tragic and persistent health disparities in Indian Country.

IHS's failure to fully fund the Tribe's CSC in CY 2010 is not only inconsistent with this Congressional policy, but stands as yet another impediment to accomplishing the ultimate goal of improving Native American health.

With no material facts in dispute, the Tribe respectfully requests that this Court grant the accompanying Motion for Summary Judgment in favor of the Tribe.

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Respectfully submitted,

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