Alexander B. Ritchie, Attorney General
Arizona Bar No. 019579
SAN CARLOS APACHE TRIBE
P.O. Box 40
San Carlos, AZ 85550
(928) 475-3344
Alex.Ritchie@scat-nsn.gov

Lloyd B. Miller
Alaska Bar No. 7906040
Rebecca A. Patterson
Alaska Bar No. 1305028
SONOSKY, CHAMBERS, SACHSE,
MILLER & MONKMAN, LLP
725 East Fireweed Lane, Suite 420
Anchorage, AK 99503
(907) 258-6377
lloyd@sonosky.net
rebecca@sonosky.net

Attorneys for Plaintiff San Carlos Apache Tribe

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

San Carlos Apache Tribe, Plaintiff, v. Alex Azar, Secretary, U.S. Department of Health and Human Services; Michael Weahkee, Principal Deputy Director, Indian Health Service; United States of America, Defendants.	No. 2:19-cv-05624-NVW **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COUNT II**

The San Carlos Apache Tribe ("Tribe") is entitled to payment of its full contract support costs as a matter of law, including costs associated with administering Federal

programs funded with collections from Medicare, Medicaid, and private insurance. The Tribe therefore opposes Defendants' Motion to Dismiss Count II.

MEMORANDUM OF POINTS AND AUTHORITIES

The Indian Health Service ("IHS") operates a comprehensive Federal program delivering health care to American Indians and Alaska Natives. *See* Mot. to Dismiss 3-4, ECF No. 13 ("IHS Mot."). That Federal program is funded both by appropriated dollars and by third-party revenue dollars. This is the Federal program that, without limitation, is contractible by a Tribe under the contracting provision of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5321(a)(1)—a provision which makes no distinction between program activities funded with appropriated dollars and program activities funded with third-party revenue dollars.

The ISDEAA directs that IHS must pay contract support costs to reimburse a Tribe for the administrative costs the Tribe incurs in connection with operating that same "Federal program." *Id*. § 5325(a)(3). This mandate, like the contracting mandate, again makes no distinction between appropriated dollars and third-party revenue dollars. Since a Tribe is entitled to contract support costs to reimburse it for the administrative costs of carrying out IHS's entire "Federal program," the proper base for contract support cost purposes necessarily includes both the portion of that program that is funded with appropriated dollars and the portion of that program that is funded with third-party revenue dollars. This result is compelled by the text and purpose of the Act and reinforced by Congress's command that the ISDEAA must be liberally construed in favor of the contracting Tribe, *id*. § 5329(c) (model agreement, § (a)(2)), especially its

provisions concerning contract support costs. *See Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996).

In arguing for dismissal of Count II, Defendants ("IHS") ignore the pivotal "Federal program" language Congress used in § 5325(a)(3); misread § 5326, which in any event is irrelevant; and fail to carry a half-hearted argument about duplication. IHS's selective review of the statutory text produces a result Congress did not intend, and it offends Congress's mandate to construe all provisions of the ISDEAA in favor of the Tribes. IHS also fails to grapple with the one federal court decision that has addressed this question in the specific context of Title I of the ISDEAA; that decision held that a Tribe is entitled to payment of contract support costs on the portion of its program funded by third-party revenue dollars. *Navajo Health Found.—Sage Mem'l Hosp., Inc. v. Burwell*, 263 F. Supp. 3d 1083 (D.N.M. 2016). Properly understood, the Act and existing case law dictate that the San Carlos Apache Tribe is entitled to payment of its full contract support costs as a matter of law.

STANDARD OF REVIEW

The Defendants' motion to dismiss turns strictly on statutory interpretation of the ISDEAA, which is purely a question of law.[1] *Chemehuevi Indian Tribe v. Newsom*, 919 F.3d 1148, 1151 (9th Cir. 2019). Under the Contract Disputes Act, the district court reviews questions of law *de novo*. 41 U.S.C. § 7104(b); *see also* 25 U.S.C. § 5331(a). In

[1] Because the ISDEAA is incorporated into the parties' contract by operation of law, 25 U.S.C. § 5329(c) (model agreement, § (a)(1)), any violation of the ISDEAA is a breach of contract.

deciding a motion to dismiss, courts "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the non-moving party." *Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1042 (9th Cir. 2015) (quotation omitted). On a motion to dismiss, courts "may consider materials incorporated into the complaint or matters of public record," as well as "documents 'whose contents are alleged in a complaint and whose authenticity no party questions.'" *Id.*

FACTUAL AND STATUTORY BACKGROUND

The IHS System. The IHS annual budget justification submitted to Congress provides an extensive description of the Federal program that IHS operates.[2] IHS "provides comprehensive primary health care and disease prevention services to approximately 2.1 million American Indians and Alaska Natives through a network of over 650 hospitals, clinics, and health stations on or near Indian reservations." 2013 CJ at CJ-1. At IHS direct-service facilities, IHS provides healthcare free of charge to all eligible American Indians and Alaska Natives. *Id.*; *see* 25 U.S.C. § 1621u(a). For all patients who are covered by Medicare, Medicaid, or other insurance, IHS supplements its appropriated dollars by billing and collecting from third-party payers. *Id*. at CJ-141-43. As IHS's Motion explains, IHS spends these collections on the specific facility or

[2] *See, e.g.*, Dep't of Health & Human Servs., IHS FY 2013 Congressional Justification, at CJ-1 (2013) ("2013 CJ"), https://www.ihs.gov/sites/budgetformulation/themes/responsive2017/documents/FY2013BudgetJustification.pdf.

program through which care was provided, thereby increasing the total healthcare services IHS provides. IHS Mot. 4.[3]

Third-party billing—and the reinvestment of third-party revenue, as required by law—is a routine part of IHS's Federal program. 2013 CJ at CJ-141. As reported to Congress, third-party collections "are a significant part of the IHS and Tribal budgets, and provide increased access to quality health care services for American Indian and Alaska Natives." *Id.*; *see also id.* at CJ-14 (IHS's "Total Program Level" budget reported to Congress includes Medicare, Medicaid, and private insurance collections). IHS is authorized to bill third parties under various authorities, including 25 U.S.C. § 1621e(a) (private insurance) and 42 U.S.C. §§ 1395qq (Medicare), 1396j (Medicaid), and IHS's expenditure of those collections is controlled by these same authorities and 25 U.S.C. § 1621f. During the years at issue here, third-party revenues contributed over $900 million annually to IHS's budget, 2013 CJ at CJ-141, which was then spent directly on the programs and facilities that generated those revenues, *see* IHS Mot. 4.[4]

---

[3] *See Ariz. Health Care Cost Containment Sys. v. McClellan*, 508 F.3d 1243, 1246 (9th Cir. 2007) ("In 1976, Congress found that many IHS facilities were 'inadequate, outdated, inefficient, and undermanned,' and enacted the Indian Health Care Improvement Act ('IHCIA') to 'implement the Federal responsibility for the care and education of the Indian people by improving the services and facilities of Federal Indian health programs and encouraging maximum participation of Indians in such programs.' . . . [Section] 402(a) of the IHCIA amended the Social Security Act to permit IHS facilities to obtain Medicaid reimbursement for services provided to Medicaid-eligible Indians. As a result, IHS facilities could receive reimbursement from Medicaid as well as funding through direct Congressional appropriations." (citations omitted)).

[4] *See also* 2013 CJ at CJ-141 (estimating over $900 million in third-party collections supporting 6,462 full-time equivalent (FTE) IHS personnel). IHS uses these funds for a variety of purposes, including personnel benefits and compensation, travel and

IHS administrative support for its programs is a discrete budget component. IHS supports all of its operations (including the portions funded by appropriated dollars as well as the portions funded by third-party revenue dollars) through IHS's centrally-run administrative program known as "Direct Operations." 2013 CJ at CJ-129. Direct Operations "includes oversight of human resources, financial resources, facilities, information technology and administrative support resources and systems[] accountability." *Id*. at CJ-129-30. These administrative resources "provide[] critical support in the overall administration and delivery of the health programs and services throughout . . . IHS." *Id.* at CJ-129. This centralized administrative structure allows IHS to "benefit[] from many efficiencies through common administrative systems." *Id.*

The Tribal System. The ISDEAA authorizes Tribes to contract for the operation of IHS's Federal programs. 25 U.S.C. § 5321(a). The purpose informing the Act is to confer upon Tribes greater control and "assur[e] maximum Indian participation in the direction of . . . Federal services to Indian communities." *Id*. § 5302(a). The Act thus authorizes a Tribe to contract with IHS (among other agencies serving Tribes) to operate all Federal programs IHS otherwise would continue to operate directly for the Tribe. *Id*.

---

transportation, non-patient transportation, communications, utilities and rent, printing and reproduction, contractual services, supplies, equipment, land and structures, grants, insurance, and indemnities. *See id*. at CJ-138 (chart); *see also id.* at CJ-143 ("The collection of third party revenue is essential to maintaining facility accreditation and standards of health care through the Joint Commission on Accreditation of Healthcare Organizations or the Accreditation Association for Ambulatory Health Care. Collections are also used to maintain the certification required by the Centers for Medicare and Medicaid Services (CMS) for participation in the Medicare and Medicaid programs.").

§ 5321(a); *see also Navajo Nation v. Dep't of Health & Human Servs.*, 325 F.3d 1133, 1135-36 (9th Cir. 2003) (discussing same). The Act makes contracting mandatory for IHS, 25 U.S.C. § 5321(a) ("The Secretary is directed . . . ."), and the contracting mandate broadly reaches all agency "programs, functions, services, or activities," "includ[ing] administrative functions . . . that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs . . . [and] without regard to the organizational level within the Department that carries out such functions." *Id*.

The ISDEAA requires that IHS fund a tribally-contracted Federal program at minimum levels prescribed by statute, 25 U.S.C. § 5325(a), beginning with a base funding no less than what IHS would have otherwise spent on the program, *id.* § 5325(a)(1). A contracting Tribe also bills and collects from third-party payers in the same manner and under the same authorities as IHS. *See supra* p. 5 (citing 25 U.S.C. § 1621e(a) (private insurance), 42 U.S.C. §§ 1395qq (Medicare), 1396j (Medicaid)); *see also* 25 U.S.C. § 1641(d)(1) (tribal direct billing to Medicare and Medicaid). Contrary to IHS's misstatement of this framework, *see* IHS Mot. 12, contracting Tribes (just like IHS) are *required* to bill third-party payers because IHS and tribal programs are both a "payer of last resort," 25 U.S.C. § 1623(b). And—again, just like IHS—Tribes are required to spend these third-party revenues to augment these health care programs. 25 U.S.C. §§ 1621f(a)(1), 1641(c)(1)(B), 1641(d)(2)(A); 42 U.S.C. § 1395qq(c). The ISDEAA reiterates this requirement by mandating that Tribes spend these funds "to further the general purposes of the contract." 25 U.S.C. § 5325(m)(1).

Contract Support Costs (CSCs). In addition to appropriated dollars and third-party revenue dollars, the ISDEAA requires the Secretary to add certain contract support costs to the contract. 25 U.S.C. § 5325(a)(2)–(3). These costs cover the Tribe's fixed overhead costs necessary to carry out the contract, *id.*, such that without CSCs a Tribe would have to tap into program funds to cover these costs. Congress mandated CSC funding to enable Tribes to deliver the same level of services the Secretary would have provided had the Secretary continued operating the contracted program. S. Rep. No. 100-274, at 9 (1987); *see also Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 186 (2012); *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 639 (2005); *Norton Sound Health Corp. v. Thompson*, 55 F. App'x 835, 836 (9th Cir. 2003).[5]

Contract support costs are defined by express reference to the operation of the entire "Federal program" the Tribe is operating. Thus, direct CSCs are defined as "direct program expenses for *the operation of the Federal program* that is the subject of the contract," 25 U.S.C. § 5325(a)(3)(A), and indirect CSCs are defined as "any additional administrative or other expense related to the overhead incurred by the tribal contractor in

[5] CSC includes administrative costs that the IHS program would not have incurred if IHS had continued to run the program itself, either because the agency covers those functions with "resources other than those under contract" (*i.e.*, administrative functions handled in a centralized manner within IHS, within the Department of Health & Human Services, or within other agencies), 25 U.S.C. § 5325(a)(2)(B), or because they are costs that federal agencies simply do not incur, such as agency-mandated annual audits and insurance coverages, *id.* § 5325(a)(2)(A). They also include tribal costs above and beyond the overhead costs the IHS program would have incurred. *See Cook Inlet Tribal Council v. Mandregan*, 348 F. Supp. 3d 1, 13–14 (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).

connection with *the operation of the Federal program*, function, service, or activity pursuant to the contract," *id.* (emphases added); *see also Cherokee Nation*, 543 U.S. at 635 (discussing two types of CSC). "Most contract support costs are indirect costs 'generally calculated by applying an "indirect cost rate" to the amount of funds otherwise payable to the Tribe.'" *Cherokee Nation*, 543 U.S. at 635.[6]

IHS's duty to pay contract support costs in full is not contested, and correctly so. *See id.* at 634, 637–38; *Ramah Navajo Chapter*, 567 U.S. at 185 ("[W]e hold that the Government must pay each tribe's contract support costs in full."); *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 501 F. App'x 957, 959 (Fed. Cir. 2012) (applying *Ramah* to IHS). Rather, the issue is whether the "Federal program" described in § 5325(a)(3)(A)(i) and (ii), to which CSCs are added, includes (a) only the portion of the contracted programs the Tribe carried out with IHS appropriated funds (as IHS asserts), or (b) also includes the portion of the contracted programs the Tribe carried out using third-party revenues generated from those programs.

San Carlos Apache Tribe. The San Carlos Apache Tribe is a federally recognized Indian Tribe and is an "Indian tribe" within the meaning of the ISDEAA. 85

---

[6] In general, an "[i]ndirect cost rate . . . is the ratio (expressed as a percentage) of the indirect costs to a direct cost base." 2 C.F.R. Pt. 200, App. VII, at ¶ B.7. "Indirect costs" (also called the "indirect cost pool") are pooled overhead costs "that jointly benefit two or more programs," *id*. at ¶ B.6, such as centralized accounting costs. The direct cost "base" is the total of all programs served by the indirect cost pool. *Id*. at ¶ B.1. Count II of the Tribe's Complaint asserts that IHS is responsible for reimbursing the Tribe's indirect costs associated with the expenditure of both IHS-appropriated funds in the base, and third-party revenues in the base. But IHS seeks to limit its liability just to indirect costs associated with the Tribe's expenditure of IHS appropriated funds.

Fed. Reg. 5462, 5465 (Jan. 30, 2020); *see* 25 U.S.C. § 5304(e). During fiscal years 2011 through 2013 the Tribe carried out a contract with IHS to provide certain health care services, including emergency medical services, substance abuse services, mental health services, a Community Health Representative program, a teen wellness program, and general health services through the Tribe's Department of Health and Human Services (DHHS). IHS Mot. Ex. A, at 17, ECF No. 13-2 (FY 2011); *id.* at 24 (FY 2012); *id.* at 28 (FY 2013). The contract between the Tribe and IHS was entered into pursuant to Title I of the ISDEAA. *Id.* at 4; *see also* Compl. ¶¶ 5, 7–12.

In the course of carrying out the Tribe's contract with IHS, the Tribe received from IHS and spent funds that Congress had appropriated to IHS. *See* Compl. ¶¶ 47-49. Also in the course of carrying out the Tribe's contract with IHS, and as expressly stated in the Tribe's scope of work under the contract, *see* IHS Mot. Ex. B, at 3, ECF No. 13-3, the Tribe collected third-party revenues from Medicare, Medicaid, and private insurers, Compl. ¶¶ 34, 51. Finally, in the course of carrying out the contract—and in accordance with federal law, including § 5325(m)(1) of the ISDEAA as incorporated into the contract—the Tribe spent third-party revenues collected under the contract to provide additional services under the contract. Compl. ¶¶ 34, 51. To date, IHS has not paid the Tribe CSCs on portions of the contracted program funded with these third-party revenues. Compl. ¶ 55; Compl. Ex. 2, at 3–4, ECF No. 1-3. The Tribe timely filed a claim under the Contract Disputes Act, 41 U.S.C. §§ 7101–7109, asserting its entitlement to these unpaid CSCs for fiscal years 2011 through 2013 (and asserting other

underpayments that are beyond the scope of IHS's Motion). Compl. Ex. 2. IHS denied the claim. Compl. Ex. 3, ECF No. 1-4. This action followed. *See* 41 U.S.C. § 7104.

ARGUMENT

I. THE "FEDERAL PROGRAM" INCLUDES OPERATIONS FUNDED BY THIRD-PARTY COLLECTIONS.

The "Federal program" on which IHS must pay CSCs includes all healthcare activities carried out pursuant to the Tribe's contract with IHS, both the portion funded directly by IHS appropriations and the portion funded by the third-party revenues the Tribe is required to collect and reinvest in the program. This interpretation is dictated by the plain language of the Act, its purpose and embedded rules of construction, and by IHS's own practice demonstrating that the expenditure of third-party revenues is an integral part of IHS's Federal program operations.

A. The Language of The Act Includes All Contracted Activities within the "Federal Program," Regardless of Funding Source.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose," recognizing that "[s]tatutory interpretation focuses on the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *United States v. Havelock*, 664 F.3d 1284, 1289 (9th Cir. 2012) (en banc) (quotations omitted). Further, in the special case of the ISDEAA, "[c]ontracts made under [the Act] specify that '[e]ach provision of the [Act] and each provision of th[e] Contract shall be liberally construed for the benefit of the Contractor.'" *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 194 (2012) (quoting 25 U.S.C. § 5329(c) (model

agreement, § 1(a)(2)). This statutory rule is an overlay to the common law rule of construction dictating that statutes impacting Indian tribes "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). In order to prevail in an ISDEAA dispute, therefore, IHS "must demonstrate that its reading is clearly required by the statutory language." *Ramah Navajo Chapter*, 567 U.S. at 194. IHS's constrained reading of the term "Federal program" fails to meet that heavy burden.

Beginning with the dictionary, the word "Federal" is broad and encompasses everything of a Federal character, including anything a Federal agency does: "of, relating to, or loyal to the federal government." *Federal*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/federal (last accessed Mar. 4, 2020). The word "program" is also broad, meaning "a plan or system under which action may be taken toward a goal." *Program*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/program (last accessed Mar. 4, 2020). In the particular context of the ISDEAA, a contractible "program" means anything the Secretary of Health and Human Services does "for the benefit of Indians," 25 U.S.C. § 5321(a)(1)(E), which of course means all of the *Indian* Health Service. Further, the ISDEAA equates the term contractible "programs" with "programs, functions, services, or activities." *Id.* § 5321(a)(1).[7] Going even further, Congress made plain that these terms include IHS's

[7] *See also* 25 U.S.C. § 5321(a)(2), (4) (each twice referring to "program, function, service, or activity"); *id.* § 5324(j) (three times referring to "program, activity, function, or service"); *id.* § 5325(a)(1), (a)(3)(ii), (a)(3)(B), (a)(4), (a)(5)(A), (g), (n) (referring

"administrative functions" at any organizational level of the agency.[8] Plainly it was Congress's intent to mandate the broadest possible scope of contracting across IHS.

Congress's decision to use the broad terms "Federal program" and "Federal program, function, service, or activity" in 25 U.S.C. § 5325(a)(3)(A)(i) and (ii), respectively, and to use these and like terms throughout the ISDEAA, means that the term "Federal program" encompasses the entirety of IHS's Federal program serving Indians. To limit those Federal programs only to programs or portions thereof funded with "appropriations," as IHS asserts, would do violence to Congress's intent that the term "Federal program" should instead have broad application. The Act's definition of indirect CSC as *any* additional administrative expenses "related to" overhead incurred "in connection with" the Federal program, *id.*, further underscores Congress's intent that the CSC provisions, in particular, should be interpreted broadly. *See, e.g.*, *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1197 (2017) (noting "Congress'[s] use of the expansive phrase 'relate to'"); *Mont v. United States*, 139 S. Ct. 1826, 1832 (2019) ("The Court has often recognized that 'in connection with' can bear a broad interpretation."

---

throughout to the "program, function, service, or activity"); *id.* § 5329(c) (referring throughout to "programs, services, functions, and activities"); *id.* § 5330 ("program, activity, function, or service").

[8] *See, e.g.*, 25 U.S.C. § 5321(a)(1) ("The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of . . . the Department of Health and Human Services . . . that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.").

(quotation omitted)). Moreover, Congress in the ISDEAA knew full well how to refer to "appropriations" when that was its intent, *see, e.g.*, 25 U.S.C. § 5325(b) ("Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations."), further arguing against a construction that would import into § 5325(a)(3) a limitation to appropriated funds only, *see King v. St. Vincent's Hosp*., 502 U.S. 215, 221 (1991) (statute must be read as a whole because "the meaning of statutory language, plain or not, depends on context"). In sum, the term "Federal program" in 25 U.S.C. § 5325(a)(3)(A)(i) and (ii)—the program for which CSCs are to be paid—includes all IHS programs regardless of funding source, including third-party revenues.

IHS programs and services indisputably include healthcare services that IHS funds with third-party revenues. IHS's own annual submissions to Congress make plain that these revenues are an integral part of the agency's "total, program level" budget, *see* 2013 CJ at CJ-10, 141, representing "a significant part of the IHS . . . budget[]." *Id.* at CJ-141. Given that third-party revenues (also termed "collections") infuse virtually every program operation IHS carries out, *see supra* p. 4–5, one cannot reasonably conclude that a Tribe's contracting right somehow does not reach the portion of an IHS program funded with third-party revenue dollars. Put differently, no reasonable construction of the Act would put one-half of IHS programs off-limits because of the funding source behind those programs. This is why the courts have affirmed that the ISDEAA contracting mandate applies regardless of "the source of the funds" used to carry out a given

program,[9] emphasizing that "[n]owhere does the statute provide exceptions based on the source of that funding."[10] The very structure of IHS program operations, together with the plain language of the statutory text, compels the conclusion that contractible programs cover the entirety of an IHS program, including the portion funded with third-party revenues.

Even if § 5325(a)(3)(A) were considered ambiguous regarding the scope of the term "Federal program" for which CSCs are to be paid, the Supreme Court has cautioned that the ISDEAA rule of construction demands that such a provision be construed in favor of the Tribe. *See Ramah Navajo Chapter*, 567 U.S. at 194 (citing § 5329(c) (model agreement, § 1(a)(2))). Borrowing from *Ramah*, IHS's interpretation of the Act to bar CSCs for the operation of the third-party revenue portion of contracted programs is not "clearly required by the statutory language." *Id.* IHS therefore cannot carry its heavy burden to demonstrate that the term "Federal program" is limited to the portion of a program funded with appropriated dollars.

The only federal court to have considered the precise statutory question presented here agreed with the Tribe and rejected IHS's argument. In *Sage Memorial*, the district court concluded that the ISDEAA requires IHS to pay CSC on the full Federal program

---

[9] *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 544 (D.D.C. 2014) (holding, in a dispute regarding the Secretarial amount, that the program base "is determined based on what the Secretary otherwise would have spent, not on the source of the funds the Secretary uses").

[10] *Fort McDermitt Paiute & Shoshone Tribe v. Azar*, No. CV 17-837 (TJK), 2019 WL 4711401, at *6, 8 (D.D.C. Sept. 26, 2019) (program includes all the funds IHS would have used "to *operate* a program," including third party revenue (emphasis in original)).

and that IHS may not reduce a Tribe's CSC on the basis that a portion of the Federal program is funded with third-party revenues from private insurance, Medicare, or Medicaid. *Navajo Health Found.—Sage Mem'l Hosp., Inc. v. Burwell*, 263 F. Supp. 3d 1083 (D.N.M. 2016). The court held that "[t]hird-party funding is part of federal programming for the purposes of reimbursement under the ISDEAA" and that "[t]he Indian canon provides further reason to interpret 'federal programs' broadly" to include third-party revenues. *Id.* at 1164-65. The court also reasoned that Congress's treatment of billing requirements and third-party revenue expenditures in the IHCIA "suggests that Congress intended to include them within [the contractible programs'] scope under the ISDEAA as well." *Id.* at 1165. It emphasized that the ISDEAA agreement in that case specifically included third-party billing functions, *id.*, just as the Tribe's contract does here, *see* IHS Mot. Ex. B, at 3, ECF No. 13-3, and this fact removed any doubt as to whether the collection and expenditure of third-party revenues falls within the scope of the contract. While IHS now claims to disagree with *Sage*, the agency abandoned its appeal in that case. No. 18-2043, 2018 WL 4520349 (10th Cir. July 11, 2018).

The different result reached more recently in *Swinomish Indian Tribal Community v. Azar*, 406 F. Supp. 3d 18 (D.D.C. 2019), is distinguishable because that decision concerned a compact under Title V of the Act (rather than the Title I contract at issue here), and the court relied heavily on language in Title V, which the court said did not exist in Title I, *id.* at 31 (discussing 25 U.S.C. § 5325(m)).[11] Moreover, that decision's

---

[11] Section 5388(j) of Title V provides that program income "shall be treated as supplemental funding to that negotiated in the funding agreement" and "shall not result in

analysis is unpersuasive because it erroneously asserts that the expenditure of third-party revenue is somehow separate from the Federal program. *Id.* at 27–28. The court apparently did not examine IHS's annual description of its Federal programs to Congress, and it overlooked that the ISDEAA makes no such distinction either. Nor did the court appear to consider that federal law *requires* Tribes (just like IHS) to collect and spend third-party revenues when carrying out contracted ISDEAA programs. *See supra* p. 7.

Finally, the *Swinomish* court failed to recognize the congressional purpose in permitting IHS and Tribes to collect such revenues in the first place, which was to provide additional resources to enhance programs and services, just as IHS does. *Ariz. Health Care Cost Containment Sys.*, 508 F.3d at 1245–46. Nothing anywhere suggests that Congress intended that Tribes (or IHS, for that matter) divert those collections to finance overhead—and, as noted earlier, *supra* p. 5–6, IHS does not do so. The interpretation adopted in *Swinomish* therefore creates tension between the ISDEAA (requiring the diversion of third-party revenue to cover overhead, under the *Swinomish* court's approach) and the IHCIA (directing all third-party revenue to enhance services

---

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). The *Swinomish* decision placed considerable weight on the word "supplemental," choosing a narrow dictionary definition that led the court to interpret "supplemental" as meaning an "extra" amount that is "not a part of the amount negotiated in the [IHS] funding agreement itself." 406 F. Supp. 3d at 26. That term does not appear in Title I. That said, the court ignored other more natural dictionary definitions, while disregarding the statutory structure and context of the provision which show that § 5388(j) was intended as a limit on *IHS's discretion* to restrict funds on the basis of third-party revenues. *Cf. Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1347 (D.C. Cir. 1996) ("[T]here is overwhelming evidence that Congress intended the ISDA to limit the Secretary's discretion in funding matters.").

and programs), in violation of basic statutory interpretation principles. *See Design Trend Int'l Interiors, Ltd. v. Cathay Enters., Inc.*, 103 F. Supp. 3d 1051, 1060 (D. Ariz. 2015) (courts "seek to harmonize, whenever possible, related statutory and rule provisions" (quotation omitted)).

B. IHS's Arguments are Unavailing.

In arguing for a narrow interpretation of the ISDEAA's contract support cost language, one of IHS's argument is that "Congress did not use the terms 'Medicare,' 'Medicaid,' or 'program income' or otherwise identify such funds as part of the Secretarial amount in § 5325(a)(1)." IHS Mot. 12. True enough, but nor did Congress use the term "Secretarial amount" in § 5325(a)(1), nor did it use the terms IHS quotes in the section it prefers to focus on, § 5325(m). IHS's argument answers the wrong question. As the Supreme Court put it, the right question is whether the statute "clearly require[s]" IHS's narrow reading of the terms "Federal program" and "Federal program, activity, function, or service" specified in 25 U.S.C. § 5325(a)(3)(A)(i) and (ii), *see Ramah Navajo Chapter*, 567 U.S. at 194, since these are the programs whose "operation" CSC payments are intended to support. At most, IHS's argument suggests that the statute is ambiguous with respect to the inclusion of program income, in which case the statute must be construed in favor of the Tribe. *See id.*

As for IHS's much vaunted 25 U.S.C. § 5325(m), that section simply cannot bear the weight IHS would place upon it. First of all, it does not address the agency's duty to pay CSCs; that duty is specified in § 5325(a)(3). Second, it does not speak to Medicaid, Medicare, or anything other than general "program income." And third, it is directed at

an entirely different topic—how program income is to be "used." Program income is to be "used by the tribal organization to further the general purposes of the contract." 25 U.S.C. § 5325(m)(1). It is *not* to be used to reduce whatever amount of funding the Tribe might otherwise be entitled to. *Id.* § 5325(m)(2). The self-evident purpose of this second provision is to be sure Tribes (like IHS) are not disincentivized from billing and collecting from third-party payers; if appropriated dollars could be reduced to the extent third-party payments were collected, there would be no point in collecting third-party payments. Subsection (2)'s protection from such a reduction mirrors the protections that apply to IHS itself.[12] It has nothing to do either with contract support or with the scope of contractable Federal programs and services covered by the ISDEAA.

Finally, IHS argues that third-party revenues must be separate from the "Federal program" because the terms on which a Tribe collects those revenues are sometimes specified in authorities beyond the Act itself. IHS Mot. 11-12. But this argument makes no sense. IHS and Tribes share the *same* authority to bill, collect, and spend third-party revenues from private insurance, Medicare, and Medicaid. And when it comes to the one program IHS's motion mentions in making this argument (the Contract Health Services

[12] *See, e.g.*, 25 U.S.C. §§ 1641(a) ("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 [the Medicaid and Medicare programs] 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."), 1621f(b) ("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) [referring to Medicare, Medicaid, and other reimbursements].").

program, since renamed the Purchased and Referred Care program), *that program is an IHS program funded with appropriated dollars*. 2013 CJ at CJ-3, 10, 94-97. Indeed, many contracting tribes receive CHS funding in a lump-sum amount under their contracts, in which case IHS pays contract support costs on that amount. It is immaterial that the Tribe here receives CHS funds on a reimbursable basis over the course of the year; IHS still owes contract support costs on those funds. What matters is that under its ISDEAA contract the Tribe, just like IHS, is using CHS funds to provide Indian health care services. The expenditure of CHS funds under the contract is no less a part of the contracted Federal program than any other contracted program.

C. The ISDEAA's Purpose and IHS's Own Practice Require Payment of CSC on Services Funded with Third-Party Revenues.

The Act's CSC provisions were enacted—and repeatedly strengthened for the Tribes' benefit—as a result of Congress's ongoing frustration with IHS's and the BIA's failure to adequately support the administrative costs of operating contracted programs. *See* Pub. L. No. 100-472, title II, § 205, 102 Stat. 2285, 2292–93 (Oct. 5, 1988); Pub. L. No. 103-413, Title I, § 102(14)–(19), 108 Stat. 4250, 4257–59 (Oct. 25, 1994); S. Rep. No. 100-274, at 9 (1987); S. Rep. No. 103-374, at 9 (1994); *see also Ramah Navajo Sch. Bd.*, 87 F.3d at 1344–45 (noting "clear congressional irritation" with the agencies and citing Senate report statement that "Self-determination contractors' rights under the Act have been systematically violated *particularly in the area of funding indirect costs*" (emphasis in original) (quoting S. Rep. No. 100-274)). The agencies' failure to cover these costs in full forced Tribes to use either tribal funds or health program funds to make

up the difference, a Hobson's choice that Congress condemned. With respect to tribal funds, Congress was critical that Tribes were being forced "to pay for the indirect costs associated with programs that *are a federal responsibility*," S. Rep. No. 100-274, at 9 (emphasis added), emphasizing "that Indian tribes should not be forced to use their own financial resources to subsidize federal programs." *Id.* At the same time, Congress insisted that Tribes not "be compelled to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid." S. Rep. No. 103-374, at 9. Congress added the CSC mandate to the Act precisely "to insure that the Federal government provides an amount of funds to a tribal contractor that will enable the contractor to provide *at least the same amount of services* as the Secretary would have otherwise provided." S. Rep. No. 100-274, at 16 (emphasis added).

Yet, by refusing to pay CSCs on the portion of the Tribe's program funded by third-party revenues, IHS is recreating the precise Hobson's choice that Congress sought to end: forcing the Tribe to choose between subsidizing the Federal program with its own funds or diverting health program dollars and thereby reducing the amount of services the Tribe can provide. This result is antithetical to the very purpose of the Act's contract support cost provisions.

When IHS collects and spends third-party revenues on a program, it uses a single administrative cost structure to support the services associated with those expenditures *and* the services associated with the expenditure of appropriated dollars. IHS does not have separate accounting staff, financial officers, or human resources staff associated

with the portion of its programs funded through third-party expenditures. By the same token, no portion of IHS's third-party collections goes into IHS's "Direct Operations."

IHS's Congressional Budget Justifications show this clearly. The centralized administrative functions of the "Direct Operations" portion of the budget covers all IHS programs, with no separate allocation or designation for programs funded with third-party revenues. 2013 CJ at CJ-13-14. All Direct Operations administrative functions are funded 100% with appropriated dollars, and no third-party revenues are diverted to supplement the Direct Operations portion of the budget. *Id.* Thus, IHS is able to commit *all* third-party revenue dollars to enhance IHS programs and facilities as part of the "Hospitals and Health Clinics" portion of the budget. *Id.* Yet when Tribes collect and spend third-party revenues in exactly the same manner, IHS's position would demand that Tribes shoulder these administrative costs by diverting third-party revenues. This directly contravenes Congress's goal of ensuring that tribal contractors be funded to provide at least the same level of services as IHS provides, and it cannot be squared with Congress's inclusion of the CSC provisions in the Act.

II. EXPENDITURE OF THIRD-PARTY REVENUES DOES NOT IMPLICATE § 5326 OR THE ANTI-DUPLICATION PROVISION.

IHS's Motion relies heavily on 25 U.S.C. § 5326, stretching its language to argue that it prohibits payment of CSC on "non-IHS funds." IHS Mot. 13. But that is simply not what the statute says. Section 5326 reiterates that IHS owes CSC on "costs directly attributable to contracts, grants and compacts pursuant to the [ISDEAA]." Section 5326 also states that IHS does *not* owe CSC for costs associated with another agency's

contract—that is, costs "associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and *any entity other than the [IHS]*" (emphasis added). The plain meaning of this provision is that IHS must pay CSC on costs arising under the ISDEAA contract, but it does not owe CSC on costs arising under *other* agencies' contracts or grants (such as contracts or grants with education, housing, or transportation agencies). That is what § 5326 says, and that is the sum total of what it means.

As IHS notes, Congress enacted § 5326 in response to a Tenth Circuit case adopting a CSC calculation that effectively forced the BIA to pay CSC on criminal justice programs funded by the State of New Mexico. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1459, 1463–64 (10th Cir. 1997); *see* IHS Mot. 13 (citing H.R. Rep. No. 105-609, at 57, 108 (1998)). Congress responded with § 5326 to clarify that IHS and BIA owe CSC only on programs covered by an ISDEAA contract. Congress did not purport to (and did not) add further limitations addressing any situation beyond the one addressed in that case.

Section 5326 has no role to play here. The Tribe seeks CSC to cover administrative costs it incurred in carrying out programs under *its ISDEAA contract with IHS*, using third-party revenues it collected and then spent pursuant to that same ISDEAA contract. Such costs are "directly attributable to" that contract, not some other contract with some other agency. No matter how many times IHS tries to re-characterize § 5326, IHS may not re-write the statute to its liking. Moreover, Congress has mandated that this

provision, like the rest of the ISDEAA, must be construed in the Tribe's favor. *See* 25 U.S.C. § 5329(c) (model agreement, § 1(a)(2)).

IHS's reliance on two additional cases to support its § 5326 argument fares no better. In *Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 418–19 (D.D.C. 2008), the issue—just as in the 1997 *Ramah Navajo Chapter* decision (and brought by the same attorneys)—concerned IHS's asserted liability for overhead costs allocable to *other* agencies' contracts and grants, and the district court found § 5326 conclusive on that point. But nothing in *Tunica* remotely suggests that the *Tunica* court was absolving IHS of its duty to pay contract support costs associated with *IHS's own ISDEAA contracts*.

In *Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100 (D.D.C. 2019), the district court was concerned with an entirely different issue. On the precise question presented here, the court appeared to *agree* with *Sage* in upholding IHS's duty to reimburse Tribes for the cost of administering the third-party revenue funded portions of their ISDEAA contract operations. *Id*. at 113 (noting that "because the money [in *Sage*] had been 'earned in the course of carrying out' the self-determination contract, it could not be excluded from the CSC calculation" (quoting 25 U.S.C. § 5325(m)). Where the *Seminole* court parted company with the Tribe was when it came to *tribally*-funded health care services, holding that such services were not eligible for CSC precisely because they were *not* services funded with "program income earned in the course of carrying out its federal health program." *Id.*

Next, IHS makes a vague argument that somehow the ISDEAA's provision barring payment of duplicate amounts bars the entirety of the Tribe's CSC claim. IHS Mot. 16-17 (discussing 25 U.S.C. § 5325(a)(3)). IHS has made similar arguments elsewhere—asserting that tribal CSC requirements of one kind or another are blanketly prohibited as improper duplicate payments—but these arguments have been universally rejected. The *Sage* court concluded that a duplication offset could only be claimed "for [an] individual [CSC] activity [if] IHS already paid for that specific, individuated activity under the Secretarial amount." *Sage Mem'l Hosp.*, 263 F. Supp. 3d at 1178. It rejected the notion that IHS could disqualify entire classes of CSC requirements and bypass its burden to prove precise duplicated costs simply by invoking § 5325: "The United States' repeated admission during the hearing that it does not know what costs fall into the Secretarial amount fortifies the Court's conclusion on this point, because this lack of knowledge would leave no check on IHS'[s] ability to claim without proof that any specific CSC claim duplicates a cost within the Secretarial amount's black box." *Id.* Similarly, in *Cook Inlet Tribal Council* the court rejected IHS's effort to categorically disqualify all CSCs required for facility costs simply based on an assertion that *some* facility costs in *some* amount had already been paid to the Tribe in the Secretarial amount. *Cook Inlet Tribal Council v. Mandregan*, 348 F. Supp. 3d 1, 14 (D.D.C. 2018) ("IHS posits that it is 'irrelevant' that it cannot show how much facility funding has been provided [in the Secretarial amount]. The Court disagrees." (citation omitted)).

The same result should follow here. If IHS could eventually prove, at the merits stage, that some particular amount within the Tribe's claim has actually already been paid

by IHS, the agency might have a valid argument for a duplication offset. But that is a matter of defense (in the nature of an offset); it only comes into play after this Court establishes that IHS is liable, as a matter of law, for contract support costs incurred to operate the portion of the Tribe's contracted programs that were funded with third-party revenues. What IHS cannot do is either bypass that liability issue or wave the "duplicated cost" card and dodge the task of actually proving with precision what CSC costs were duplicated and in what amounts.

IHS's remaining arguments are red herrings. First, IHS's vague assertions about "pass through" funds, *see* IHS Mot. 16–17, have no legal significance and in any event are irrelevant, as the Tribe—not IHS—collected and spent the third-party revenues at issue here. *See* IHS Mot. Ex. B, at 3, ECF No. 13-3 (contract scope of work includes the duty to "[m]aintain an efficient billing system, to maximize third party revenues"). And finally, to the extent that any Tribe spends third-party revenues to provide health care services (in accordance with federal law), and then might bill third parties for reimbursement for those services (again, as required by federal law), this result is far from an "improper windfall." *See* IHS Mot. 17. Rather, it is precisely what Congress intended, and it is precisely what IHS does when it spends third-party revenues to expand the care IHS is able to provide to Indian beneficiaries. *See, e.g.*, H.R. Rep. No. 94-1026, at 108 (1976) ("[T]he Committee firmly expects that funds from Medicare and Medicaid will be used to expand and improve current IHS health care services and not to substitute for present expenditures."). In short, nothing in the language of the statute compels the result IHS urges here.

CONCLUSION

The ISDEAA requires that IHS pay contract support costs on the Tribe's entire Federal program under contract, which includes the portion of that program funded with expenditures of third-party revenues that the Tribe collects and spends pursuant to its ISDEAA contract. In attempting to limit CSCs to the portion of the program funded with appropriated dollars—a limitation that Congress did not include in the Act—IHS fails to carry its burden to show that its narrow interpretation is clearly required by the statutory language. For these reasons, Plaintiff San Carlos Apache Tribe respectfully requests that the Court deny Defendants' motion to dismiss Count II.

Respectfully submitted this 5th day of March 2020.

SAN CARLOS APACHE TRIBE
Attorney General

By: /s/ Alexander B. Ritchie
Alexander B. Ritchie
Arizona Bar No. 019579
Alex.Ritchie@scat-nsn.gov

SONOSKY, CHAMBERS, SACHSE,
MILLER & MONKMAN, LLP

By: /s/ Lloyd B. Miller
Lloyd B. Miller
Admitted *pro hac vice* only
Alaska Bar No. 7906040
Rebecca Patterson
Admitted *pro hac vice* only
Alaska Bar No. 1305028
Lloyd@sonosky.net
Rebecca@sonosky.net

Attorneys for Plaintiff San Carlos Apache Tribe