[ORAL ARGUMENT NOT SCHEDULED]

No. 19-5336

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FORT MCDERMITT PAIUTE AND SHOSHONE TRIBE,

Plaintiff-Appellee,

v.

ALEX M. AZAR, II, in his official capacity as Secretary of the U.S. Department of Health & Human Services, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The appellant is Alex M. Azar, II, in his official capacity as Secretary of the U.S. Department of Health & Human Services, Michael D. Weahkee, RADM, in his official capacity as Principal Deputy Director of the Indian Health Service, and the United States. The appellee is Fort McDermitt Paiute and Shoshone Tribe (the Tribe), an Indian Tribe with a reservation in Nevada and Oregon. No amici or intervenors are currently before this Court.

B. Rulings Under Review

The government seeks review of the district court's September 26, 2019 memorandum opinion and order, Joint Appendix (JA) 249-269, granting plaintiff's second motion for summary judgment and denying defendants' second motion for summary judgment. *See Fort McDermitt Paiute and Shoshone Tribe v. Alex M. Azar, et al.*, Case No. 17-cv-0837 (D.D.C. Sept. 26, 2019) (Kelly, J.).

C. Related Cases

This case has not previously been before this Court. Counsel is not aware of any related cases.

/s/ Joshua Dos Santos
Joshua Dos Santos

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GLOSSARY

IHS	Indian Health Service
EMS	Emergency Medical Services

INTRODUCTION

The Indian Health Service (IHS) is an agency within the Department of Health and Human Services that provides health services to American Indians. The Indian Self-Determination and Education Assistance Act allows Indian tribes to take over IHS programs and provide health care themselves. When a tribe takes over an IHS program, it is entitled to receive from the Secretary of Health and Human Services the appropriated funds that otherwise would have funded the portion of the program that IHS operated for the tribe's benefit.

Here, the district court held that a tribe could get more than that, in two respects. First, the district court held that the tribe could receive not only the funds that the Secretary provided for the healthcare needs of the tribe itself, but also funding that the Secretary provided for the healthcare needs of a different tribe that had received services at the same facility. The court did so even though that other tribe had never authorized anyone else to take over IHS's provision of services to that tribe's members. Second, the court held that the Secretary must pay, from appropriated funds, an amount equal to reimbursements that the tribe was expected to receive from third parties after it assumed control of the program, even though the court recognized that this requirement was "illogical" and led to a "double recovery."

Both of the district court's holdings are in error. The Indian Self-Determination Act allows a tribe to provide healthcare services using the appropriated money that IHS would otherwise have used to provide services to the tribe. But the

Act does not allow the tribe to unilaterally take over funds that support healthcare services for other tribes, nor does it require IHS to use its limited resources to match the revenue that the tribe expects to receive from third parties. The district court's contrary decision contravenes the statute's text and gives the contracting tribe a windfall to the detriment of other tribes.

STATEMENT OF JURISDICTION

Plaintiff invoked the jurisdiction of the district court pursuant to 25 U.S.C. § 5331(a) and 28 U.S.C. §§ 1331, 1362. The district court entered final judgment on September 26, 2019. JA268. The government timely appealed on November 25, 2019. JA270; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 *et seq.*, requires the Indian Health Service to provide a tribe with funds that were allocated to another tribe absent authorization by that other tribe.

2. Whether the Indian Self-Determination Act requires a federal agency to provide a contracting tribe not only with the appropriated funds that the agency would have provided for the program, but also with funds equal to revenue that a tribe is expected to collect from third parties.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

This case concerns how much funding the Indian Health Service (IHS) must provide to a tribe that chooses to take over one of IHS's programs under the Indian Self-Determination Act (the Act).

1. The Indian Health Service is a federal agency within the Department of Health and Human Services that provides health care to American Indians and Alaska Natives. *See* 25 U.S.C. § 1661; *see also* 42 U.S.C. § 2001(a). Congress provides IHS with lump sum appropriations that IHS has discretion to "expend . . . for the benefit, care, and assistance of the Indians." 25 U.S.C. § 13 (describing the use of appropriations under the Snyder Act); *see id.* § 1621 (similar provision in the Indian Healthcare Improvement Act). For IHS to best gauge the health care needs of Indian tribes, Congress requires IHS to consult with the tribes it serves about the allocation of its budget. *See id.* § 5325(i). And pursuant to those consultations, IHS's longstanding practice has been to allocate appropriated funds to programs for particular tribes, and to designate tribal shares for programs that serve multiple tribes. *See* JA1, 170-71, 109; *Lincoln v. Vigil*, 508 U.S. 182, 185 (1993) (describing IHS's allocation of funds to programs).

IHS programs receive funds from two main sources. First, they receive the just-mentioned appropriated funds that IHS allocates to each program after consulting with tribes. Second, Congress has authorized IHS programs to receive

payments from third parties such as insurance companies, as well as reimbursements through the Medicaid and Medicare programs. *See* 25 U.S.C. § 1621f; 42 U.S.C. § 1395qq(a), (e)(1)(A), § 1396j. By statute, those payments run directly to the IHS program that rendered the services. *See* 25 U.S.C. § 1621e; *id.* § 1641(c). And although there are few restrictions on spending general appropriated funds that come from IHS, facilities may only use Medicare and Medicaid revenue for certain purposes. *See id.* § 1641(c)(1)(B).

2. a. Under the Indian Self-Determination Act, eligible tribes may assume control of programs that IHS runs for their benefit. *See* 25 U.S.C. §§ 5304(i), 5321(a), 5361, 5382. Depending on the tribe's eligibility, a tribe may do so by entering into a self-determination contract under Title I of the Act, *see id.* § 5321, or a self-governance compact under Title V, *see id.* § 5384. At issue here is a tribal request for a self-governance compact under Title V.

Title V specifies that IHS programs benefitting multiple tribes are divided into "tribal shares," which are defined as "an Indian tribe's portion of all funds and resources that support secretarial programs." 25 U.S.C. § 5381(a)(8). When a tribe seeks to take over a program that "benefit[s] more than one Indian tribe"—*i.e.*, a program in which other tribes have shares—the Act requires that "approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant." *Id.* § 5304(*l*); *see id.* § 5383(c)(1)(B) (requiring authorization by all benefitted tribes before a contracting tribe can enter into a self-governance compact to run a

program). But even without other tribes' approval to operate the entire program, IHS may divide a program so that a tribe can operate its own "share" or "portion" of the program. *Id.* § 5385(b); *id.* § 5321(a)(4) (allowing portions of a program to be severed); *id.* § 5387(c)(1)(D) (same); *see also id.* § 5324(i)(1) (allowing the Secretary to "divide the administration of a program that has previously been administered for the benefit of a greater number of tribes").

When a tribe obtains a self-governance compact, IHS must provide the tribe with two types of funding: an amount of funding called the Secretarial amount, and a separate amount for "contract support costs." 25 U.S.C. § 5325(a). The Secretarial amount "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof." *Id.* § 5325(a)(1). Contract support costs cover the cost of activities that a tribe will have to undertake but that IHS never had to engage in (such as state workers' compensation), or services for which IHS had paid with other funding that it does not transfer to the tribe (such as legal services). *Id.* § 5325(a)(2); *see id.* § 5388(c) (providing that the amount of funding for a self-governance compact is the same as that for a self-determination contract).

With respect to third-party payments, Congress has provided that Indian tribes may recover payments from insurance companies or tortfeasors directly. *See* 25 U.S.C. § 1621e. And as to Medicare and Medicaid reimbursements, a tribe has two options: it may have IHS collect the reimbursements and transmit them to the tribe,

or it may collect the reimbursements itself. *See* 25 U.S.C. § 1641(d). Either way, the Medicare and Medicaid programs are the source of the funds, and the tribe must abide by restrictions on the use of such reimbursements similar to those that exist when IHS runs the program and collects those reimbursements. *See id.* § 1641(d)(2)(A).

b. IHS is required to "negotiate and enter into" a self-governance agreement when an eligible tribe requests one. 25 U.S.C. §§ 5384(a), 5387(e). But if the agency and the tribe "are unable to agree . . . , the Indian tribe may submit a final offer to the Secretary." *Id.* § 5387(b). The agency may reject the final offer within 45 days for one of four statutorily specified reasons: (1) that the offer exceeds the amount of funding to which the tribe is entitled; (2) that IHS cannot legally delegate the program; (3) that delegation of the program would result in significant danger or risk to public health; or (4) that the tribe is not eligible to participate in self-governance. *Id.* § 5387(c)(1)(A). If IHS rejects the tribe's offer, the tribe has the option to seek administrative review or file suit against the Secretary in district court. *See id.* §§ 5331(a), 5387(c)(1)(C), 5391(a).

B. Factual Background

1. The Fort McDermitt Paiute and Shoshone Tribe is an Indian tribe with a reservation in parts of Nevada and Oregon. JA252. For decades, IHS has operated the Fort McDermitt Clinic (Clinic) and the Fort McDermitt Emergency Medical

Services (EMS) program for the benefit of several tribes, including the Fort McDermitt Tribe and the Winnemucca Tribe. JA1.

In 2013, the Fort McDermitt Tribe authorized the Pyramid Lake Paiute Tribe to contract with IHS and assume control of the EMS program. IHS rejected the Pyramid Lake Tribe's offer for several reasons, but the District Court for the District of Columbia eventually ordered IHS to accept the Pyramid Lake Tribe's proposal in full. *See Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534 (D.D.C. 2014).

2. About a year later, the Fort McDermitt Tribe stated its intent to assume operation of the Clinic, this time without the Pyramid Lake Tribe as an intermediary. JA230, 254. Some weeks afterward, IHS notified Congress that it intended to close the Clinic, and explained to the Fort McDermitt Tribe that it did not have enough funds to pay the Pyramid Lake Tribe the amount that the district court had ordered and at the same time continue operating the Clinic. JA130, 254. The Tribe then rescinded its authorization for the Pyramid Lake Tribe to operate the EMS program on its behalf, and asked to assume control of both the EMS program and the Clinic through a Title V self-governance compact. JA230, 254. But the Winnemucca Tribe, which had no functioning governing body at the time, did not authorize the Tribe to take over Winnemucca's share of the programs. JA131, 241-42.

After negotiations failed, the Tribe made IHS a final offer in which it asked for Secretarial funding equal to the Clinic and EMS programs' total projected expenditures, which amounted to $1,106,453 ($603,842 for the Clinic, and $502,611

for the EMS program). JA230-31. IHS rejected the offer for several reasons, some of which the parties later resolved. JA255. As relevant here, IHS relied on its statutory authority to reject a final offer when "the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled." 25 U.S.C. § 5387(c)(1)(A)(i); *see* JA120-123.

In particular, IHS made two objections to the amount of Secretarial funding that the Tribe had requested under 25 U.S.C § 5325(a)(1). First, IHS stated that the Tribe was not entitled to an amount equal to all of IHS's projected expenditures, because a portion of those expenditures are "shares allocable to Winnemucca." JA123, 231. Since "Winnemucca ha[d] not authorized the Tribe to carry out" Winnemucca's portion of the program "on its behalf," IHS "reject[ed] the Tribe's proposal" to receive Winnemucca's share of funding. JA123. Instead, IHS explained that the Tribe was entitled only to its own tribal share, which amounted to $633,417 before certain contractually required reductions that are not challenged here. *Id.*

IHS's second objection was that, although the Tribe's proposal was not clear, it implied that IHS would have to match the revenue that the programs receive from third parties every year. In particular, the Tribe had requested an amount of Secretarial funding equal to the total amount of money the programs projected they would spend—an amount which necessarily included third-party revenue that the programs expected to receive and spend, such as payments from third-party insurers or government health programs like Medicare and Medicaid. IHS explained that,

although it was prepared to transfer to the Tribe the balance of past, unspent reimbursements, those "reimbursements [would be] part of a one-time transfer of non-recurring funds" that are not part of a tribe's Secretarial funding. JA122. IHS further 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." *Id.*

C. Prior Proceedings

The Tribe brought this suit, arguing as relevant here that IHS had unlawfully rejected the provisions in the Tribe's final offer related to funding. The district court granted summary judgment to the Tribe on the funding issues, based solely on its resolution of questions of law.

The district court concluded that the Tribe was entitled to all the funds that the Secretary had provided to the EMS program and the Clinic, regardless of whether the funds had been allocated for the healthcare needs of the Fort McDermitt Tribe or for those of the Winnemucca Tribe. In the court's view, the statute's language did not "limit[]" the Tribe "to only those funds allocated to it by IHS." JA258-60. The court relied exclusively on its interpretation of 25 U.S.C. § 5325(a)(1), which requires IHS to provide the funds that it "would have otherwise provided *for the operation of the programs* or portions thereof for the period covered by the contract." JA258 (quoting 25 U.S.C. § 5325(a)(1)) (emphasis in original). The court interpreted that language to mean that "the minimum level of funding is determined by the *program* covered by the

contract, not by the identity of the tribe seeking to operate that program." *Id.* (emphasis in original). The court thus concluded that the Act entitled the Tribe to all funds that the EMS program and Clinic would spend—even those funds that represented another tribe's share. JA258-59.

The district court also concluded that the Tribe was entitled to have the Secretary match the revenue that the Tribe would expect to receive from third parties such as private insurance, Medicare, and Medicaid. The court noted the Tribe's argument that IHS had insufficiently explained its objection in its rejection of the final offer and stated that the "Tribe's procedural arguments are well-taken," but ultimately did "not address them" and instead resolved the issue on the merits. JA261. The court acknowledged that the Tribe's reading of the statute "illogical[ly]" created a "double-recovery" whereby IHS would essentially have to match the third-party revenue that the Tribe would collect (and that, as a consequence, IHS would no longer have access to). JA265. Yet the court held that the "clear and unavoidable meaning" of the statute required that "illogical result." JA263-65. For this conclusion, too, the court relied solely on 25 U.S.C. § 5325(a)(1). It interpreted that provision to mean that a tribe's Secretarial funding must include all money that the programs "would have spent," regardless of whether the money came from IHS or from third parties. JA263.

SUMMARY OF ARGUMENT

The Indian Self-Determination and Education Assistance Act allows Indian tribes to assume control of programs that the Indian Health Service runs for their benefit. When tribes exercise that option, the Secretary of Health and Human Services is instructed to make annual payments to the tribe based on the amount of appropriated funds that the Secretary would otherwise have provided to the transferred program. The district court here erred by, in two respects, allowing the Fort McDermitt Tribe to obtain more than this amount.

1. First, the district court allowed the Tribe to obtain not only the share of funds allocated for services to its own tribal members, but also the funding allocated for services to another tribe. That conclusion is mistaken. The Act expressly prohibits tribes from taking over programs that benefit other tribes unless those other tribes consent. And that prohibition logically extends to funding also. When a tribe takes over its own portion of an IHS program, it is entitled only to its share of program funds, not to other tribes' shares unless those tribes provide authorization.

The district court's contrary holding was premised on its misunderstanding of the statute's requirement that contracting tribes receive funds equal to what "the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof." 25 U.S.C. § 5325(a)(1). That provision does not authorize a tribe to deprive another tribe of its right to self-determination. Nor does it authorize a tribe to take funds that IHS needs to serve other tribes that have neither

elected to assume control of their own health care nor consented to have another tribe do so. Rather, that provision entitles a tribe to funding for only those "portions" of a program that a tribe has authority to control. And absent another tribe's authorization, a tribe only has authority to assume control of its own share of a program.

2. The district court likewise erred in bringing about what the court itself identified as an "illogical result," under which a tribe can receive from the Secretary an amount equal to third-party payments that IHS will no longer have access to because the Tribe will collect them directly. JA265. The statute does not authorize this "double-recovery." *Id.* By the statute's plain terms, tribes are entitled only to funds the program would have received from "the appropriate Secretary," not to funds the programs would have received from third parties.

While a tribe is authorized to collect payments from third parties, it is not entitled to have IHS match those third-party payments with funds that IHS does not have. Instead, IHS must provide the same appropriated funds that it would have provided to the relevant portion of the program if it had been running the program itself, and Congress separately authorized a tribally run program to continue collecting third-party revenues just as it had when IHS was in charge.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Baylor v. Mitchell Rubenstein & Assocs., P.C.*, 857 F.3d 939, 944 (D.C. Cir. 2017). IHS

has the "burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting [a tribe's] offer." 25 U.S.C. § 5387(d); *see id.* § 5398 (same for appeals of "any decision" by IHS under Title V of the Indian Self-Determination Act).

ARGUMENT

IHS PROPERLY REJECTED THE TRIBE'S FINAL OFFER

The Indian Self-Determination Act allows a tribe to take over a program that the Indian Health Service runs for the tribe's benefit and to obtain the money that IHS would ordinarily provide for the program. But that money includes only appropriated funds that IHS allocated for the portion of the program that the tribe is authorized to operate. IHS does not have to turn over other tribes' shares of funding unless the requesting tribe is authorized to take over the other tribes' portions of a program. Nor does IHS need to provide an amount equal to payments that the programs are expected to receive from third parties. Accordingly, IHS correctly rejected the Tribe's offer.

A. The Tribe Is Not Entitled To The Winnemucca Tribe's Share Of Program Funding.

1. a. The Indian Health Service provides health care to American Indians and Alaska Natives. *See* 25 U.S.C. § 1661; 42 U.S.C. § 2001(a). Rather than creating separate facilities for each tribe, IHS often conserves resources by serving more than one tribe through the same program. The Indian Self-Determination Act generally

allows tribes to take over IHS's programs and thus provide health care to tribal members themselves instead of relying on IHS. But unsurprisingly, the Self-Determination Act does not allow a tribe to take over multi-tribe programs without first obtaining consent from the other affected tribes, which also have a right to self-determination.

That common-sense proposition is reflected in the Act in several ways. First, in a proviso added to the definition of "tribal organization," the Act states that whenever a tribe seeks to take over a program that benefits more than one tribe, "the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract." 25 U.S.C. § 5304(*l*). Second, for a tribe to be eligible for a self-governance compact under Title V, the Act requires a resolution of approval by "the governing body of each Indian tribe to be served." *See* 25 U.S.C. § 5383(c)(1)(B).

When other tribes have not authorized a tribe to assume control of the entire multi-tribe program, the Act allows a tribe to take over only its own portion of the program. Numerous provisions in the Act allow IHS to sever a multi-tribe program to accommodate a single tribe's request. *See* 25 U.S.C. §§ 5321(a)(4), 5324(i), 5387(c)(1)(D) (allowing portions of a program to be severed based on a tribe's proposal). And another provision expressly states that "a self-determination contract" could "require[] the Secretary to divide the administration of a program that has previously been administered for the benefit of a greater number of tribes than are represented by the tribal organization that is a party to the contract." *Id.* § 5324(i)(1).

b. The Act does not entitle tribes that assume responsibility for only their portion of a multi-tribe program to claim the funding allocated for services to other tribes. Title V states explicitly that a tribe is entitled only to its "tribal share" of funding, 25 U.S.C. § 5385(b)(1), which "means an Indian tribe's portion of all funds and resources that support secretarial programs," *id.* § 5381(a)(8). The clear import of that language is that tribes have differing "portion[s]" of "funds and resources" for any given program, and that they are only entitled to their "share." And Congress's reference to "an Indian tribe's portion of all funds" must have been a reference to IHS's practice of allocating funds to particular tribes based on its periodic consultation with the tribes.

Indeed, as the Supreme Court has noted, the Act's "statutory language itself makes clear" that the relevant Secretary "may allocate funds to one tribe at the expense of another." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 193 (2012). For example, the Act allows two or more tribes to run their portions of a program together, and if one tribe later seeks to withdraw from the agreement, the Act states that the "withdrawing Indian tribe or tribal organization shall be entitled to its tribal share of funds supporting those programs, services, functions, or activities." 25 U.S.C. § 5386(g)(2)(A). That provision makes sense only if tribes can have different and separate "shares" of funds allocated by IHS. Similarly, after defining the amount of funds that a tribe may receive, the Act states that "[n]otwithstanding any other provision in this chapter, . . . the Secretary is not required to reduce funding for

programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization." 25 U.S.C. § 5325(b). And the Act repeats the same limitation in Title V. 25 U.S.C. § 5399(b) ("the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe in order to make funds available to another tribe or tribal organization under this chapter"). That language "underscores the Secretary's discretion to allocate funds among tribes," *Salazar*, 567 U.S. at 196, and again highlights that tribes cannot obtain funding that IHS has allocated to other tribes' portions of a program, without those tribes' consent.

c. In accordance with this clear statutory scheme, IHS correctly determined that the Fort McDermitt Tribe was requesting more than its share of funding here. The Tribe sought to assume control of programs that also benefitted the Winnemucca Tribe. But the Tribe never obtained authorization to take over the Winnemucca Tribe's portion of the programs, JA258 n.5, so the Tribe could take over only its own portion with its own "tribal share" of funds. 25 U.S.C. § 5385(b)(1). And that meant that the Tribe was not entitled to an amount of funding equal to *all* of the program's expenditures, because that amount would necessarily include the Winnemucca Tribe's share. IHS was therefore correct to decline the Tribe's proposal because it "exceed[ed] the applicable funding level to which the Indian tribe is entitled." 25 U.S.C. § 5387(c)(1)(A)(i).

2. a. The district court's holding to the contrary is based on a misplaced focus on, and misreading of, a single provision in the statute. The court decided that, even

though "Winnemucca has not authorized the Tribe to contract on its behalf," IHS's refusal to turn over Winnemucca's share of funds "is foreclosed by the language of" 25 U.S.C. § 5325(a)(1). JA258. Specifically, the court emphasized that provision's requirement that IHS provide the funds that it "would have otherwise provided *for the operation of the programs* or portions thereof for the period covered by the contract." *Id.* (quoting 25 U.S.C. § 5325(a)(1)) (emphasis in original). The court believed that this "language makes clear" that "the minimum level of funding is determined by the *program* covered by the contract, not by the identity of the tribe seeking to operate that program." *Id.* (emphasis in original). As the court saw it, IHS's "internal[] allocat[ion]" of funds to Winnemucca did not matter. JA258-59. Instead, what mattered was that IHS had provided Winnemucca's share of funds to the programs that the Tribe now sought to take over. *Id.* And once IHS had done that, the court held that the Tribe was entitled to have those funds with or without Winnemucca's consent. JA260.

b. That interpretation is fundamentally mistaken. Section 5325(a)(1)'s statement that IHS must provide all funds that it "would have otherwise provided for the operation of the programs or portions thereof," 25 U.S.C. § 5325(a)(1), does not answer the relevant question here: namely, which "portions" of a program a tribe is entitled to have funded in the first place. As explained, the answer to that question is made clear in other provisions: a tribe may unilaterally take over only its "portion" of a program and only its "tribal share" of funding. *See id.* § 5385(b)(1). And if a Tribe

wishes to take over *other* tribes' portions of a program, it needs their consent. Nothing in Section 5325(a)(1) negates those specific limitations. To the contrary, Section 5325(a)(1) aligns with the rest of the statutory scheme by allowing IHS to provide funds for only "portions" of a program. *Id.*

The district court rested its decision in part on its misapprehension that the Tribe "has not contracted for a portion of the [programs]," but instead for the programs in their entirety. JA259 (alterations and quotation marks omitted). But the Tribe is not entitled to contract for control of the entire programs. As explained, the Act explicitly prohibits the Tribe from doing so without the Winnemucca Tribe's approval. *See* 25 U.S.C. § 5304(*l*); *id.* § 5383(c)(1)(B). The Tribe is contracting for the only portion of the programs that it is authorized to operate without any other tribes' consent: its own. Indeed, the record shows that the Fort McDermitt Tribe previously took advantage of these provisions by withdrawing its earlier consent for the Pyramid Lake Paiute Tribe to take over its portion of the EMS program. JA230, 254.

The district court's interpretation impermissibly allows a tribe to obtain funding allocable to another tribe simply by exercising its right to assume responsibility for its own portion of the program. Such a result cannot be squared with the express provisions that prohibit a tribe from unilaterally assuming control of multi-tribe programs. Nor can that outcome be reconciled with the Act's purpose of "self-determination." *See* 25 U.S.C. § 5302(a). It simply cannot be that an Act about "self-

determination" and "self-governance" allows one tribe to take over other tribes' shares of funding without their consent.

The district court's interpretation leads to other incongruous results as well. It would mean that when a program benefits multiple tribes, every one of those tribes is entitled to the *full* amount of program funding whenever they request to take over their own portion of the program. Again, that simply cannot be true; Congress did not contemplate that IHS would be compelled to pay the entire amount of program funding to each tribe with a share in the program, and of course cannot be expected to appropriate duplicative funds for that purpose each year. Nor is the problem solved where, as here, only one tribe claims program funding. In that case, IHS is left with no funding to serve the other affected tribes, which have not elected to receive healthcare services from another tribe rather than IHS.

The district court's decision also creates the potential for increased tension between tribes that are beneficiaries of the same program—a consequence that Congress contemplated and expressly tried to avoid. Specifically, when Congress was considering an early version of the Indian Self-Determination Act, the Bureau of Indian Affairs voiced concern about "historically based, well established, and deep rooted rivalries," noting that if "shared facilities were to be operated by only one of the rival groups," some of the other groups might not be "served . . . on a fair and

equal basis."[1] Congress responded with a proviso to make sure that "each tribal group served [must] approve or at least not object to a requested contract or grant when it is made by only one of the groups currently served." *Indian Self-Determination Act Hearings* at 61; *see* 25 U.S.C. § 5304(*l*). The district court's reading of the statute would undo Congress's carefully crafted solution.

c. The potential competition among tribes for program funding is relevant in one other respect. As noted, the Tribe's interpretation here not only infringes the interests of IHS, but also the interests of the Winnemucca Tribe. In light of the tribal interests on both sides of the legal dispute, the district court properly did not justify its decision based on any canon of interpretation in favor of Indian tribes. Although the Act states that its provisions "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), that provision cannot justify interpreting the statute to benefit the Fort McDermitt Tribe at the expense of the Winnemucca Tribe. *See Confederated Tribes of Chehalis Indian Reservation v. Washington,* 96 F.3d 334, 340 (9th Cir. 1996) (refusing to "apply the canons of construction for the benefit of the Tribes if such application would adversely affect" the interests of another tribe).

[1] *Indian Self-Determination and Education Assistance Act: Hearings before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 93rd Cong. 61 (1974) (*Indian Self-Determination Act Hearings*).

In any event, that canon is irrelevant here even absent any conflict of interest between the tribes. The Supreme Court has made clear that such a rule of construction "does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 & n.16 (1986); *see Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). And no ambiguity exists here: the Tribe cannot take away the Winnemucca Tribe's share of funding any more than it can take over the Winnemucca Tribe's portion of the program without its consent.

B. The Act Does Not Require IHS To Match The Tribe's Third-Party Revenue.

1. The Indian Self-Determination Act allows a tribe to take over IHS programs and obtain the funds that IHS normally would "provide[]" to those programs. 25 U.S.C. § 5325(a)(1). Those funds do not include money that IHS facilities receive from third parties. That conclusion is clear from the statutory text, context, and history.

a. IHS programs receive funding from several sources. One source of funding is money that Congress appropriates for IHS to spend on healthcare programs for American Indians and Alaska Natives. *See* 25 U.S.C. §§ 13, 1621. IHS allocates those funds among its programs after consulting with the tribes, thus providing a subset of those funds to each funded program. *See id.* § 5325(i).

But IHS programs also receive funding from third parties. Because some tribal members may be eligible for Medicare or Medicaid, Congress instructed that an IHS facility "shall be eligible for payments" under the Medicare and Medicaid programs "if and for so long as it meets all of the conditions and requirements . . . which are applicable generally" for providers of the relevant care. 42 U.S.C. § 1395qq(a) (Medicare); *id.* § 1396j (Medicaid). Congress made clear that these funds should go to the relevant facility, rather than being available to IHS generally, requiring that the Secretary "ensure that each Service unit of the Service receives 100 percent of the amount to which the facilities of the Service, for which such Service unit makes collections, are entitled" under Medicare and Medicaid. 25 U.S.C. § 1641(c)(1)(A). Similarly, Congress provided the United States with a "right to recover" from other responsible third parties (such as insurance providers or workers' compensation plans) the value of health services provided through IHS programs, *id.* § 1621e(a), but stated that such recovery "shall be credited" directly to the IHS "Service Unit" that provided the care, *id.* § 1621f(a)(1).

After Indian tribes assume control of programs (or portions of programs) that were previously run by IHS, they are entitled to collect such funds. Medicare and Medicaid funds are expressly made payable not to IHS, but to a "facility of the Indian Health Service," "whether operated by such Service or by an Indian tribe or tribal organization." 42 U.S.C. § 1395qq(a) (Medicare); *id.* § 1396j(a) (Medicaid). And reimbursements from other third parties are likewise payable to whichever entity

actually provides the care. 25 U.S.C. § 1621e(a) (providing right of recovery to "the United States, an Indian tribe, or tribal organization"). Congress thus guaranteed that tribes could receive money directly from Medicare, Medicaid, and third-party insurers upon assuming control of a tribal health program, through mechanisms entirely separate from the receipt of their allocable share of IHS funding. As the district court recognized, it would be "illogical" to suggest that tribes could, in addition to receiving these funds directly from third-party payers, claim a right to "double-recovery" by forcing IHS to provide an equal amount from its own budget (despite the lack of any evident source of funding for that purpose). JA265.

The district court was mistaken to nonetheless hold that, when an Indian tribe assumes control of a program that IHS had previously run, these third-party funds are included in the amount that IHS "would have otherwise provided for the operation of the program[]." 25 U.S.C. § 5325(a)(1). Those funds would have been available (and remain available) to the program not because IHS "provided" them, but rather because the program was independently entitled to bill for and collect these funds from sources other than IHS. Accordingly, each time Congress referred to third-party revenue, it used words like "reimbursements," "payments," or "income," *see* 25 U.S.C. §§ 1621e, 1621f, 1641, 5388(j). Not once did Congress refer to that revenue as funds that IHS "provides" for operation of a facility.

b. The Act's history and statutory context reinforce the conclusion that third-party revenue is entirely separate from the money that IHS "provide[s]" to an IHS

program. 25 U.S.C. § 5325(a)(1). When Congress first enacted the Indian Self-Determination Act in 1975, IHS was barred from collecting income from third parties. Thus, when Congress said that contracting tribes could receive funds equal to what "the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof," 25 U.S.C. § 5325(a)(1), it could only have been referring to appropriated funds that IHS allocates to its programs.

It was not until a year later, in the Indian Healthcare Improvement Act, that Congress authorized IHS facilities to recover payments from insurance companies and tortfeasors, and to seek reimbursements under the Medicare and Medicaid programs. *See* Indian Healthcare Improvement Act, Pub. L. No. 94-437, tit. IV, 90 Stat. 1400, 1408-10 (1976) (codified at 25 U.S.C. § 1621e); 42 U.S.C. §§ 1395qq(a), (e)(1)(A), 1396j. And when Congress did so, it enacted specific provisions for the treatment of third-party revenue when a tribe takes over an IHS medical program. Specifically, Congress provided that a tribe that takes over an IHS medical facility can bill for and collect third-party revenue directly. *See* 25 U.S.C. § 1641(d)(1) (allowing a tribe to "directly bill for, and receive payment for, health care items and services provided by such program for which payment is made [under the Medicare or Medicaid programs] or from any other third party payor"); *id.* § 1621e(a) (allowing "an Indian tribe, or tribal organization" to collect payments from third parties like insurance companies and tortfeasors). Those specific provisions demonstrate that Congress viewed third-party revenue as distinct from the funding that IHS would

provide to a tribe under the Indian Self-Determination Act. Congress could not have thought that by allowing IHS facilities to receive third-party revenue, and granting tribes the right to do the same, it was also increasing the amount of money that IHS would have to provide tribes from its own coffers for the already-reimbursed services.

Other provisions further emphasize that Congress thought of third-party revenue as different from IHS funding. Congress placed restrictions on the use of Medicare and Medicaid reimbursements that do not apply to funds that an agency provides as Secretarial funding. *See* 25 U.S.C. § 1641(d)(2)(A). In addition, IHS "may not offset or limit any amount obligated to any Service Unit or entity *receiving funding from the Service* because of *the receipt of reimbursements*," *id.* § 1621f(b) (emphases added), which shows that "receipt of reimbursements" is not part of a facility's "funding from the Service."

Congress has likewise made clear that revenue received from third parties is separate from the Secretarial amount. In the 1994 amendments to the Indian Self-Determination Act, Congress added a provision to the funding statute stating that "[t]he program income earned by a tribal organization in the course of carrying out a self-determination contract . . . shall not be a basis for reducing the amount of funds otherwise obligated to the contract." Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, tit. I, 108 Stat 4250, 4260 (codified at 25 U.S.C. § 5325(m)). Similarly, Title V of the Indian Self-Determination Act provides that "[a]ll Medicare, Medicaid, or other program income earned by an Indian tribe shall be

treated as supplemental funding to that negotiated in the funding agreement," and that "[s]uch 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." 25 U.S.C. § 5388(j). These provisions show that Congress did not think of "program income" as part of the funds "negotiated in the funding agreement," but rather as something "supplemental."

2. The district court acknowledged that the IHS's interpretation had "intuitive and practical appeal," and that the Tribe's interpretation created an "illogical result." JA263-65. Yet the district court mistakenly read 25 U.S.C. § 5325(a)(1) to mean that IHS must supply funds equal to all the money IHS used "to *operate* a program," regardless of "how and from which sources IHS had been cobbling together those funds." JA262. That interpretation is fundamentally flawed for several reasons.

a. To begin, the district court's reading is erroneous on its own terms. Section 5325's text states that IHS must supply the funds that "the appropriate *Secretary* would have otherwise *provided* for the operation of the programs," 25 U.S.C. § 5325(a)(1) (emphases added). There is no reason why the amount that *the Secretary would have provided* must mean the amount that *the program*—in this case a medical facility—*would have spent*, and the district court gave none. The provision on its face refers to funds that the Secretary provides, not all funds obtained and ultimately expended by the facility. Nor can a medical facility's expenditures be attributed to the Secretary, as the statute itself draws a distinction between the facility and the Service more broadly.

See, e.g., 25 U.S.C. § 1621f(b) (referring to a "Service Unit" as "receiving funding from the Service").

Moreover, the statute refers to money that the Secretary provided "for the operation of the program," which makes clear that the focus is on the amounts being given *to* the relevant facility, rather than on the amount obtained and expended *by* the relevant facility. That focus is underscored by the use of the word "provided," which refers to something that is "suppl[ied]" or "contribute[d]" rather than something that is ultimately used. *See* Black's Law Dictionary (5th ed. 1979) (defining "provide" as "[t]o make, procure, or furnish for future use," or to "supply" or "contribute"); *see Provide*, Webster's New Collegiate Dictionary (11th ed. 1975) ("to supply what is needed for sustenance or support"). The amount that the Secretary provides for a program's use is not necessarily the same as the amount the program ultimately spends.

b. In any event, even if the district court's interpretation were plausible when 25 U.S.C. § 5325(a)(1) is read in isolation, a "cardinal rule" of interpretation is that "a statute is to be read as a whole." *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Here, the district court's holding would wreak havoc on Congress's design. As the district court recognized, if third-party revenue is part of the money that IHS "would have otherwise provided" to a program, then a tribe will obtain a "double-recovery." JA265. Specifically, the tribe would receive an amount equal to IHS's estimate of third-party revenue for the year (based on past collections), and on top of

that would also collect the revenue throughout the year directly from third parties. That result makes no sense, not just because the tribe would for no reason receive double the revenue for the same services, but because IHS has no pool of funds from which to make such payments. Naturally, IHS will not have access to third-party revenue that the tribe will collect. And IHS has no appropriated funds available to pay facilities an estimate of future third-party revenue, for the obvious reason that the facilities receive that revenue directly. The result is that, if the district court's holding stands, IHS will have to take money away from its other programs—precisely the result Congress sought to avoid. *See* 25 U.S.C. § 5325(b) ("[T]he Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization.").

The district court was incorrect to discount the "illogical result" created by the Tribe's "double-recovery." JA265. The district court concluded that its interpretation was not entirely "absurd," because at least the result "ensures that the Tribe will receive the necessary funds to provide, at a minimum, the same services that IHS had already been providing." *Id.* There is no basis for presuming that Congress would have pursued that end by forcing IHS to match third-party revenues that the Tribe would already be authorized to collect, with money that IHS does not have. And in any event, as discussed above, the government's interpretation is entirely consistent with—indeed, the only reasonable reading of—the statutory text, such that the

government need not demonstrate that the alternative reading is absurd in order to prevail.

c. Just as misplaced was the district court's reliance on a provision stating that the Act "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). Such a rule of construction "does not permit reliance on ambiguities that do not exist," *Catawba Indian Tribe, Inc.*, 476 U.S. at 506 & n.16, and may not be relied upon when it "conflict[s] with the intent embodied in the statute Congress wrote," *Chickasaw Nation*, 534 U.S. at 94. For the reasons already stated, Congress plainly did not intend for IHS to reduce funding for other programs in order to match the third-party revenue a tribe will already receive. As the district court itself conceded, that result is nonsensical. *See Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1036 (9th Cir. 2013) (rejecting interpretation of 25 U.S.C. § 5325 that would lead to an "illogical result"). The only reasonable reading of the statute is that the funds that "the appropriate Secretary would have otherwise provided" to the program includes only the appropriated funds that *the Secretary* would have allocated, and not payments that *third parties* would have made to the programs.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7,506 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Joshua Dos Santos
JOSHUA DOS SANTOS

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Joshua Dos Santos
JOSHUA DOS SANTOS

ADDENDUM

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25 U.S.C. § 5304(*l*)

§ 5304. Definitions

* * *

(*l*) "tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; . . . .

25 U.S.C. § 5324(*i*)

§ 5324. Contract or grant provisions and administration

* * *

(*i*) Division of administration of program

(1) If a self-determination contract requires the Secretary to divide the administration of a program that has previously been administered for the benefit of a greater number of tribes than are represented by the tribal organization that is a party to the contract, the Secretary shall take such action as may be necessary to ensure that services are provided to the tribes not served by a self-determination contract, including program redesign in consultation with the tribal organization and all affected tribes.

(2) Nothing in this subchapter shall be construed to limit or reduce in any way the funding for any program, project, or activity serving a tribe under this or other applicable Federal law. Any tribe or tribal organization that alleges that a self-determination contract is in violation of this section may apply the provisions of section 5331 of this title.

25 U.S.C. § 5325

§ 5325. Contract funding and indirect costs

(a) Amount of funds provided

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

(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.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this chapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of--

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this chapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or activity under a self-determination contract by a tribe or tribal organization (including a cost reimbursement construction contract) shall--

(A) be used to provide additional services or benefits under the contract; or

(B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 13a of this title.

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary--

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

(b) Reductions and increases in amount of funds provided

The amount of funds required by subsection (a) of this section--

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to--

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this chapter or as provided in section 5324(c) of this title.

Notwithstanding any other provision in this chapter, the provision of funds under this chapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this chapter.

* * *

(m) Use of program income earned

The program income earned by a tribal organization in the course of carrying out a self-determination contract--

(1) shall be used by the tribal organization to further the general purposes of the contract; and

(2) shall not be a basis for reducing the amount of funds otherwise obligated to the contract.

* * *

25 U.S.C. § 5381(a)(8)

§ 5381. Definitions

(a) In general

In this subchapter:

* * *

(8) Tribal share

The term "tribal share" means an Indian tribe's portion of all funds and resources that support secretarial programs, services, functions, and activities (or portions thereof) that are not required by the Secretary for performance of inherent Federal functions.

25 U.S.C. § 5383(c)

§ 5381. Selection of participating Indian tribes

* * *

(c) Applicant pool

(1) In general

The qualified applicant pool for self-governance shall consist of each Indian tribe that--

(A) successfully completes the planning phase described in subsection (d) of this section;

(B) has requested participation in self-governance by resolution or other official action by the governing body of each Indian tribe to be served; and

(C) has demonstrated, for 3 fiscal years, financial stability and financial management capability.

(2) Criteria for determining financial stability and financial management capacity

For purposes of this subsection, evidence that, during the 3-year period referred to in paragraph (1)(C), an Indian tribe had no uncorrected significant and material audit exceptions in the required annual audit of the Indian tribe's self-determination contracts or self-governance funding agreements with any Federal agency shall be conclusive evidence of the required stability and capability.

25 U.S.C. § 5385

§ 5385. Funding agreements

(a) Funding agreement required

The Secretary shall negotiate and enter into a written funding agreement 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.

(b) Contents

(1) In general

Each funding agreement required under subsection (a) of this section shall, as determined by the Indian tribe, authorize the Indian tribe to plan, conduct, consolidate, administer, and receive full tribal share funding, including tribal shares of discretionary Indian Health Service competitive grants (excluding congressionally earmarked competitive grants), for all programs, services, functions, and activities (or portions thereof), that are carried out for the benefit of Indians because of their status as Indians without regard to the agency or office of the Indian Health Service within which the program, service, function, or activity (or portion thereof) is performed.

* * *

25 U.S.C. § 5386(g)

§ 5386. General provisions

* * *

(g) Withdrawal

(1) Process

(A) In general

An Indian tribe may fully or partially withdraw from a participating inter-tribal consortium or tribal organization its share of any program, function, service, or activity (or portions thereof) included in a compact or funding agreement.

(B) Effective date

The withdrawal referred to in subparagraph (A) shall become effective within the timeframe specified in the resolution which authorizes transfer to the participating tribal organization or inter-tribal consortium. In the absence of a specific timeframe set forth in the resolution, such withdrawal shall become effective on--

(i) the earlier of--

(I) 1 year after the date of submission of such request; or

(II) the date on which the funding agreement expires; or

(ii) such date as may be mutually agreed upon by the Secretary, the withdrawing Indian tribe, and the participating tribal organization or inter-tribal consortium that has signed the compact or funding agreement on behalf of the withdrawing Indian tribe, inter-tribal consortium, or tribal organization.

(2) Distribution of funds

When an Indian tribe or tribal organization eligible to enter into a self-determination contract under subchapter I of this chapter or a compact or funding agreement under this subchapter fully or partially withdraws from a participating inter-tribal consortium or tribal organization--

(A) the withdrawing Indian tribe or tribal organization shall be entitled to its tribal share of funds supporting those programs, services, functions, or activities (or portions thereof) that the Indian tribe will be carrying out under its own self-determination contract or compact and funding agreement (calculated on the same basis as the funds were initially allocated in the funding agreement of the inter-tribal consortium or tribal organization); and

(B) the funds referred to in subparagraph (A) shall be transferred from the funding agreement of the inter-tribal consortium or tribal organization, on the condition that the provisions of sections 5321 and 5324(i) of this title, as appropriate, shall apply to that withdrawing Indian tribe.

(3) Regaining mature contract status

If an Indian tribe elects to operate all or some programs, services, functions, or activities (or portions thereof) carried out under a compact or funding agreement under this subchapter through a self-determination contract under subchapter I of this chapter, at the option of the Indian tribe, the resulting self-determination contract shall be a mature self-determination contract.

25 U.S.C. § 5387

§ 5387. Provisions relating to the Secretary

* * *

(b) Final offer

In the event the Secretary and a participating Indian tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels), the Indian tribe may submit a final offer to the Secretary. Not more than 45 days after such submission, or within a longer time agreed upon by the Indian tribe, the Secretary shall review and make a determination with respect to such offer. In the absence of a timely rejection of the offer, in whole or in part, made in compliance with subsection (c) of this section, the offer shall be deemed agreed to by the Secretary.

(c) Rejection of final offers

(1) In general

If the Secretary rejects an offer made under subsection (b) of this section (or one or more provisions or funding levels in such offer), the Secretary shall provide--

(A) a timely written notification to the Indian tribe that contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority, that--

(i) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this subchapter;

(ii) the program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe;

(iii) the Indian tribe cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in significant danger or risk to the public health; or

(iv) the Indian tribe is not eligible to participate in self-governance under section 5383 of this title;

(B) technical assistance to overcome the objections stated in the notification required by subparagraph (A);

(C) the Indian tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, except that the Indian tribe may, in lieu of

filing such appeal, directly proceed to initiate an action in a Federal district court pursuant to section 5331(a) of this title; and

(D) the Indian tribe with the option of entering into the severable portions of a final proposed compact or funding agreement, or provision thereof, (including a lesser funding amount, if any), that the Secretary did not reject, subject to any additional alterations necessary to conform the compact or funding agreement to the severed provisions.

(2) Effect of exercising certain option

If an Indian tribe exercises the option specified in paragraph (1)(D), that Indian tribe shall retain the right to appeal the Secretary's rejection under this section, and subparagraphs (A), (B), and (C) of that paragraph shall only apply to that portion of the proposed final compact, funding agreement, or provision thereof that was rejected by the Secretary.

(d) Burden of proof

With respect to any hearing or appeal or civil action conducted pursuant to this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer (or a provision thereof) made under subsection (b) of this section.

(e) Good faith

In the negotiation of compacts and funding agreements the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy. The Secretary shall carry out this subchapter in a manner that maximizes the policy of tribal self-governance, in a manner consistent with the purposes specified in section 3 of the Tribal Self-Governance Amendments of 2000.

* * *

25 U.S.C. § 5388

§ 5388. Transfer of funds

(a) In general

Pursuant to the terms of any compact or funding agreement entered into under this subchapter, the Secretary shall transfer to the Indian tribe all funds provided for in the funding agreement, pursuant to subsection (c) of this section, and provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolutions. In any instance where a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 10 days after the apportionment of such funds by the Office of Management and Budget to the Department, unless the funding agreement provides otherwise.

(b) Multiyear funding

The Secretary is authorized to employ, upon tribal request, multiyear funding agreements. References in this subchapter to funding agreements shall include such multiyear funding agreements.

(c) Amount of funding

The Secretary shall provide funds under a funding agreement under this subchapter in an amount equal to the amount that the Indian tribe would have been entitled to receive under self- determination contracts under this chapter, including amounts for direct program costs specified under section 5325(a)(1) of this title and amounts for contract support costs specified under section 5325(a) (2), (3), (5), and (6) of this title, including any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.

(d) Prohibitions

(1) In general

Except as provided in paragraph (2), the Secretary is expressly prohibited from--

(A) failing or refusing to transfer to an Indian tribe its full share of any central, headquarters, regional, area, or service unit office or other funds due under this chapter, except as required by Federal law;

(B) withholding portions of such funds for transfer over a period of years; and

(C) reducing the amount of funds required under this chapter--

(i) to make funding available for self-governance monitoring or administration by the Secretary;

(ii) in subsequent years, except pursuant to--

(I) a reduction in appropriations from the previous fiscal year for the program or function to be included in a compact or funding agreement;

(II) a congressional directive in legislation or accompanying report;

(III) a tribal authorization;

(IV) a change in the amount of pass-through funds subject to the terms of the funding agreement; or

(V) completion of a project, activity, or program for which such funds were provided;

(iii) to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under this chapter; or

(iv) to pay for costs of Federal personnel displaced by self-determination contracts under this chapter or self-governance;

(2) Exception

The funds described in paragraph (1)(C) may be increased by the Secretary if necessary to carry out this chapter or as provided in section 5324(c)(2) of this title.

(e) Other resources

In the event an Indian tribe elects to carry out a compact or funding agreement with the use of Federal personnel, Federal supplies (including supplies available from Federal warehouse facilities), Federal supply sources (including lodging, airline transportation, and other means of transportation including the use of interagency motor pool vehicles) or other Federal resources (including supplies, services, and resources available to the Secretary under any procurement contracts in which the Department is eligible to participate), the Secretary shall acquire and transfer such personnel, supplies, or resources to the Indian tribe.

(f) Reimbursement to Indian Health Service

With respect to functions transferred by the Indian Health Service to an Indian tribe, the Indian Health Service shall provide goods and services to the Indian tribe, on a reimbursable basis, including payment in advance with subsequent adjustment. The reimbursements received from those goods and services, along with the funds

received from the Indian tribe pursuant to this subchapter, may be credited to the same or subsequent appropriation account which provided the funding, such amounts to remain available until expended.

(g) Prompt Payment Act

Chapter 39 of Title 31 shall apply to the transfer of funds due under a compact or funding agreement authorized under this subchapter.

(h) Interest or other income on transfers

An Indian tribe is entitled to retain interest earned on any funds paid under a compact or funding agreement to carry out governmental or health purposes and such interest shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the interest is earned or in any subsequent fiscal year. Funds transferred under this subchapter shall be managed using the prudent investment standard.

(i) Carryover of funds

All funds paid to an Indian tribe in accordance with a compact or funding agreement shall remain available until expended. In the event that an Indian tribe elects to carry over funding from 1 year to the next, such carryover shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in that or any subsequent fiscal year.

(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.

(k) Limitation of costs

An Indian tribe shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds transferred under a compact or funding agreement. If at any time the Indian tribe has reason to believe that the total amount provided for a specific activity in the compact or funding agreement is insufficient the Indian tribe shall provide reasonable notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred

under the funding agreement, the Indian tribe may suspend performance of the activity until such time as additional funds are transferred.

25 U.S.C. § 1621e(a)

§ 1621e. Reimbursement from certain third parties of costs of health services

(a) Right of recovery

Except as provided in subsection (f), the United States, an Indian tribe, or tribal organization shall have the right to recover from an insurance company, health maintenance organization, employee benefit plan, third-party tortfeasor, or any other responsible or liable third party (including a political subdivision or local governmental entity of a State) the reasonable charges billed by the Secretary, an Indian tribe, or tribal organization in providing health services through the Service, an Indian tribe, or tribal organization, or, if higher, the highest amount the third party would pay for care and services furnished by providers other than governmental entities, to any individual to the same extent that such individual, or any nongovernmental provider of such services, would be eligible to receive damages, reimbursement, or indemnification for such charges or expenses if--

(1) such services had been provided by a nongovernmental provider; and

(2) such individual had been required to pay such charges or expenses and did pay such charges or expenses.

25 U.S.C. § 1621f

§ 1621f. Crediting of reimbursements

(a) Use of amounts

(1) Retention by program

Except as provided in sections 1621a(a)(2) and 1680c of this title, all reimbursements received or recovered under any of the programs described in paragraph (2), including under section 1680c of this title, by reason of the provision of health services by the Service, by an Indian tribe or tribal organization, or by an urban Indian organization, shall be credited to the Service, such Indian tribe or tribal organization, or such urban Indian organization, respectively, and may be used as provided in section 1641 of this title. In the case of such a service provided by or through a Service Unit, such amounts shall be credited to such unit and used for such purposes.

(2) Programs covered

The programs referred to in paragraph (1) are the following:

(A) Titles XVIII, XIX, and XXI of the Social Security Act.

(B) This chapter, including section 1680c of this title.

(C) Public Law 87-693.

(D) Any other provision of law.

(b) No offset of amounts

The Service may not offset or limit any amount obligated to any Service Unit or entity receiving funding from the Service because of the receipt of reimbursements under subsection (a).

25 U.S.C. § 1641

§ 1641. Treatment of payments under Social Security Act health benefits programs

(a) Disregard of Medicare, Medicaid, and CHIP payments in determining appropriations

Any payments received by an Indian health program or by an urban Indian organization under title XVIII, XIX, or XXI of the Social Security Act for services provided to Indians eligible for benefits under such respective titles shall not be considered in determining appropriations for the provision of health care and services to Indians.

(b) Nonpreferential treatment

Nothing in this chapter authorizes the Secretary to provide services to an Indian with coverage under title XVIII, XIX, or XI1 of the Social Security Act in preference to an Indian without such coverage.

(c) Use of funds

(1) Special fund

(A) 100 percent pass-through of payments due to facilities

Notwithstanding any other provision of law, but subject to paragraph (2), payments to which a facility of the Service is entitled by reason of a provision of title XVIII or XIX of the Social Security Act shall be placed in a special fund to be held by the Secretary. In making payments from such fund, the Secretary shall ensure that each Service unit of the Service receives 100 percent of the amount to which the facilities of the Service, for which such Service unit makes collections, are entitled by reason of a provision of either such title.

(B) Use of funds

Amounts received by a facility of the Service under subparagraph (A) by reason of a provision of title XVIII or XIX of the Social Security Act shall first be used (to such extent or in such amounts as are provided in appropriation Acts) for the purpose of making any improvements in the programs of the Service operated by or through such facility which may be necessary to achieve or maintain compliance with the applicable conditions and requirements of such respective title. Any amounts so received that are in excess of the amount necessary to achieve or maintain such conditions and requirements shall, subject to consultation with the Indian tribes being served by the Service unit, be used for reducing the health resource deficiencies (as determined in section

1621(c) of this title) of such Indian tribes, including the provision of services pursuant to section 1621d of this title.

(2) Direct payment option

Paragraph (1) shall not apply to a tribal health program upon the election of such program under subsection (d) to receive payments directly. No payment may be made out of the special fund described in such paragraph with respect to reimbursement made for services provided by such program during the period of such election.

(d) Direct billing

(1) In general

Subject to complying with the requirements of paragraph (2), a tribal health program may elect to directly bill for, and receive payment for, health care items and services provided by such program for which payment is made under title XVIII, XIX, or XXI of the Social Security Act or from any other third party payor.

(2) Direct reimbursement

(A) Use of funds

Each tribal health program making the election described in paragraph (1) with respect to a program under a title of the Social Security Act shall be reimbursed directly by that program for items and services furnished without regard to subsection (c)(1), except that all amounts so reimbursed shall be used by the tribal health program for the purpose of making any improvements in facilities of the tribal health program that may be necessary to achieve or maintain compliance with the conditions and requirements applicable generally to such items and services under the program under such title and to provide additional health care services, improvements in health care facilities and tribal health programs, any health care-related purpose (including coverage for a service or service within a contract health service delivery area or any portion of a contract health service delivery area that would otherwise be provided as a contract health service), or otherwise to achieve the objectives provided in section 1602 of this title.

(B) Audits

The amounts paid to a tribal health program making the election described in paragraph (1) with respect to a program under title XVIII, XIX, or XXI of the Social Security Act shall be subject to all auditing requirements applicable to the program under such title, as well as all auditing requirements applicable to

programs administered by an Indian health program. Nothing in the preceding sentence shall be construed as limiting the application of auditing requirements applicable to amounts paid under title XVIII, XIX, or XXI of the Social Security Act.

(C) Identification of source of payments

Any tribal health program that receives reimbursements or payments under title XVIII, XIX, or XXI of the Social Security Act shall provide to the Service a list of each provider enrollment number (or other identifier) under which such program receives such reimbursements or payments.

(3) Examination and implementation of changes

(A) In general

The Secretary, acting through the Service and with the assistance of the Administrator of the Centers for Medicare & Medicaid Services, shall examine on an ongoing basis and implement any administrative changes that may be necessary to facilitate direct billing and reimbursement under the program established under this subsection, including any agreements with States that may be necessary to provide for direct billing under a program under title XIX or XXI of the Social Security Act.

(B) Coordination of information

The Service shall provide the Administrator of the Centers for Medicare & Medicaid Services with copies of the lists submitted to the Service under paragraph (2)(C), enrollment data regarding patients served by the Service (and by tribal health programs, to the extent such data is available to the Service), and such other information as the Administrator may require for purposes of administering title XVIII, XIX, or XXI of the Social Security Act.

(4) Withdrawal from program

A tribal health program that bills directly under the program established under this subsection may withdraw from participation in the same manner and under the same conditions that an Indian tribe or tribal organization may retrocede a contracted program to the Secretary under the authority of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.). All cost accounting and billing authority under the program established under this subsection shall be returned to the Secretary upon the Secretary's acceptance of the withdrawal of participation in this program.

(5) Termination for failure to comply with requirements

The Secretary may terminate the participation of a tribal health program or2 in the direct billing program established under this subsection if the Secretary determines that the program has failed to comply with the requirements of paragraph (2). The Secretary shall provide a tribal health program with notice of a determination that the program has failed to comply with any such requirement and a reasonable opportunity to correct such noncompliance prior to terminating the program's participation in the direct billing program established under this subsection.

(e) Related provisions under the Social Security Act

For provisions related to subsections (c) and (d), see sections 1880, 1911, and 2107(e)(1)(D) of the Social Security Act.

42 U.S.C. § 1395qq(a)

§ 1395qq. Indian Health Service facilities

(a) Eligibility for payments; conditions and requirements

A hospital or skilled nursing facility of the Indian Health Service, whether operated by such Service or by an Indian tribe or tribal organization (as those terms are defined in section 1603 of Title 25), shall be eligible for payments under this subchapter, notwithstanding sections 1395f(c) and 1395n(d) of this title, if and for so long as it meets all of the conditions and requirements for such payments which are applicable generally to hospitals or skilled nursing facilities (as the case may be) under this subchapter.

25 U.S.C. § 1396j(a)

§ 1396j. Indian Health Service facilities

(a) Eligibility for reimbursement for medical assistance

A facility of the Indian Health Service (including a hospital, nursing facility, or any other type of facility which provides services of a type otherwise covered under the State plan), whether operated by such Service or by an Indian tribe or tribal organization (as those terms are defined in section 1603 of Title 25), shall be eligible for reimbursement for medical assistance provided under a State plan if and for so long as it meets all of the conditions and requirements which are applicable generally to such facilities under this subchapter.