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8  
 9 **IN THE UNITED STATES DISTRICT COURT**  
 10 **FOR THE DISTRICT OF ARIZONA**

11 San Carlos Apache Tribe,  
 12 Plaintiff,

No. 2:19-CV-05624-NVW

13 v.

14 Alex Azar, U.S. Department of Health and  
 Human Services; Michael Weahkee,  
 15 Principal Deputy Director, Indian Health  
 Service; United States of America,  
 16  
 17 Defendants.

**DEFENDANTS' REPLY IN SUPPORT  
 OF THEIR MOTION TO DISMISS  
 COUNT II OF PLAINTIFF'S  
 COMPLAINT**

18  
 19 **I. INTRODUCTION**

20 In Count II of its complaint (Doc. 1), Plaintiff San Carlos Apache Tribe seeks a  
 21 construction of the Indian Self-Determination and Education Assistance Act ("ISDEAA")  
 22 (codified as amended at 25 U.S.C. § 5301 *et seq.*), that would require the Indian Health  
 23 Service ("IHS") to pay Plaintiff direct and indirect costs associated with income obtained  
 24 by the Tribe from third-party payers such as Medicare and Medicaid. Plaintiff's request is  
 25 contrary to the plain language of the ISDEAA, and Defendants are entitled to dismissal of  
 26 Count II of Plaintiff's complaint as a matter of law.

27 The ISDEAA provides for the transfer of funds that the Secretary would have  
 28 otherwise used to operate an IHS program (the Secretarial amount), 25 U.S.C. § 5325(a)(1),

1 and for the Secretary to also pay contract support costs (“CSC”) for the tribal contractor’s  
2 reasonable direct and indirect costs for activities required to operate that program that are  
3 not already funded as part of the Secretarial amount, *id.* § 5325(a)(2)–(3). But the  
4 ISDEAA’s CSC provisions do not create an unlimited funding source to cover a tribal  
5 contractor’s costs of administering programs funded with non-IHS awards, such as other  
6 sources of federal financial assistance, as well as state financial assistance and third-party  
7 payments. In fact, the statute prohibits it. *Id.* § 5326.

8 **II. ARGUMENT: THE ISDEAA PREVENTS IHS FROM PAYING**  
9 **CONTRACT SUPPORT COSTS BASED ON PLAINTIFF’S EXPENDITURE**  
10 **OF NON-IHS FUNDS.**

11 **A. *Swinomish* Persuasively Decided the Issue Presented.**

12 In *Swinomish Indian Tribal Community v. Azar*, the court held that “§ 5325(a) does  
13 not entitle the Tribe to collect CSC for its expenditure of third-party revenue, as that  
14 section’s references to the ‘Secretarial amount’ to which CSC must be added and the  
15 ‘Federal program’ that generates CSC do not include third-party revenue.” 406 F. Supp. 3d  
16 18, 27-28 (D.D.C. 2019). Although the contract with IHS in that case arose under Title V  
17 of the ISDEAA, rather than Title I as here, that is a distinction without a difference. *See*  
18 Pl. Opp’n at 16. As the court noted, Title V adopts Title I’s funding provisions. *Id.* at 20-  
19 21; 25 U.S.C. § 5388(c). The court also analyzed Title V’s § 5388(j), which, like Title I’s  
20 § 5325(m), treats program income separately from the funding authorized by § 5325(a).  
21 *Swinomish*, 406 F. Supp. 3d at 26-27. But the court ultimately concluded that the “text,  
22 structure, and logic of § 5325(a) counsel against treating the Tribe’s collection and  
23 expenditure of third-party revenue as part of the Secretarial amount or federal program for  
24 the purposes of calculating CSC owed.” *Id.* at 32. Section 5325(a) applies equally to  
25 agreements under Titles I and V, and this Court should follow the *Swinomish* court’s  
26 commonsense conclusion.

1           **B. Neither Navajo Health Foundation—Sage Memorial Hospital Nor Seminole**  
2           **Tribe of Florida Advances Plaintiff’s Case.**

3           Contrary to Plaintiff’s contention, *see* Pl.’s Opp’n. at 15-16, *Navajo Health*  
4 *Foundation—Sage Memorial Hospital*, 263 F. Supp. 3d 1083 (D.N.M. 2016) (“*Sage*”),  
5 does not provide persuasive authority. In *Sage*, the tribal contractor presented claims to an  
6 IHS contracting officer for unpaid CSC, including CSC for costs allocable to the portion  
7 of the tribal program funded by third-party reimbursements such as Medicare and Medicaid  
8 as well as the tribally-funded portion of the program.<sup>1</sup> *See* 263 F. Supp. 3d at 1088.  
9 Without analysis, the court found that Medicare and Medicaid reimbursements were part  
10 of the federal program that the plaintiff took over under the ISDEAA contract. *See id.* at  
11 1163-66. The court also noted that § 5325(m) provides that program income earned cannot  
12 be a basis for reducing the amount provided under the contract, and found without  
13 explanation that the plaintiff was entitled to receive CSC on that program income. *See id.*  
14 at 1166-68.

15           The reasoning of *Sage* is not persuasive, and this Court should not follow that  
16 court’s conclusions. Despite the length of its decision, the *Sage* court did not address the  
17 meaning of § 5326, and did not address how § 5325(a)(2) and (3)(A) should be interpreted  
18 in light of § 5326. *See, e.g.*, 1163-68. Although *Sage* held that Medicare and Medicaid  
19 funds were part of the federal program and that the plaintiff was entitled to CSC on those  
20 funds, the court did not identify any of the plaintiff’s actual direct or indirect costs that  
21 would otherwise go unreimbursed. *See id.* It did not address the fact that Medicare,  
22 Medicaid, and other third party payments are non-IHS funds. It did not address the fact  
23 that the contract at issue in that case did not provide for IHS to turn over those third-party  
24 funds to the plaintiff. It did not address the fact that by statute, Medicare and Medicaid  
25 payments already reimburse providers for direct and indirect costs associated with

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27           <sup>1</sup> In *Sage*, the tribal contractor claimed a lump sum for “indirect-type costs.” *See*  
28 Indian Health Manual, § 6-3.2.E(2), available at  
[https://www.ihs.gov/IHM/index.cfm?module=dsp\\_ihm\\_pc\\_p6c3](https://www.ihs.gov/IHM/index.cfm?module=dsp_ihm_pc_p6c3). In contrast, here  
Plaintiff’s claims involve application of an indirect cost rate. *See* Pl.’s Opp’n at 9; *see also*  
*Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 104-05 (D.D.C. 2019).

1 providing those health care services. Thus, it offered no convincing reason why such funds  
2 should be considered part of the Secretarial amount or were entitled to CSC payments.  
3 Accordingly, this Court should not follow *Sage*.

4 Nor did the court in *Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100 (D.D.C.  
5 2019) “agree” with *Sage* as Plaintiff suggests. Pl.’s Opp’n. at 24. Rather, the court’s  
6 analysis of *Sage* was confined to explaining why the case was distinguishable from the  
7 issue before that court. *Seminole*, 376 F. Supp. 3d at 113. The court’s momentary  
8 speculation that “[i]f the Tribe can show that its other money is program income, *Sage*  
9 *Memorial may* ultimately govern,” *id.* at 114 (emphasis added), neither accepts nor rejects  
10 the decision, is not a binding holding, and does not provide persuasive authority for this  
11 Court.

12 **C. The ISDEAA Prohibits IHS from Funding Indirect Costs Attributable to**  
13 **Non-IHS Funding Sources.**

14 Congress has authorized Plaintiff, as an ISDEAA contractor, to enter into contracts  
15 or reimbursement agreements with third-party payers. Pl. Opp’n at 7. *See, e.g.*, Dep’t of  
16 Health & Human Servs., Centers for Medicare & Medicaid Servs., Medicare Participating  
17 Physician or Supplier Agreement, [https://www.cms.gov/Medicare/CMS-Forms/CMS-](https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/Downloads/CMS460.pdf)  
18 [Forms/Downloads/CMS460.pdf](https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/Downloads/CMS460.pdf); 42 C.F.R. § 431.107 (requiring a provider agreement for  
19 Medicaid providers). Congress has also made clear that “funds available” to the IHS “may  
20 be expended only for costs directly attributable to contracts” under the ISDEAA, and “no  
21 funds ... shall be available” for “indirect costs associated with any contract, grant,  
22 cooperative agreement, self-governance compact, or funding agreement entered into  
23 between” a tribal contractor and “any entity” other than IHS. 25 U.S.C. § 5326. The  
24 disputed costs at issue in Count II of the Complaint are allocable to Plaintiff’s expenditure  
25 of non-IHS funds obtained through Plaintiff’s agreements with non-IHS entities. Section  
26 5326 thus prohibits IHS from paying (and Plaintiff from using) IHS funds for the direct  
27 and indirect costs associated with these non-IHS entities.

28 As Defendants previously noted, Mot. at 13, and Plaintiff acknowledges, Pl. Opp’n

1 at 23, Congress adopted § 5326 in response to the Tenth Circuit’s decision in *Ramah*  
2 *Navajo Chapter v. Lujan*, 112 F.3d 1455, 1463 (10th Cir. 1997), that effectively required  
3 the Bureau of Indian Affairs (BIA) to pay CSC on programs funded by the U.S. Department  
4 of Justice through the State of New Mexico. Plaintiff’s interpretation of § 5325’s funding  
5 provisions would restore the Tenth Circuit’s result over Congress’s clear refutation of that  
6 result. Just as Plaintiff argues that revenue generated under agreements with third-party  
7 payers such as Medicare and Medicaid is attributable to its contracts with IHS, so the  
8 plaintiff in *Ramah Navajo Chapter* could have argued that its expenditures for criminal  
9 justice and juvenile offender restitution programs were attributable to its contract with BIA  
10 for law enforcement. Pl. Opp’n at 23. This broad interpretation of contracted programs  
11 contradicts the plain meaning of § 5326, which Congress enacted to overrule the Tenth  
12 Circuit’s construction of § 5325(a). As another court recognized after analyzing Congress’  
13 addition of § 5326, “funding indirect costs in a *pro rata* amount constitutes a ‘reasonable’  
14 amount of funding for purposes of § [5325](a).” *Tunica-Biloxi Tribe of La. v. United*  
15 *States*, 577 F. Supp. 2d 382, 425 (D.D.C. 2008); *see also Seminole Tribe of Fla. v. Azar*,  
16 376 F. Supp. 3d 100, 109-11 (D.D.C. 2019).

17 IHS is prohibited from providing CSC funding for costs associated with third-party  
18 payers, and Plaintiff may already be collecting direct and indirect costs from those third-  
19 party payers. Thus, even if costs associated with third-party payers were otherwise eligible  
20 as CSC, and they are not, by recovering all its costs from the third-party payers, Plaintiff  
21 has no unfunded costs that would be eligible CSC under the ISDEAA. *See* 25 U.S.C. §  
22 5325(a)(2), (3) (defining CSC to exclude activities that are otherwise funded). For  
23 instance, if Plaintiff is enrolled in Medicare and seeks reimbursement for outpatient  
24 services provided, it may receive reimbursement as a Federally-Qualified Health Center  
25 (“FQHC”). *See* 42 U.S.C. § 1395x(aa)(4). FQHCs are reimbursed based on a Prospective  
26 Payment System (“PPS”). *See* 42 C.F.R. § 405.2462(c). Tribal health clinics may also  
27 receive reimbursement as Rural Health Clinics (“RHCs”). *See* 42 U.S.C. 1395x(aa)(2).  
28 RHCs are reimbursed based on an all-inclusive rate, which is based on reasonable cost

1 principles. *See* 42 C.F.R. § 405.2462(a)-(b). Under either reimbursement system,  
2 Medicare payments include reimbursement for direct and indirect costs associated with  
3 providing Medicare services. *See generally* Ctrs. for Medicare & Medicaid Servs.  
4 (“CMS”), Provider Reimbursement Manual, Ch. 21 § 2102.1 (“Reasonable cost takes into  
5 account both direct and indirect costs of providers .... The objective is that under the  
6 methods of determining costs, the costs for individuals covered by the program are not  
7 borne by others”); *see also, e.g., id.* § 2122.3 (determining that employment-related taxes  
8 are a type of reimbursable administrative costs).

9 Likewise, Medicaid programs compensate providers for their direct and indirect  
10 costs. *See e.g.,* 42 U.S.C. § 1396a(bb) (requiring state Medicaid programs to fully  
11 compensate providers for their reasonable costs). Depending on the system of Medicaid  
12 reimbursements in which Plaintiff participates, Plaintiff enjoys several layers of protection  
13 to ensure maximum reimbursement for providing Medicaid services. *See* CMS,  
14 Comparing Reimbursement Rates, [www.cms.gov/Outreach-and-Education/American-  
15 Indian-Alaska-Native/AIAN/LTSS-TA-Center/info/understand-the-reimbursement-  
16 process.html](http://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/LTSS-TA-Center/info/understand-the-reimbursement-process.html) (identifying numerous rates available to ISDEAA contractors). Moreover, as  
17 a tribal health care provider, Plaintiff is even entitled to “wrap-around” payments from  
18 States in the event that Medicaid managed care plans do not pay the full rate to which  
19 Plaintiff is otherwise entitled. *See* 42 U.S.C. § 1396u-2(h)(2)(C)(ii). Accordingly, Plaintiff  
20 recovered direct and indirect costs for any care it provided to Medicaid-eligible patients.

21 Additionally, for any services provided to ineligible persons, Plaintiff must obtain  
22 full payment from the patients, their insurance, etc., for the actual costs of the health  
23 services provided. *See* Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125  
24 Stat. 786, 1029 (2011) (“non-Indian patients may be extended health care at all tribally  
25 administered or [IHS] facilities, subject to charges”). Thus, although ISDEAA contractors  
26 may provide health care services to ineligible persons, Congress expressly requires that the  
27 contractors recover their costs from those ineligible persons rather than IHS. *See id.*

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**D. The ISDEAA Authorized Plaintiff to Assume All IHS Administrative Functions that Support Contracted Programs.**

Plaintiff acknowledges that IHS carries out administrative support for its healthcare programs through the “Direct Operations” component of its budget. Pl. Opp’n at 6, 21-22. But Plaintiff’s suggestion that it is deprived of the benefit of this centralized administrative structure, and therefore cannot offer the same level of services as IHS, is misplaced. In fact, the ISDEAA authorizes Plaintiff to contract for IHS’s administrative functions and a corresponding share of the budget, 25 U.S.C. § 5325(a)(1), and excludes such transferred activities from the definition of CSC. *Id.* § 5325(a)(2)(A)–(B). Thus, while Plaintiff can contract for the share of IHS’s administrative functions that support its programs, IHS cannot fund an expansion to those administrative functions using CSC.

**III. CONCLUSION**

For the reasons stated herein and in their Motion to Dismiss, defendants ask the Court to grant their Motion to Dismiss Count II of Plaintiff’s Complaint.

RESPECTFULLY SUBMITTED this 3rd day of April, 2020.

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 3, 2020, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants in this case:

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