[ORAL ARGUMENT NOT YET SCHEDULED]

No. 19-5336

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

FORT McDERMITT PAIUTE AND SHOSHONE TRIBE,

Plaintiff-Appellee,

v.

ALEX M. AZAR, II, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Columbia, No. 1:17-CV-00837-TJK
Before the Honorable Timothy J. Kelly

APPELLEE'S RESPONSE BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES AND AMICI

All parties and amici appearing before the district court and in this Court are listed in the Brief for Appellants.

B. RULINGS UNDER REVIEW

All references to the rulings at issue appear in the Brief for Appellants.

C. RELATED CASES

This case has not previously been before this Court or any other court except the District Court below. There are no other cases pending in this Court or in any other court involving substantially the same parties and the same or similar issues.

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GLOSSARY OF ACRONYMS

BIA	Bureau of Indian Affairs
EMS	Emergency Medical Services
FA	Funding Agreement
H&C	Hospital and Health Clinics
IHS	Indian Health Service
ISDEAA	Indian Self-Determination and Education Assistance Act
PRC	Purchase/Referred Care

INTRODUCTION

Appellee Fort McDermitt Paiute and Shoshone Tribe ("the Tribe") exercised its statutory right to assume operation of the Fort McDermitt Clinic and health care program under the Indian Self-Determination and Education Assistance Act (ISDEAA or Act). But the Indian Health Service failed to meet its statutory obligation to award the amount the Secretary was otherwise providing for the Clinic, instead offering less than 10% of the funds supporting Clinic operations. The Tribe seeks the full amount it is entitled to under the ISDEAA and which the district court correctly awarded the Tribe.

In the ISDEAA Congress mandated that IHS must, upon demand, enter into a contract or compact with a tribe to operate any IHS health program benefiting the tribe. If there is a dispute, the tribe submits a final offer and by law IHS may only reject that offer on limited grounds and within 45 days. Further, in rejecting any aspect of a tribe's final offer, Congress provided that IHS carries a heavy burden of proof to issue a written decision that "clearly demonstrates" that one of the specified rejection grounds applies. Here, IHS rejected nearly one-half of the total funding the Tribe proposed but failed to provide any legally defensible ground for that rejection. Indeed, in the ensuing litigation the government has sought to make this case about something it is not: whether a tribe's funding amount may include programs supported by third-party revenues. But that issue was *never* raised in

IHS's rejection letter and it therefore cannot be a lawful basis for upholding that decision years later.

The ISDEAA is a unique statute in the agency review context: if an agency's rejection decision is invalid, the tribe is entitled to injunctive relief to reverse that decision, and the tribe's final offer is to be awarded as proposed. In order to prevail on judicial review, IHS must "clearly demonstrate" that its rejection decision was valid *as issued*. Post-hoc justifications of the kind advanced here will not do. Because IHS failed to carry the heavy burden Congress imposed upon it in the ISDEAA, the district court properly overturned IHS's rejection, and this Court should affirm the district court's decision.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 25 U.S.C. § 5331(a) of the ISDEAA, and pursuant to 28 U.S.C. §§ 1331, 1362. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether IHS has shown by clear and convincing evidence that its rejection "clearly demonstrate[d]" that the Tribe's final offer exceeded the applicable funding level under the ISDEAA on the grounds that a portion of the funds IHS had been spending on the Fort McDermitt Clinic should be allocated to a different tribe.

2. Whether IHS has shown by clear and convincing evidence that its rejection "clearly demonstrate[d]" that the Tribe's final offer exceeded the applicable funding level under the ISDEAA on the grounds that an undetermined portion of IHS's expenditures were funded through third-party revenues.

STATUTES AND REGULATIONS

Certain applicable statutory provisions and regulations are reproduced in the addendum to this brief. All other applicable statutes and regulations are contained in the Brief for Appellants.

STATEMENT OF THE CASE

A. Statutory Background: The Indian Self-Determination Act

The Indian Self-Determination and Education Assistance Act of 1975, as amended, 25 U.S.C. §§ 5301–5423, authorizes Indian tribes and tribal organizations to contract with the Indian Health Service to operate federal programs and services that the government otherwise would continue to operate directly for the tribes and their members. *See* H.R. REP. NO. 93-1600, at 1–2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7775, 7776; S. REP. NO. 100-274, at 1 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2620. The ISDEAA was enacted to give Indian tribes more control over the federal services they receive and to assure "maximum Indian participation" so that these services would be "more responsive to the needs and desires of those communities." 25 U.S.C. § 5302(a). The Act seeks to achieve this

purpose by the "establishment of a meaningful Indian self-determination policy" that encourages the transition from federal dominance of programs serving Indian tribes to tribal operation of these programs. § 5302(b).[1]

In recognition of this core policy objective and in direct response to the agencies' continuing reluctance to fulfill that objective, the ISDEAA is a unique statute that reverses the usual balance of power between the contractor and the federal agency. First, in Title I of the ISDEAA, Congress dictated that "upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract," the Secretary of Health and Human Services (acting through IHS) *must* by law contract with the tribe to "administer" the federal program that otherwise would be administered by the Secretary. § 5321(a)(1). IHS has no choice in the matter. Similarly, under a Title V self-governance compact like the one at issue here, Congress dictated that "[t]he Secretary *shall* negotiate and enter into a written compact with each Indian tribe participating in self-governance in a manner consistent with the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States." § 5384(a) (emphasis added). Again, IHS has no choice.

[1] All statutory citations refer to Title 25 of the U.S. Code unless otherwise noted.

The Act's funding provisions are also a far cry from routine discretionary government contracting matters, as they tightly constrain the agency's discretion. *See* § 5325(a)(1); *see also* § 5388(c) (incorporating same). The Act specifies the amount of funding the Secretary is required to provide under a contract or compact, mandating that the Secretary *must* transfer to the tribe "the amount the Secretary would have expended had the government itself [continued to] run the program" (the so-called "Secretarial amount"). *Arctic Slope Native Ass'n v. Sebelius*, 629 F.3d 1296, 1298-99 (Fed. Cir. 2010), *vacated on other grounds*, 567 U.S. 930 (2012). Thus, the ISDEAA confers upon tribes the power to decide whether and when to contract or compact, and it dictates the standard for determining precisely how much funding the agency must provide.

The self-governance provisions of Title V also include important procedural safeguards for tribes, enacted in response to Congress's "concern[s] with the reluctance of the IHS" to comply with the Act. H.R. REP. NO. 106-477, at 21 (1999), *reprinted in* 2000 U.S.C.C.A.N. 573, 579. Thus, when a tribe elects to compact under Title V, the Secretary is required to negotiate the terms of the compact with the tribe. § 5384(a). But if IHS and the tribe "are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels)," the Act gives the tribe the right to "submit a final offer to the Secretary." § 5387(b).

The Secretary may then only reject a final offer for one of four specific reasons enumerated in the statute, including (insofar as pertinent here) that:

> the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this subchapter[.]

§ 5387(c)(1)(A)(i). Moreover, if the Secretary chooses to reject a final offer on one of the permitted grounds, *within 45 days after receipt of the offer* the Secretary must provide "written notification to the Indian Tribe that contains *a specific finding* that *clearly demonstrates*, or that is supported by a controlling legal authority, that" the grounds the Secretary has invoked is actually satisfied. § 5387(b)-(c)(1)(A) (emphasis added). Thus, Congress mandated that if the Secretary chooses to reject a tribe's final offer, it must do so (1) within 45 days of receiving the offer; (2) in writing; and (3) by making "a specific finding that clearly demonstrates" that one of the permissible grounds for rejection has been met. *Id.* If IHS does not make "a timely rejection of the offer," or if the rejection is not "in compliance with subsection (c)" of § 5387, then "the offer shall be deemed agreed to by the Secretary." § 5387(b).

Finally, Congress also departed from ordinary Administrative Procedure Act (APA) and government contracting regimes when it fashioned the ISDEAA's special appeal provisions. Under the ISDEAA, section 5331(a) provides tribes with direct judicial review to challenge IHS funding decisions without requiring exhaustion of

administrative remedies. Even more importantly, once a civil action is commenced "the *Secretary* shall have the burden of demonstrating *by clear and convincing evidence* the validity of the grounds for rejecting the offer" and "that *the decision is fully consistent with provisions and policies" of Title V*. §§ 5387(d), 5398(2) (emphasis added). In such an action, if the agency unlawfully rejected a tribe's final offer "the district courts may order appropriate relief including money damages [or] injunctive relief against . . . any agency," or, as pertinent here, "*immediate injunctive relief to reverse*" *a decision rejecting a tribe's final offer*. § 5331(a); *see also* § 5391(a) (incorporating same into Title V).

These provisions are strict—even harsh—in comparison to typical federal contracting procedures. Yet they were deemed necessary by Congress in the face of repeated agency failures to respect tribal rights under the Act. Today's ISDEAA is the result of multiple rounds of amendments in which Congress repeatedly strengthened tribal rights under the Act in response to IHS's and the Bureau of Indian Affairs' (BIA) inappropriate actions. A principal area in which the agencies violated tribal rights concerned contract funding amounts:

> Actions by Federal agencies to reduce tribal contract funding . . . frustrate the intent of the Indian Self-Determination Act and are contrary to the purposes of the Act. The intent of these amendments is to protect and stabilize tribal programs by protecting and stabilizing the funds for those programs from inappropriate administrative reduction by Federal agencies.

S. REP. NO. 100-274, at 30. The Senate Committee emphasized the importance of basing tribal funding amounts on actual agency expenditures, i.e., the resources the agency spent on the program—not arbitrary agency "budget" amounts:

> In practice . . . it has been difficult for tribes and Federal officials to correlate projected budgets with *actual expenditures and resources*. Often, the base figures used in Bureau budget exercises are based not on actual expenditures, but on estimates based upon the President's proposed budget. Not knowing the actual amount of resources available for the operation of programs makes it difficult for tribes that are planning to enter into self-determination contracts to determine the amount of funds that would be available for tribal operation of the program.

Id. at 22 (emphasis added). Congress expressly acknowledged that agency budget figures frequently bear no relation to *actual expenditures and resources*. For this reason, Congress mandated that IHS must base tribal contract funding on what the "Secretary would have otherwise provided," § 5325(a)(1), i.e., actual agency expenditures.

When Congress added the direct appeal provision discussed above, § 5331(a), it was for similar reasons. Congress expressly rejected IHS assertions that funding determinations were unreviewable discretionary decisions, and it provided an alternative to normal agency appeal procedures.[2] The House Committee explained

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[2] *See* S. REP. NO. 100-274, at 34 (explaining that Section 5331(a) was added to allow "parties aggrieved by federal agency violations of the Self-Determination Act the right to seek injunctive relief in the United States District Courts").

that a direct-appeal provision was "necessary because the Indian Health Service . . . has refused [to] permit an appeal and hearing on the issue of the amount of funding to which a tribe is entitled under . . . the Act," emphasizing "the importance of requiring an appeal and hearing on the important factual issue of the level of funding to which a tribe is entitled under contracts pursuant to the Act." H.R. REP. NO. 99-761, at 8-9 (1986).

Despite the harsh rebukes from Congress, IHS continued to deprive tribes of the funding to which they were entitled, leading to successive rounds of ISDEAA amendments. In 1999, the House Committee expressed continued "concern[] with the reluctance of the IHS to include all available federal health funding in self governance funding agreements." H.R. REP. NO. 106-477, at 21. In response to these concerns, in 2000 Congress added Title V to the Act, making the ISDEAA even more pro-tribal and strengthening the dispute-resolution procedures and tribal appeal rights. Congress shortened the Secretary's review period from 90 to 45 days and narrowed the grounds upon which the Secretary could reject a tribe's proposal. *Compare* § 5321(a)(2), *with* § 5387(b). Congress also incorporated the Title I direct appeal provision permitting immediate injunctive relief, *see* § 5391(a), while adding a new provision heightening the Secretary's burden of proof to defend any rejection of a final offer, *see* § 5398. "Congress provided tribes with this relief to assure that

tribes had a strong, effective, and immediate means to obtain agency compliance with the Act's requirements." H.R. REP. NO. 106-477, at 34.

B. Factual and Procedural Background.

The Fort McDermitt Paiute and Shoshone Tribe is a federally-recognized Indian tribe composed of Northern Paiute and Western Shoshone peoples. The Tribe is centered in remote McDermitt, Nevada, and its reservation extends across the Nevada border, encompassing lands in Humboldt County, Nevada and Malheur County, Oregon. Fort McDermitt is an "Indian tribe" as that term is defined by the Act at section 5304(e). Joint Appendix (JA) 229, ¶ 1. The Fort McDermitt Clinic, which is located on the Tribe's reservation, is the primary source of healthcare for the Tribe's members. The Tribe currently provides health care services at the Clinic on behalf of IHS pursuant to an ISDEAA self-governance compact authorized by Title V of the Act.

1. Prior Proceedings and Negotiations

This action concerns the Fort McDermitt Tribe's Compact to operate the Fort McDermitt Clinic and related medical services. But, in discussing the proper funding amount, we do not write on a blank slate. Before entering into the Compact, in January 2013, Fort McDermitt designated the nearby Pyramid Lake Paiute Tribe (Pyramid Lake) as its "tribal organization" for purposes of contracting under the ISDEAA to operate the Fort McDermitt Clinic Emergency Medical Services (EMS)

program. JA229, ¶ 2; *see also Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 539 (D.D.C. 2014); § 5304(*l*) (defining tribal organization). During the ensuing contract negotiations between IHS and Pyramid Lake, a dispute arose regarding the recurring funding amount for that EMS contract. JA229-30, ¶ 3; *Pyramid Lake*, 70 F. Supp. 3d at 539. Pyramid Lake requested an annual funding amount of $502,611, which was the amount IHS had been spending to operate the McDermitt EMS program. Yet IHS claimed the annual amount available for the contract was only $38,746—what IHS called Fort McDermitt's "tribal share," i.e. the amount IHS had *budgeted* for the McDermitt EMS program as shown on an IHS 2013 Service Unit-wide tribal shares table. JA229-30, ¶ 3; *Pyramid Lake*, 70 F. Supp. 3d at 539, 544–45. IHS also argued that third-party revenues it had been spending on the EMS program could not be included in the Tribe's funding amount. *See Pyramid Lake*, 70 F. Supp. 3d at 544. The Court ruled for Pyramid Lake, and ultimately directed IHS to pay $502,611 in direct program costs annually for the EMS contract. JA230, ¶ 3; *see also Pyramid Lake*, 70 F. Supp. 3d at 545; *Pyramid Lake*, No. 1:13-cv-01771 (CRC), 2015 WL 13691433, at *2 (D.D.C. Jan. 16, 2015) (Final Order). IHS chose not to appeal that order.

IHS continued operating the rest of the health care programs at the Fort McDermitt Clinic, including primary medical, dental, and mental health care; substance abuse treatment; diabetes prevention, treatment and management; and

other community wellness programs. JA230, ¶ 4. As documented in IHS data, the Fort McDermitt Clinic serves principally members of the Fort McDermitt Tribe, along with a relatively small number of members of other tribes; only two members of the Winnemucca Tribe received care there in 2015. JA30-31.

In February 2016, the Tribe notified IHS that it intended to contract for the operation of all activities at the Fort McDermitt Clinic. *Id.* ¶ 5. In response, IHS submitted a notice to Congress indicating it planned to *close* the Fort McDermitt Clinic. *Id.* ¶ 6. In May 2016, Fort McDermitt notified IHS that it also intended to directly operate the EMS program, and it rescinded its authorization for Pyramid Lake to do so on its behalf. *Id.* ¶ 7.

After the parties' negotiations reached an impasse, on October 13, 2016, the Tribe submitted a final offer to IHS addressing five substantive issues remaining in dispute. *Id.* ¶ 9. On November 23, 2016, IHS rejected the final offer. *Id.* ¶ 10. The parties were later able to reach agreement on a number of the disputed issues, but two remained unresolved: the recurring funding amount to which the Tribe is entitled, and an employee housing services provision which is no longer at issue in this case. JA230-31, ¶ 11. On appeal, the only remaining issue is whether the Secretary met his burden in his rejection letter to "clearly demonstrate[]" that the Tribe's proposed funding amount was in excess of the amount to which the Tribe was entitled by law. § 5387(c)(1)(A)(i). If the Secretary cannot prove by clear and

convincing evidence that he met this burden, § 5398, the rejection must be overturned.

2. The Disputed Funding

The final offer and this action address the amount for only one category of funding known as "Hospitals & Health Clinics" (H&C) funding. JA98; *see also* JA96; JA205-07, ¶¶ 46–59. The H&C category is the largest in the IHS budget, and it provides funds for medical and surgical inpatient care, routine and emergency ambulatory care, medical support services including laboratory, pharmacy, nutrition, diagnostic imaging, medical records, and physical therapy, secondary medical services such as ophthalmology, orthopedics, emergency medicine, and radiology, and other core health services. *See* DEP'T OF HEALTH & HUMAN SERVS., IHS, JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES, FISCAL YEAR 2021, at CJ-67 (2020).[3] H&C also includes funds for specialty programs addressing diabetes, maternal and child health, youth services, geriatric health, communicable disease treatment and surveillance and other quality improvement initiatives. *Id*. at CJ-67 to 68.

[3] *Available at* https://www.ihs.gov/sites/budgetformulation/themes/responsive2017/display_objects/documents/FY_2021_Final_CJ-IHS.pdf.

The Tribe proposed a recurring funding amount of $1,106,453 for the Tribe's Clinic-level H&C funding. This amount was a combination of two numbers: (1) the projected expenditure of $603,842 for the Clinic, which was based on *actual* FY 2015 IHS expenditures as relayed by IHS; and (2) the EMS program funding amount of $502,611. JA231, ¶ 12. (The EMS program funding amount was established in the *Pyramid Lake* litigation and is not in dispute.)

IHS rejected the Tribe's proposed amount, asserting it "exceed[ed] the applicable funding level to which the tribe is entitled" under the ISDEAA.[4] JA123 (quoting § 5387(c)(1)(A)(i)). Although IHS stated that the Secretarial amount is "typically based on prior year budgets for the service area in question," IHS insisted "there must be room for the Secretary to exercise her discretion in determining the Secretarial amount . . . ."[5] JA123. IHS attached a new table projecting that—contrary to the undisputed $603,842 that IHS had previously calculated based on *actual* expenditures in the immediately preceding year—*in the future* the Secretary would only be budgeting or allocating $183,223 in H&C funding to the Fort McDermitt Clinic. JA133. IHS therefore asserted that the Tribe was only entitled

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[4] IHS initially rejected the final offer in its entirety, but the parties were later able to reach agreement on most of the disputed issues. JA203, ¶ 36; JA 215, ¶ 36. The only issue that remains in dispute is IHS's rejection of the proposed funding amount.

[5] IHS has since abandoned this argument.

to $183,223 for Clinic operations, instead of the $603,842 proposed by the Tribe (putting aside the undisputed EMS funding). JA133.[6] Then IHS changed the funding amount again, awarding the Tribe only $52,663 in H&C funds for the Clinic (apart from the EMS funding). JA231, ¶ 13.[7]

In its rejection letter, IHS explained that in calculating the Tribe's award amount, IHS withheld $190,197 of "H&C program funds" for another nearby tribe, the Winnemucca Indian Colony (Winnemucca). JA 123. IHS did not provide any documentation in support of the asserted Winnemucca deduction. JA231, ¶ 13. Nor did the rejection letter otherwise explain how IHS arrived at the deduction, nor how this number factored into either the amount of $183,223 that IHS originally calculated or the $52,663 that IHS actually awarded for the Clinic.

The rejection letter never asserted that IHS was reducing the Secretarial amount (referred to in the letter as the "recurring funding amount") on the basis that

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[6] The $502,611 in EMS funding is added to this amount for purposes of the funding total. Accordingly, the Tribe asserted that it was entitled to $1,106,453 for the Clinic and EMS program together. JA133; *see also* JA120-21 (stating amounts in Exhibit B, JA133, differ only "slightly" from the amounts in Exhibit A, which represent "the total Secretarial amount that would be available for transfer to the Tribe").

[7] With the EMS funding added to this amount, IHS awarded the Tribe $555,274 in *total* funding for the Clinic and EMS programs combined. JA231, ¶ 13.

some portion of IHS's spending was attributable to third-party revenues (an issue IHS first raised on appeal before the district court). *See* JA120-23.

IHS also rejected the Tribe's proposed employee housing provision. JA117.

The Tribe appealed IHS's rejection of its proposed funding amount and housing provision directly to the district court pursuant to §§ 5331(a) and 5391.

3. District Court Proceedings

The district court issued two summary judgment orders in favor of the Tribe, only one of which IHS challenges here. First, in September 2018 the court granted the Tribe's motion for summary judgment and denied IHS's cross-motion as to the employee housing provision. JA225-27. The district court explained that "IHS must specify which grounds it invokes when it rejects an offer," and "[i]n subsequent proceedings, the government may rely only on the particular grounds it specified." JA225 (citing §§ 5387(c)(1)(A), 5387(d), 5398). Because one of the grounds asserted in the letter had been abandoned on appeal and the other was invalid,[8] the district court concluded that IHS's rejection of the housing provision was unlawful. The court declined to consider a third justification IHS raised on appeal because it

[8] Because the Tribe had not requested any funding associated with the employee housing provision, the district court concluded that the housing provision could not properly be rejected on the basis that it exceeded the applicable funding amount under § 5387(c)(1)(A)(i). JA225-26.

had not been raised in the rejection letter. JA226-27. IHS does not challenge this ruling. *See* Appellants' Br. 2; *see also id.* Circuit Rule 28(a)(1) Statement.[9]

Turning to IHS's rejection of the proposed funding amount, the district court concluded that it did not have sufficient information to rule on the parties' summary judgment motions, denied the motions without prejudice and directed the parties to enter a joint stipulation of facts. JA227; *see also* JA229-33 (Joint Statement of Stipulated Facts).

Following submission of the joint stipulation, the parties cross-moved for summary judgment a second time. This time IHS presented *new* estimates of the amounts to which it believed the Tribe was entitled, asserting that in 2016 IHS actually spent $221,211.23 in H&C Clinic-level funding, up from the $183,223 it had previously asserted and from the $52,663 awarded (all in addition to the undisputed $502,611 in EMS funding). JA238, ¶¶ 6. The Tribe maintained that it was entitled to the full $1,106,453 it had proposed in its final offer, because this

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[9] Accordingly, the district court's ruling that the employee housing services provision was unlawfully rejected stands, and the Tribe is entitled to have that provision included in its Funding Agreement. *Boyd v. Ford Motor Co.*, 948 F.2d 283, 284 (6th Cir. 1991) (where party has "not chosen to raise a question concerning" a particular district court ruling, "any issues pertaining to that ruling are considered abandoned on appeal"); *see* JA227 (granting the Tribe's motion as to this issue, which had requested that "the proposed employee housing services provision [be] approved by operation of law," Dist. Ct. Dkt. No. 14, at 26 (Pl.'s Mot. Summ. J.)).

amount reflected the full amount that IHS would have spent on the Clinic and EMS programs that the Tribe was taking over, and because IHS had unlawfully rejected the proposal on grounds not permitted by the statute.

The district court found for the Tribe, concluding that IHS could not reduce the Tribe's funding on the basis of its Winnemucca allocation argument because the Tribe was simply taking over the same Clinic that IHS had been running and was therefore entitled to receive the same funds that IHS had been spending: "IHS cannot now withhold those funds for operation of the very same program because the Tribe seeks to run the Clinic itself." JA259. Regarding IHS's third-party revenue argument, the district court first noted the Tribe's "well-taken" argument that IHS had not adequately raised this issue in the rejection letter. JA261. The court determined that it need not reach this procedural issue, however, because even if IHS's third-party revenue argument could be considered, it "fail[ed] as a matter of law" because the Secretarial amount must "be determined by the funds provided to *operate* a program," and the ISDEAA "does not further cabin that amount based on how and from which sources IHS had been cobbling together those funds." JA261-62 (emphasis in original).

Because "the justifications relied on by IHS for declining the Tribe's proposed amount" were invalid as a matter of law, the district court concluded that IHS had "failed to carry its burden to show that it properly rejected the Tribe's proposal" and

therefore awarded the Tribe the full amount of funding requested in its final offer. JA266. IHS now appeals, challenging this second summary judgment order.

SUMMARY OF ARGUMENT

If IHS rejects a tribe's proposal for an ISDEAA compact, it can only do so on limited statutorily-specified grounds, and only by providing a written decision, within 45 days, that "clearly demonstrates" or is "supported by a controlling legal authority" establishing that one of the limited grounds has been met. §§ 5387(b), 5387(c)(1)(A). IHS has failed to meet that stringent standard here.

IHS must provide the Tribe with the amount of funding IHS itself had been spending to operate the Clinic. § 5325(a)(1). In its final offer the Tribe proposed a funding amount calculated from IHS's own information about prior expenditures at the Fort McDermitt Clinic and the associated EMS program. IHS's rejection of that proposed amount is flawed for multiple reasons.

IHS may not withhold funds that it has allegedly internally budgeted for another tribe, especially when the Fort McDermitt Clinic was solely operated for the benefit of the Fort McDermitt Tribe when IHS ran it, and the Tribe relied only on funding information for that facility. *See* JA141-59 (Compact). IHS's attempt to withhold funding on this basis also fails because the agency's rejection letter never raised the arguments on which it now relies, and because it waived any reliance on the "tribal shares" provision before the district court.

IHS similarly failed to raise its third-party revenue argument in the rejection letter, and thus the agency cannot meet its burden to show that the rejection "clearly demonstrate[d]" the validity of any funding reduction on this basis. §§ 5387(c)(1)(A), 5387(d), 5398. Nor has IHS ever provided a specific finding regarding the amount of funds that it alleges may be withheld on this basis. The Act's funding mandate does not distinguish between sources of funding, as IHS suggests, and IHS has failed to establish that its interpretation of the Act is "clearly required by the statutory language." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 194 (2012).

Accordingly, IHS cannot carry its burden to demonstrate "the validity of the grounds for the decision made," § 5398(1), and the district court properly overturned the agency's decision and awarded the Tribe the full amount of funding proposed in its final offer. This Court should affirm the district court's decision.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150 (D.C. Cir. 1996). Summary judgment is appropriate where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

In applying this standard in an ISDEAA action, a court's review of the agency's decision is *de novo*. 25 U.S.C. § 5331(a).[10] The district court's first opinion concluded that *de novo* review was appropriate here, JA221-22, and IHS has not challenged that conclusion on appeal. Indeed, IHS acknowledges that the Secretary has the "burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting [a tribe's] offer" and "that the decision is fully consistent with provisions and policies" of Title V. *See* Appellants' Br. 12-13 (quoting 25 U.S.C. §§ 5387(d), 5398). Unlike actions under the APA, the burden is not on the Tribe to establish the illegality of the agency's action; instead, the burden is squarely on the agency to "clearly demonstrate[]" its actions satisfied the ISDEAA's high standards.

Additionally, and again unlike APA actions, there is no deference to the agency's interpretation of law. To the contrary, the Supreme Court has noted that when interpreting IHS's obligations, "[c]ontracts made under [the ISDEAA] specify that '[e]ach provision of the [ISDEAA] and each provision of this Contract shall be

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[10] *See also Pyramid Lake*, 70 F. Supp. 3d at 542; *accord Cook Inlet Tribal Council v. Mandregan*, 348 F. Supp. 3d 1, 5 (D.D.C. 2018), *vacated in part on other grounds on reconsideration*, No. 14-CV-1835 (EGS), 2019 WL 3816573 (D.D.C. Aug. 14, 2019); *Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, 945 F. Supp. 2d 135, 141–42 & n.5 (D.D.C. 2013). *But see Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103, 108-09 (D.D.C. 2009) (applying APA standard where Plaintiff stated claims for relief under both the ISDEAA and APA).

liberally construed for the benefit of the Contractor . . . .'" *Ramah Navajo Chapter*, 567 U.S. at 194 (quoting § 5329(c) (Model Agreement § 1(a)(2))). The Supreme Court has interpreted this language to mean that the government "must demonstrate that its reading [of the ISDEAA] is clearly required by the statutory language." *Id.* Title V of the Act goes even further, explicitly stating that: "[e]ach 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) (emphasis added).

ARGUMENT

I. IHS HAS NOT DEMONSTRATED BY CLEAR AND CONVINCING EVIDENCE THAT IT PROPERLY REJECTED THE TRIBE'S PROPOSED FUNDING AMOUNT.

Notwithstanding IHS's attempt to reframe the issue, the only question before this court is whether IHS has "demonstrat[ed] by clear and convincing evidence . . . the validity of the grounds for" its November 2016 rejection of the Tribe's proposed funding amount. § 5398(1). IHS has not done so. The agency instead chooses to ignore its burden, arguing that it should be allowed to reduce Fort McDermitt's funding because an unspecified portion of IHS's expenditures was internally allocated to Winnemucca and another unspecified portion was funded by third-party revenues. The arguments advanced here—articulated only on appeal and years after

the November 2016 rejection was issued—fail to establish that the decision *when made* included "a specific finding" that either "clearly demonstrate[d], or that [was] supported by a controlling legal authority" that one of the limited statutory rejection grounds applied. § 5387(c)(1)(A). Indeed, IHS's opening brief hardly discusses the rejection decision at all. IHS cannot carry its burden as to either the Winnemucca argument or the third-party revenue argument it raises here because neither was advanced at the time with particularity, much less advanced with sufficient support to carry the agency's heavy burden. Nor does either argument have merit as a matter of law, even if they had been adequately raised in the rejection letter. The district court's decision in favor of the Tribe should accordingly be affirmed.

A. Because the Tribe Is Compacting to Operate the Same Program IHS Previously Ran, IHS Cannot Withhold a Portion of its Funding on the Basis that Those Funds Were Internally Budgeted for Winnemucca.

IHS's argument focuses on the ISDEAA provisions governing the procedures for severing a portion of a program that serves multiple tribes. But in addition to being legally flawed, that argument simply does not apply to the situation here, because the Fort McDermitt Clinic is *not* a program serving multiple tribes. The Fort McDermitt Tribe has assumed operation of the Clinic—not a portion of it, as IHS suggests—and the Tribe is therefore entitled to the full funding IHS had been spending to operate the Clinic.

1. IHS's Argument Rests on the False Factual Premise that the Clinic Serves Multiple Tribes.

The Fort McDermitt Clinic is designed to serve Fort McDermitt tribal members and that is precisely what it does. The Clinic is located on the Fort McDermitt Reservation, and Fort McDermitt members make up the majority of its patients, with over 300 Fort McDermitt members served each year. JA30. The Fort McDermitt Clinic is one of many clinics in IHS's Schurz Service Unit, which encompasses 13 tribes. *See, e.g.*, JA45. As with all facilities in the IHS system, the Clinic's doors are open to all Indian people who qualify as IHS beneficiaries, *see* 42 C.F.R. § 136.12(a); Dist. Ct. Dkt. No. 14 at 31-32, ¶ 18,[11] but this does not mean that the Clinic thereby becomes "a program that has previously been administered for the benefit of" multiple tribes within the meaning of the ISDEAA, *see* § 5324(i)(1).

In fact, the record shows that the Clinic serves members of many tribes throughout its region, and Winnemucca members make up a tiny portion of this patient mix—in 2015, for example, the Clinic's users included members of several dozen tribes, yet *just two* Winnemucca members, compared to 12 members of the Te-Moak Bands of Western Shoshone and 14 members of the Pyramid Lake Paiute

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[11] *See also* Letter from Michael H. Trujillo, Dir., IHS, to Tribal Leaders, at 2 (Jan. 10, 2000), *available at* https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/2000_Letters/01-10-2000_Letter.pdf (last accessed May 25, 2020).

Tribe (along with 331 members of the Fort McDermitt Tribe). JA30-31. The small share of Winnemucca users is because Winnemucca members have historically received their health care primarily through the Purchased/Referred Care program (PRC, formerly known as Contract Health Services, or CHS) rather than by receiving direct care at a clinic within the IHS system. *See* JA44 (noting that "Winnemucca is covered by CHS for Medical, Dental, Pharmacy and Mental Health Services"), 97 n.2 (same). That pattern continues to this day, and IHS has acknowledged that "the Winnemucca Tribe's members have not routinely accessed [the Clinic] in the last three years," Dist. Ct. Dkt. No. 16, at 21 (Defs.' Cross-Mot. Summ. J.), with Winnemucca members accounting for less than one percent of all users—just *two users* in each of the past three years at the time of compacting.[12] JA31.

IHS argues that a portion of the Clinic is allocable to Winnemucca—despite the facts in the record to the contrary—and therefore that the Fort McDermitt Tribe is not entitled to operate that alleged portion without Winnemucca's consent. Appellants' Br. 13-16. But this assertion is belied by the fact that IHS entered into a compact with the Fort McDermitt Tribe for operation of the entire Clinic, without severing any portions of the program as IHS now suggests. *See* JA145, 153

[12] The Tribe has also raised objections to the manner in which IHS tracks tribal affiliation, which is based on home address rather than tribal membership, JA97 n.2, and IHS has not rebutted or responded to these objections.

(Compact §§ 1.2.1, 4.1); JA162-69 (Funding Agreement (FA) § 3). This is not because the Fort McDermitt Tribe has taken over a program operated for Winnemucca's benefit, but rather because the Clinic is a program operated solely for the benefit of the Fort McDermitt Tribe and its members, and the Fort McDermitt Tribe is therefore entitled to operate the full Clinic under the ISDEAA. If it were true that IHS was required to sever a portion of the program as IHS's brief now suggests, it would mean that IHS must have retained a portion of the Clinic operations that it continues to operate for Winnemucca. But that simply is not the case. (And, IHS cannot point to any evidence suggesting that this is the case, nor has it done so here.) IHS's argument therefore rests on a factual premise for which there is no support in the record.

The statutory provisions IHS relies on, §§ 5321(a)(4), 5324(i), 5387(c)(1)(D), and 5386(g)(2)(A) are inapplicable for this reason. Regarding § 5324(i), the district court correctly explained that "[t]he Tribe has not contracted for a 'portion[]' of the Clinic," and thus there was "no 'divi[sion] [of] the administration of [the] program" within the meaning of § 5324(i)(1). JA259 (alterations in original) (quoting § 5324(a)(1), (i)(1)). Rather, as the district court understood, "the Tribe has assumed operation of [the] same Clinic, with the same regional service" that IHS had provided, which primarily benefits Fort McDermitt members but will remain open to other IHS beneficiaries in the region. JA259-60.

The same is true of §§ 5387(c)(1)(D) and 5321(a)(4), which permit IHS and a tribe to sever a program and enter into a compact or contract for discrete portions of the program. Again, that is not what happened here—the Tribe has entered into a compact with IHS for the entire program IHS was previously operating, as described above, and it is therefore entitled to funding for the full program. Finally, § 5386(g) addresses an entirely different situation where one tribe is withdrawing from a previously formed "inter-tribal consortium or tribal organization." This provision is wholly inapplicable, as no inter-tribal consortium or tribal organization including Fort McDermitt and Winnemucca ever existed. The provisions cited by IHS, therefore, neither require nor permit the Secretary to reduce the amount of funds directed to the Clinic simply because the Tribe is now operating the Clinic instead of IHS.

2. IHS Is Required to Provide the Amount of Funds it Had Been Expending on the Clinic.

Simply put, the Tribe has assumed—and is now operating—the very same program IHS had been running before the Tribe compacted for operation of the program. The ISDEAA funding requirement for this circumstance is clear: when a tribe assumes a program IHS had been operating, IHS is required to provide an amount that is "not . . . less than" what the "Secretary would have otherwise provided for the operation of" the relevant program. § 5325(a)(1). The U.S. District Court for the District of Columbia has correctly held—in a decision IHS did not

appeal—that "[t]he clearest meaning of [the] term 'would have otherwise provided' in the context of the Act is what the IHS would have otherwise *spent* on the program." *Pyramid Lake*, 70 F. Supp. 3d at 544 (emphasis in original). And this Court has affirmed that "the amount of funds the [agency] would otherwise have *expended* on the particular program or service for the tribe" sets "a floor, not a ceiling" on the proper funding level for an ISDEAA contract or compact. *Navajo Nation v. U.S. Dep't of Interior*, 852 F.3d 1124, 1130 (D.C. Cir. 2017) (emphasis added) (quoting *Yurok Tribe v. Dep't of Interior*, 785 F.3d 1405, 1412 (Fed. Cir. 2015)).

This interpretation accords with Congress's purpose in crafting § 5325 to eliminate the Secretary's discretion in setting funding amounts, and to link the ISDEAA's funding provisions to the amount the "Secretary would have otherwise provided," i.e., agency expenditures, not budgets that the agency could change at its whim. § 5325(a)(1); *see* S. REP. NO. 100-274, at 22 ("[I]t has been difficult for tribes and Federal officials to correlate projected budgets with actual expenditures and resources."). For the same reason, the Act makes no distinction based on the source or internal budget categorization of these funds; to the contrary, it actually specifies that these funds should be provided "without regard to any organizational level within the . . . Department of Health and Human Services, as appropriate, at which the program . . . is operated." § 5325(a)(1). The Act further provides that the

amount of funds required under § 5325(a) "shall not be reduced by the Secretary in subsequent years except pursuant to" a limited list of circumstances not applicable here. § 5325(b)(2).

Along with other strict funding mandates, these provisions help effectuate Congress's goal of ensuring that contracting and compacting tribes are able to provide "at least the same amount of services as the Secretary would have otherwise provided" had the agency continued operating the program itself. S. REP. NO. 100-274, at 9, 13, 16; *see also Ramah Navajo Chapter*, 567 U.S. at 186. In essence, as this Court has held, "there is overwhelming evidence that Congress intended the [ISDEAA] to limit the Secretary's discretion in funding matters," as just one example of its general goal to "circumscribe as tightly as possible the discretion of the Secretary," throughout the Act. *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1344, 1347 (D.C. Cir. 1996).

Accordingly, IHS's attempt to reduce the amount of funding provided to the Clinic on the basis that some of these funds were *internally budgeted* to Winnemucca—despite the fact that IHS itself was not actually spending these funds for Winnemucca—has no basis in the statute and runs directly contrary to Congress's specific purpose in linking ISDEAA funding amounts to agency expenditures. § 5325(a)(1); *see Navajo Nation*, 852 F.3d at 1130. When IHS was running the Clinic, the agency exercised its discretion to use these funds to support the Fort

McDermitt Clinic. But once the Tribe opted to compact for the operation of the Clinic, the Act "limit[s] the Secretary's discretion" and IHS may not suddenly choose to reduce the Clinic's funding on the basis of theoretical internal budget categories. *Ramah Navajo Sch. Bd.*, 87 F.3d at 1347.

For these precise reasons, in *Pyramid Lake*, 70 F. Supp. 3d at 544, the U.S. District Court for the District of Columbia rejected the very same tribal shares argument—indeed, the very same tribal shares table—that IHS relies on here. IHS did not appeal that decision, yet it attempts to resurrect the same failed argument here. In *Pyramid Lake*, IHS reduced the available funding based on the same "tribal shares" methodology and then argued that the proposed funding amount for the EMS program was "in excess of the tribal share IHS determined the Fort McDermitt tribe was entitled to receive." *Id.* But there, as here, the tribal shares in IHS's internal budget did not reflect IHS's actual expenditures. The court specifically rejected IHS's interpretation that the funding amount it "would have otherwise provided" under section 5325(a)(1) means "the amount it allocated in its budget for a particular program." *Pyramid Lake*, 70 F. Supp. 3d at 544. It held instead, that IHS must provide "what the IHS would have otherwise *spent* on the program"—or to put it more plainly, what IHS was actually spending at the time. *Id*. (emphasis in

original).[13] The court aptly observed that "[b]ecause IHS may spend more than a tribe's budgeted tribal share if the agency itself runs a particular program—as it did here—it cannot limit funding of an ISDEAA proposal to a tribal share amount." *Id.* In its final order the court further noted that under IHS's reasoning, "the agency would have complete discretion to deny a tribe's self-determination proposal by simply setting the 'tribal share' allocated to the program at less than its operating cost, as it did here. This reading of IHS's authority runs directly contrary to both the purpose and text of ISDEAA." *Pyramid Lake*, 2015 WL 13691433, at *1 (Final Order).

The same is true here. Regardless of what internal budgeting mechanisms IHS used to allocate funding to the Fort McDermitt Clinic, the Act is clear that IHS must provide Fort McDermitt with the amount of funding that IHS had previously been *spending* at the Clinic. The Act does not permit IHS to remove any portion of this amount because it was internally budgeted as a "tribal share" for Winnemucca.

Accordingly, the district court's decision on this point should be affirmed.

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[13] IHS acknowledged in *Pyramid Lake* that the agency "generally determines the applicable funding level for an ISDEAA contract 'based on the amount the Agency *previously spent* to operate the program.'" 70 F. Supp. 3d at 544-45 (emphasis added) (citation omitted).

3. IHS May Not Rely on Arguments it Failed to Raise in the Rejection Letter or Otherwise Waived.

The district court's decision should also be affirmed because IHS did not properly raise or preserve the arguments on which it now relies.

The ISDEAA gives IHS one chance to reject a final offer. The agency must do so (1) within 45 days of receiving the offer; (2) in writing; and (3) by making "a specific finding that clearly demonstrates, or that is supported by a controlling legal authority, that" one of the permissible grounds for rejection has been met. § 5387(b), (c)(1)(A). On appeal the agency has "the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer" and "that the decision is fully consistent with provisions and policies of" Title V. §§ 5387(d), 5398. In other words, on appeal the agency must be able to demonstrate that *the grounds advanced in the rejection decision* were valid and sufficiently supported under the law, and that the decision was consistent with all provisions of Title V, including § 5387(c). IHS cannot rescue a deficient rejection letter by adding new arguments on appeal. Because a rejection or declination letter "must explain the reasons for a declination," any new arguments offered at later stages of the proceeding constitute impermissible "post-hoc justifications" and cannot be used as

a basis to affirm the agency's rejection decision. *Pyramid Lake*, 70 F. Supp. 3d at 542.[14]

While this result may seem strict, it is Congress's direct response to IHS's repeated failures to follow the ISDEAA's contracting mandates and to engage in the exact type of behavior seen here. *See, e.g.*, H.R. REP. NO. 106-477, at 39 (1999) (strengthening the Act's review provisions to ensure tribes have "strong, effective, and immediate means to obtain agency compliance with the Act's requirements"). Congress intentionally put the burden on the *agencies* to prove why any specific element of a tribe's proposal was properly rejected so that the agencies would not be able to cure a deficient rejection with justifications manufactured years after the fact.

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[14] The *Pyramid Lake* decision interpreted the parallel declination provision under Title I, 25 U.S.C. § 5321(a)(2), which contains substantively identical language to the Title V provision applicable here, 25 U.S.C. § 5387(c)(1)(A). Both provisions require "written notification . . . that contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority, that" one of the limited declination criteria is met. *See also, e.g.*, *N. Arapaho Tribe v. LaCounte*, No. CV-16-11-BLG-BMM, 2017 WL 2728408, at *8 (D. Mont. June 23, 2017) (rejecting one of the BIA's stated rationales for declining a Title I contract proposal as "an improper post hoc justification"); *Susanville Indian Rancheria v. Leavitt*, No. 2:07-cv-259-GEB-DAD, 2008 WL 58951, at *6 (E.D. Cal. Jan. 3, 2008) (rejecting IHS's "post hoc rationalizations" for rejecting a proposed Title V funding agreement like the one here, on the grounds that 25 U.S.C. § 5387(c)(1)(A) requires written notification demonstrating that at least one of the enumerated rejection criteria was met) (quoting *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 688 (9th Cir. 2007)).

This result is consistent with the "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2710 (2015) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). Allowing IHS to rely on post-hoc justifications would eviscerate the Act's deadline for responding to a final offer, § 5387(b), which requires the agency to provide a legally defensible decision within 45 days, not years later through arguments raised in the course of an appeal.[15] If not, the agency could simply reject a decision without any justification and then spend years dragging the Tribe through litigation until it came up with some convincing reason for its action.

Yet that is what we see here.

With respect to the Winnemucca issue, IHS now cites a number of statutory provisions in support of its argument that the Clinic program must be divided, or a portion of it must be severed off for Winnemucca. Appellants' Br. 14 (citing §§ 5321(a)(4), 5324(i), 5387(c)(1)(D)). But IHS never cited any of those severance and divisibility provisions in the rejection letter. *Compare* Appellants' Br. 14 (citing

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[15] The district court recited and applied this rule in a portion of its 2018 Order that IHS did not appeal, relating to the employee housing issue. In its Order, the district court correctly explained that "IHS must specify which grounds it invokes when it rejects an offer. . . . In subsequent proceedings, the government may rely only on the particular grounds it specified." JA225 (citing §§ 5387, 5398).

the foregoing three provisions), *with* JA123 (citing only §§ 5381(b), 5388(c)). Nor did IHS ask Fort McDermitt to sever any Winnemucca portions of the program, nor suggest that the agency was rejecting the Tribe's proposed scope of operations on the basis that part of the program is operated for Winnemucca's benefit.[16] *See* JA123. The rejection letter noted only that IHS believed a portion of the *funds* requested by the Tribe reflected "shares allocable to Winnemucca," i.e., amounts IHS was spending on the Fort McDermitt Clinic were budgeted for Winnemucca on its tribal shares table. JA123.[17] The letter cited § 5381(b), which requires a tribe's authorization for another tribe to receive funds and operate services on its behalf, but did not mention any of the severance or divisibility provisions on which IHS now relies. *Id.* (This is presumably because, as explained above, there *was* no separate Winnemucca program to sever; in reality the Clinic is operated for the

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[16] Indeed, in another section of the rejection letter—which initially rejected the Tribe's proposal to operate the Clinic—IHS discussed the scope of the Tribe's proposal and mentioned potentially severing certain related programs, such as the EMS program or the PRC program. JA122. IHS never mentioned Winnemucca in this portion of the letter, *id.*, underscoring the fact that it viewed all these services as exclusively for the benefit of McDermitt tribal members. And IHS never mentioned the need to sever any alleged Winnemucca portions of the program, as it now argues on appeal.

[17] The IHS tribal shares table, JA2, does not show how the Clinic expenditures are linked with the supposed budgets, nor does it show how Winnemucca funds were allegedly used for the Clinic.

benefit of a single tribe, Fort McDermitt.) Despite IHS's attempts to bolster its argument with new statutory provisions cited on appeal, the discussion in the rejection letter itself is not "a specific finding" supported by "controlling legal authority" demonstrating that a separate Winnemucca program existed that must be severed from the Fort McDermitt program. § 5387(c)(1)(A); *see, e.g.*, *Paiute Indian Tribe of Utah v. S. Paiute Agency Superintendent*, 46 IBIA 285, 287, 293 (2008) (holding that BIA had not "*clearly* demonstrated" the grounds for its final offer rejection because; although the agency gave some explanation of its reasoning, it "did not provide any *specific examples*" to support its assertions (both emphases in original)).

IHS also waived the "tribal shares" argument that it uses to justify why the agency may withhold a portion of the Clinic's funding. In invoking the statutory provision that defines "tribal share" as "an Indian tribe's portion of all funds and resources," § 5381(a)(8), IHS argues that this definition "must have been" a reference to IHS's internal budgeting allocation of funding among tribes in a service unit, Appellants' Br. 15. But IHS expressly disavowed this argument in the district court. During the hearing on the parties' first cross-motions for summary judgment, the government responded to a question from the court by asserting that its argument regarding the allocation of the Fort McDermitt and Winnemucca tribal shares was "not linked" to the statutory definition in § 5381(a)(8). JA284 (Dist. Ct. Dkt. No.

30, at 24 (Tr. Mot. Hr'g, Sept. 18, 2018)). This is a textbook example of waiver. *See, e.g.*, *First E. Corp. v. Mainwaring*, 21 F.3d 465, 467 (D.C. Cir. 1994) (noting the "general rule that a party waives an argument by failing to raise it below"); *see also United States v. Olano*, 507 U.S. 725, 733 (1993) (citations omitted) (explaining in the criminal context that "waiver is the 'intentional relinquishment or abandonment of a'" right or argument). The government may not now rely on an argument it specifically disavowed before the district court. For all of these reasons, the district court's decision on this issue should be affirmed.

B. IHS Has Not Clearly Demonstrated the Validity of its Rejection on the Basis that a Portion of IHS's Expenditures Were Funded with Third-Party Revenues.

IHS's attempt to frame this appeal around the third-party revenue issue fails for similar reasons. It is an impermissible post-hoc argument and, in any event, it is incorrect as a matter of law.

1. IHS's Third-Party Revenue Argument is an Impermissible Post-Hoc Justification

IHS argues that the amount proposed by the Tribe exceeded the applicable funding level because some of the funds the Secretary was spending at the Clinic came from third-party funding sources, such as payments from Medicare, Medicaid, and private insurance. But the agency never raised this issue in its November 2016 rejection letter, nor did it make a specific finding regarding the amount of third-party funds spent at the Fort McDermitt Clinic or the amount of the Tribe's proposed

funding that was rejected on this basis. (IHS first raised this argument before the district court. *See* Dist. Ct. Dkt. No. 16, at 19.) Now, in its rush to litigate an issue it did not properly raise, IHS chooses to ignore its statutory burden entirely, omitting *any mention* of the rejection decision in its argument on the third-party revenue issue. *See* Appellants' Br. 21-29. In so doing, the agency fails to carry its burden to show by clear and convincing evidence that the rejection decision provided "a specific finding that clearly demonstrate[d]" that the proposed funding amount exceeded the applicable level on the basis that a portion of it included third-party revenues. § 5387(c)(1)(A); *see* 32 & n.14, *supra*.

The only references in the IHS rejection letter to third-party revenues appear in a section of the letter supporting a *different ground for rejection* that IHS has since abandoned (that the Tribe allegedly could not carry out these programs without putting public health at risk). JA120-22. In the district court, IHS attempted to rely on these references to argue that the letter had adequately rejected the Tribe's proposal on the basis that a portion of the requested recurring funding was third-party revenues. Dist. Ct. Dkt. No. 33-1, at 6, 13-14, 24-27 (Defs' 2d Cross-Mot. Summ. J.). Here IHS does not even argue that the rejection letter constituted the statutorily-required specific finding on this issue—it does not mention the rejection letter *at all* in its discussion of the third-party revenue argument. In the one section of the Appellants' Brief where IHS mentions this portion of the rejection letter—*see*

Appellants' Br. 8-9—IHS entirely misconstrues the discussion presented in the letter. The rejection letter referred to "the balance of any reimbursements from Medicaid, Medicare and third-party payers *referenced in the final offer*." JA122 (emphasis added). But when the final offer discussed these balances, it was in the context of negotiations over the transfer of unspent carryover funds from prior years, which was explicitly addressed in an entirely separate portion of the contract.[18] JA86, 94-96. The final offer itself had made no reference to third-party funds as a component of the requested recurring funding amount, and the rejection letter—which expressly responded to this portion of the final offer—did not mention third-

[18] Section 4.4 of the proposed Funding Agreement was the subject of extensive negotiation by the parties. It governed the extent to which IHS was required to transfer unspent funds that had previously been contracted to Pyramid Lake for the EMS program and then had been returned to IHS. JA86, proposed FA § 4.4 (proposed provision); JA94-96 (discussing the parties' negotiations over this provision). Section 4.5 of the proposed Funding Agreement complemented Section 4.4 by providing that IHS would transfer any third-party collections received after the Tribe assumed operations—this referred to collections already billed by IHS (for services provided during the time in which IHS was operating the Clinic and EMS program) but for which payment would be received after the Tribe assumed the programs. JA86, proposed FA § 4.5. Subsection 4.3.1 likewise specified that IHS would transfer reimbursements that had already been received from third parties, as part of IHS's "transfer of current and prior years funds." JA85, proposed FA § 4.3.1. In both the proposed Funding Agreement and the final offer letter, these provisions are entirely separate from the discussion of recurring funding amounts, which made no mention of third-party funds. *See* JA83-85, proposed FA § 4.1 ("Funding Amounts"); JA96-98 ("Recurring Funding Amounts").

party revenues in its discussion of the recurring funding level. JA122-23 (discussing H&C funding amount, the only issue disputed here).

IHS now attempts to rewrite these facts, asserting that the rejection letter "explained that, to the extent the Tribe was asking IHS to match projected third-party revenue as part of the Tribe's Secretarial funding, IHS would 'reject[]' the offer 'as being in excess of the applicable funding level.'" Appellants' Br. 9 (citation omitted). In fact, the rejection letter said no such thing. It never suggested that IHS was being asked to match projected third-party revenues, a concept IHS has picked up from a remark in the district court's opinion, *see* JA263, but which was mentioned not once in IHS's rejection letter, *see* JA115-39. Nor did the letter anywhere explain that IHS believed the *recurring* funding amount must be reduced on the basis that certain funds the agency had been spending on the Clinic (aside from the lump-sum transfer of the prior year carryover amounts discussed above) were non-contractible because they were being funded through third-party collections. Simply put, IHS never raised this legal issue in the rejection letter, and IHS's mischaracterization of its own statements cannot retroactively make it so.

The district court briefly considered the Tribe's argument that IHS had failed to address this issue in the rejection letter, noting that these "procedural arguments [were] well-taken." JA261. The district court ultimately concluded that it did not need to reach this procedural question because even if IHS's argument on this issue

could be considered, it "fail[ed] as a matter of law." *Id.* The Tribe's argument that IHS failed to timely raise this issue in the rejection letter is supported by the record and was fully briefed by the parties below. Accordingly, this Court may affirm the district court's judgment on this ground alone.[19]

2. Even if IHS's Argument Could Be Considered, IHS Has Not Clearly Demonstrated the Validity of its Deduction for Third-Party Revenues.

Even if the rejection letter's vague statements about carryover balances could somehow meet IHS's burden to raise the issue, IHS must still show that it made a "specific finding" to support its stated grounds for rejection—i.e., that it properly rejected a *specific amount* of funding on the basis of the argument it now raises. §§ 5387(c)(1)(A), 5387(d), 5398. It cannot do so here.

To begin with, the final offer rejection never specified the amount of funding IHS was supposedly denying on the basis of the third-party funding point (which was discussed only in the context of another issue in the final offer). *See* JA122 (providing no numbers or calculations with the reference to third-party reimbursements); JA231-32, at ¶ 14. The Tribe's proposed funding amount was based on a document that IHS itself had provided to the Tribe during negotiations,

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[19] This Court "may affirm a judgment on any ground the record supports . . . and that the opposing party had a 'fair opportunity' to address.'" *Jones v. Bernanke*, 557 F.3d 670, 676 (D.C. Cir. 2009) (citations omitted).

showing that the agency was spending $603,842 for Clinic-level H&C funding (EMS funding aside). JA110. However, in its rejection letter IHS shifted and asserted that once the Tribe assumed the program the Tribe would be entitled only to $53,663 in Clinic-level H&C funding. JA134 ($555,275 in first row for "Hospitals and Clinics" and in first column entitled "FA Amount," less $502,511 in EMS funding). IHS supported its new position with a budget table it concocted projecting future expenditures of $183,223 in Clinic-level H&C funding (EMS funding aside). JA133. IHS cited no numbers in the letter itself and attached tables showing third-party revenue amounts varying from $289,041 to $378,455. JA110, 133 (sum of 2019 "Annualized Projected Collections"); *see also* JA231-32, ¶ 14.

IHS was no more certain in proceedings before the district court, offering different third-party revenue figures that it had allegedly excluded from the Tribe's recurring funding. *Compare* Dist. Ct. Dkt. No. 16, at 16 (asserting availability of $183,223 in non-third-party revenue contractible H&C funds), *with* JA238, at ¶ 6 (asserting $221,211.23 in contractible H&C funds). In support of these numbers IHS offered entirely new documentation, created two years after its decision. This included multiple declarations and a new "actual expenditure" table showing the agency spent $221,211.23 in appropriated H&C dollars and $280,593.29 of Special Diabetes Program for Indians appropriated funds, for a total of $501,804.52 in non-EMS non-third-party revenue Clinic-level H&C expenditures. JA238, ¶¶ 6, 8; *see*

generally JA237-48 (declarations explaining the new amounts presented by IHS). Now, before this Court, IHS does not assert *any* specific amount that it properly rejected on this basis, focusing instead on generalized statutory interpretation arguments. These ever-shifting numerical justifications—and now, no numerical justification at all—surely cannot "clearly demonstrate[]" that IHS properly rejected any specific amount on this basis, even if the agency *had* provided a specific number in the rejection letter. § 5387(c)(1)(A); *see Paiute Indian Tribe of Utah*, 46 IBIA at 287, 293. Rather, IHS's shifting justifications bear the hallmark of the precise behavior Congress sought to avoid: an agency withholding funds from a tribe by attempting to exercise discretion that Congress expressly circumscribed. *See Ramah Navajo Sch. Bd.*, 87 F.3d at 1344, 1347.

Relatedly, IHS's argument before this court seems to rest on the implicit assumption that *all* of the third-party revenue that it points to is generated by the programs the Tribe is now assuming, such that the Tribe itself will now be billing and collecting all of those third-party funds itself. But IHS has not proven that this is the case, and, in fact, this theory is not supported by the record. At the time of the parties' compact negotiations, IHS was in the process of shifting funds within the Schurz Service Unit as a result of the *Pyramid Lake* decision. The *Pyramid Lake* decision noted that the funds IHS had been using for the EMS program included not only H&C funds regularly allocated to the program, but also some amount of "IHS

discretionary funds," plus third-party revenues from the Fort McDermitt Clinic, as well as some revenues from the EMS program itself. 70 F. Supp. 3d at 538-39. But when the Fort McDermitt Tribe proposed to compact for operation of both the Clinic and the EMS program, IHS appeared to draw all of the court-ordered EMS program funding from the appropriated funds it was using to support the Fort McDermitt Clinic, completely eliminating an unspecified amount of IHS discretionary funds and third-party revenues that had previously been used to support the EMS program. *See* JA133 (Exhibit B to rejection letter). IHS also relied on funds from the Special Diabetes Program for Indians—another category of appropriated funds—to pay Clinic costs, but similarly decided those funds were now unavailable to the Tribe for compacting. JA36. At no point has IHS clearly shown how much funding falls into each of these categories—in other words, IHS cannot show that the amount it withheld on the basis of its third-party revenue argument is actually all attributable to third-party revenues versus the discretionary funds or the diabetes funds. Accordingly, IHS cannot meet its burden to show that any specific amount it subtracted from the Tribe's funding award was properly excluded on this basis.

Finally, IHS's argument regarding third-party revenues also fails as a matter of law. As the district court noted, "Section 5325(a)(1) instructs that the Tribe is entitled to no less than the amount that IHS 'would have otherwise provided for the operation of' the EMS program and the Clinic." JA263. The court correctly

concluded that "[t]he clear and unavoidable meaning of that provision is that IHS must provide in funding to the Tribe an amount that is at least equal to what it otherwise would have spent operating the EMS program and the Clinic itself." *Id.* Critically, as the court explained, § 5325(a)(1) "does not further cabin that amount based on how and from which sources IHS had been cobbling together those funds," JA262; indeed, "[n]owhere does the statute provide exceptions based on the source of that funding . . . ," JA263.

IHS offers a number of inferences drawn from other statutory provisions in the ISDEAA and the Indian Health Care Improvement Act, arguing that these provisions suggest Congress intended for the Secretarial amount to exclude third-party revenues. Appellants' Br. 22-26. But these suppositions ultimately cannot fill the central gap identified by the district court: nowhere does the text of § 5325(a)(1) limit the agency's funding obligation according to the source of the funds the agency was using to run a particular program.

IHS argues that where the text of § 5325(a)(1) uses the word "provided," this term should be interpreted to mean something different from what a particular facility spent. Appellants' Br. 26-27. Yet this conceptual distinction between funds that are "provided" by the Secretary and funds that are "spent" by a given facility is not as clear as IHS contends. Section 5325(a)(1) itself does not make this distinction, and multiple courts—including this Court—have read § 5325(a)(1) to include the

funds the Secretary was *expending*. *See Navajo Nation*, 852 F.3d at 1130 (characterizing § 5325(a)(1) as requiring at least "the amount of funds the [agency] would otherwise have *expended* on the particular program or service for the tribe" (emphasis added) (citing *Yurok Tribe*, 785 F.3d at 1412; *Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, 945 F. Supp. 2d 135, 150-51 (D.D.C. 2013))); *see also Pyramid Lake*, 70 F. Supp. 3d at 544.[20] Nor does § 5325(a)(1) draw distinctions or limit funding on the basis of the administrative level at which the funds were received or spent—indeed, it expressly specifies that funds must be made available to a tribe "without regard to any organizational level within the . . . Department of Health and Human Services . . . at which the program . . . is operated."

Particularly when read in light of the ISDEAA interpretive rule that "[e]ach provision of the [ISDEAA] . . . shall be liberally construed for the benefit of the

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[20] Other courts have weighed a separate question regarding whether contract support costs must support the portion of a health care program funded through third-party revenues. That question turns on distinct subsections of § 5325 and thus is not directly relevant here. *Compare Navajo Health Found.-Sage Mem'l Hosp., Inc. v. Burwell (Sage II)*, 263 F. Supp. 3d 1083, 1178 (D.N.M. 2016) (holding that contract support costs must cover "expenditures made with third-party revenues in support of programs administered under a Tribal self-determination contract"), *agency filed and then abandoned appeal*, No. 18-2043, 2018 WL 4520349 (10th Cir. July 11, 2018), *with Swinomish Indian Tribal Cmty. v. Azar*, 406 F. Supp. 3d 18, 32 (D.D.C. 2019) (holding that expenditures of third-party revenues are not subject to contract support costs), *appeal docketed*, No. 19-5299 (D.C. Cir. Oct. 31, 2019).

Contractor . . . ," *Ramah Navajo Chapter*, 567 U.S. at 194 (quoting § 5329(c) (Model Agreement, § 1(a)(2))) (internal quotation marks omitted), IHS's argument fails to establish that the text of § 5325(a)(1) contains an implied limit on the source of funds that must be considered when setting the funding amount for an ISDEAA compact. In the end, despite asserting that its reading of the ISDEAA is reasonable, IHS cannot meet its burden to "demonstrate that its reading [of the ISDEAA] is *clearly required* by the statutory language," as it must do in order to prevail. *Ramah Navajo Chapter*, 567 U.S. at 194 (emphasis added).

This is precisely why the *Pyramid Lake* decision—which IHS chose not to appeal—similarly held that "the *source* of the funds the Secretary uses" to operate a particular program is irrelevant; what matters is the anticipated total expenditure amount. 70 F. Supp. 3d at 544 (emphasis added). And in the time since the *Pyramid Lake* decision was issued, this Court has ruled that the amount the agency was spending should be seen as a floor, not a ceiling, for the contract funding amount. *Navajo Nation*, 852 F.3d at 1130. IHS thus cannot prevail on an argument that the only funds available are the appropriated funds it has designated for the compact.

In sum, IHS never made a specific finding that it rejected the Tribe's proposed funding amount because it included third-party revenues, and even if it had made that argument, it would not be a valid ground for rejection, so IHS could not meet

its burden to show by clear and convincing evidence that it is valid. The district court's decision on this issue should accordingly be affirmed.

II. THE DISTRICT COURT PROPERLY AWARDED THE TRIBE THE FULL AMOUNT OF PROPOSED FUNDING.

The district court correctly concluded that because IHS failed to lawfully reject the disputed portions of funding, there existed "no suitable remedy other than the injunctive relief the Tribe requests—namely, an order requiring IHS to accept the recurring funding amount proposed in the Tribe's final offer." JA266.

Congress specifically provided tribal contractors with this remedy in § 5331(a), which gives the courts the power to order "immediate injunctive relief to reverse a declination finding" when the agency's decision violated the ISDEAA.

The Tribe is entitled to injunctive relief because IHS's rejection finding made under section 5387(c) was unlawful. Nothing further is required in the case of a statutorily-authorized injunction. *S.E.C. v. Gen. Refractories Co.*, 400 F. Supp. 1248, 1254 (D.D.C. 1975) ("This Court, in exercising its discretion in issuing a statutory injunction, is guided by the primary objectives of the statute involved using public interest standards as opposed to private litigation requirements." (internal citation omitted)).[21] Specifically, as multiple district courts have recognized,

[21] *See also CSX Transp., Inc. v. Ala. Dep't of Revenue*, 888 F.3d 1163, 1181 n.8 (11th Cir. 2018) ("[W]e follow the principle that when an injunction is authorized by statute and the statutory conditions are satisfied the usual prerequisite of irreparable

"[b]ecause the [ISDEAA] specifically provides for both injunctive and mandamus relief to remedy violations of the Act, 25 U.S.C. § [5331](a), . . . the Tribe need not demonstrate the traditional equitable grounds for obtaining the relief it seeks." *Pyramid Lake*, 70 F. Supp. 3d at 545 (citing *Susanville Indian Rancheria,* 2008 WL 58951, at *10–11; *Red Lake Band of Chippewa Indians v. Dep't of Interior*, 624 F. Supp. 2d 1, 25 (D.D.C. 2009)).

In the recent *Navajo Nation* contract declination case, this Court specifically rejected the agency's argument—identical to the argument IHS advances here—that the Court should support a lower contract amount because, even if the rejection was technically unlawful, some lower amount was all that the Tribe is entitled to be paid under the Act. 852 F.3d at 1130. In other words, the Circuit rejected the agency's

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injury need not be established." (internal quotation omitted)); *Antoninetti v. Chipotle Mexican Grill, Inc.*, 643 F.3d 1165, 1175 (9th Cir. 2010) ("The standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief." (internal quotation omitted)); *Star Fuel Marts, LLC v. Sam's E., Inc.*, 362 F.3d 639, 651-52 (10th Cir. 2004) ("[I]t is not the role of the courts to balance the equities between the parties [where] Congress has already balanced the equities and has determined that, as a matter of public policy, an injunction should issue where the defendant is engaged in . . . any activity which the statute prohibits." (citations and internal quotations omitted)); *Henderson v. Burd*, 133 F.2d 515, 517 (2d Cir. 1943) ("Where an injunction is authorized by statute it is enough if the statutory conditions are satisfied." (internal citation omitted)).

argument that the Court's role in these disputes is to do an independent inquiry into what the proper contract amount should be; instead, it upheld the amount proposed by the Tribe because the agency failed to meet the statutory requirements for lawful declination.

An award of the full proposed amount is particularly appropriate here, where the number the Tribe proposed came directly from IHS's *own information* regarding past expenditures on the Clinic and EMS program. After concluding that IHS had unlawfully rejected the Tribe's proposal, the district court correctly reversed the agency's decision and awarded the Tribe the full amount proposed in its final offer.[22] This Court should affirm the judgment in full.

CONCLUSION

For the reasons stated above, this Court should affirm the district court's decision holding that IHS's rejection of the Tribe's final offer was unlawful with respect to both the Winnemucca allocation and the third-party revenue issue, and awarding the Tribe the full amount of recurring funding proposed in its final offer.

[22] IHS has not challenged the district court's decision as to remedy. *See* Appellants' Br. 2, 13-29.

Respectfully submitted this 26th day of May 2020.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding the items permitted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), this brief contains 12,437 words, including footnotes.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface in Microsoft Word using Times New Roman, 14-point font.

Dated: May 26, 2020

Respectfully submitted,

/s/ Colin C. Hampson
Colin C. Hampson
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2020, I electronically filed the foregoing brief with the Clerk of the Court using the CM/ECF system.

I certify that the participants of this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 26, 2020

Respectfully submitted,

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STATUTORY ADDENDUM

Except for the following, all applicable statutes and regulations are contained in the Brief for Appellants.

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25 U.S.C. § 5302

§ 5302. Congressional Declaration of Policy

(a) Recognition of obligation of United States.

The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) Declaration of commitment.

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed 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.

(c) Declaration of national goal

The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

25 U.S.C. § 5329(c)

§ 5329. Contract or grant specifications

. . .

(c) Model agreement.

The model agreement referred to in subsection (a)(1) of this section reads as follows:

"SECTION 1. AGREEMENT BETWEEN THE SECRETARY AND THE _____ TRIBAL GOVERNMENT.

"(a) AUTHORITY AND PURPOSE.—

"(1) AUTHORITY.—This agreement, denoted a Self-Determination Contract (referred to in this agreement as the 'Contract'), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the 'Secretary'), for and on behalf of the United States pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. [5301] et seq.) and by the authority of the _____ tribal government or tribal organization (referred to in this agreement as the 'Contractor'). The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. [5301] et seq.) are incorporated in this agreement.

"(2) PURPOSE.—Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. [5301] et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

. . .

25 U.S.C. § 5331(a)

§ 5331. Contract disputes and claims

(a) Civil actions; concurrent jurisdiction; relief.

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this chapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this chapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this chapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this chapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 5321(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

. . .

25 U.S.C. § 5381(b)

§ 5381. Definitions

. . .

(b) Indian tribe.

In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this subchapter, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this subchapter). In such event, the term "Indian tribe" as used in this subchapter shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.

. . .

25 U.S.C. § 5384(a)

§ 5384. Compacts

(a) Compact required.

The Secretary shall negotiate and enter into a written compact with each Indian tribe participating in self-governance in a manner consistent with the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

. . .

25 U.S.C. § 5391(a)

§ 5391. Civil actions

(a) Contract defined.

For the purposes of section 5331 of this title, the term "contract" shall include compacts and funding agreements entered into under this subchapter.

. . .

25 U.S.C. § 5392(f)

§ 5392. Facilitation

. . .

(f) Rules of construction.

Each provision of this subchapter 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. § 5398

§ 5398. Appeals

In any appeal (including civil actions) involving decisions made by the Secretary under this subchapter, the Secretary shall have the burden of proof of demonstrating by clear and convincing evidence—

(1) the validity of the grounds for the decision made; and

(2) that the decision is fully consistent with provisions and policies of this subchapter.

42 C.F.R. § 136.12(a)

§ 136.12. Persons to whom services will be provided.

(a) *In general.*

[(1)] Services will be made available, as medically indicated, to persons of Indian descent belonging to the Indian community served by the local facilities and program. Services will also be made available, as medically indicated, to a non-Indian woman pregnant with an eligible Indian's child but only during the period of her pregnancy through postpartum (generally about 6 weeks after delivery). In cases where the woman is not married to the eligible Indian under applicable state or tribal law, paternity must be acknowledged in writing by the Indian or determined by order of a court of competent jurisdiction. The Service will also provide medically indicated services to non-Indian members of an eligible Indian's household if the medical officer in charge determines that this is necessary to control acute infectious disease or a public health hazard.

(2) Generally, an individual may be regarded as within the scope of the Indian health and medical service program if he/she is regarded as an Indian by the community in which he/she lives as evidenced by such factors as tribal membership, enrollment, residence on tax-exempt land, ownership of restricted property, active participation in tribal affairs, or other relevant factors in keeping with general Bureau of Indian Affairs practices in the jurisdiction.

. . .