[NOT YET SCHEDULED FOR ORAL ARGUMENT]

NO. 19-5299

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SWINOMISH INDIAN TRIBAL COMMUNITY,

Appellant,

v.

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

Appellees.

REPLY BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CASE NO. 18-CV-1156
JUDGE DABNEY L. FRIEDRICH

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GLOSSARY OF ACRONYMS

"CSC" means contract support costs.

"IHS" means the Indian Health Service, an agency of the Department of Health and Human Services.

SUMMARY OF ARGUMENT

The Swinomish Indian Tribal Community (the "Tribe") is entitled to Contract Support Costs ("CSC") under the Self-Determination Act[1] to cover the expenses it incurs operating the Federal program that the Tribe compacted, including the earning, collection, and expenditure of reimbursements from Medicare, Medicaid, and other third parties. *See* 25 U.S.C. § 5388(j) (terming those revenues "program income"). Defendants, collectively the Indian Health Service ("IHS"), refuse to pay CSC to support that essential part of the Federal program.

IHS does not defend the District Court's opinion. IHS virtually ignores the operative language of the Act, which mandates that IHS pay CSC on direct program and administrative expenses incurred in connection with the "operation of the Federal program" that is the subject of the Compact. 25 U.S.C. §§ 5325(a)(3)(A)(i), (ii). Rather, IHS contends that it must pay CSC to support only the part of the compacted program funded from IHS appropriations, terming that funding the "Secretarial amount." But the Act, which must be construed in favor of the Tribe, does not bear IHS's construction.

Because its statutory argument is weak, IHS contends that the Tribe's claim is precluded by its Funding Agreement and the IHS Manual. IHS ignores that both of

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[1] Indian Self-Determination and Education Assistance Act of 1975, as amended, 25 U.S.C. §§ 5301-5423 (the "Self-Determination Act" or the "Act").

those documents yield to the Act in the event of any inconsistency. Further, those documents provide that the amount of CSC negotiated at the beginning of the year is an "estimate" to be adjusted based on "tribal CSC need."

Next, IHS argues that payment of CSC on program income would result in prohibited funding duplication because (it assumes) some part of payments from Medicare and Medicaid includes overhead and, to that extent, would duplicate the "Secretarial amount." This argument has multiple flaws. The Act prohibits only CSC payments that are already provided in the "Secretarial amount," and IHS insists that program income is entirely distinct from those appropriations. Moreover, the Indian Health Care Improvement Act (the "Improvement Act") prohibits IHS from using program income for general overhead, and requiring tribes to do so would violate the Self-Determination Act's principle of parity between IHS and the tribes that even IHS acknowledges. Finally, IHS has the statutory burden to prove the existence of specific duplications by clear and convincing evidence, but it failed to prove any.

IHS next resorts to an argument that the District Court did not address or adopt – that 25 U.S.C. § 5326 bars the payment of CSC on program income. But § 5326 is inapplicable to subchapter V compacts and would apply only if the Tribe had related contracts with other agencies that failed to contribute a fair share of CSC. IHS has not identified any such contracts, nor does the record support such an argument.

Finally, IHS quibbles with the Tribe's damages calculations. It challenges two items the Tribe included as program income (the base figure for calculating *indirect* CSC), but the record supports their inclusion. IHS also contests the Tribe's method of proving the amount of additional *direct* CSC to which it is entitled, but the Tribe's approach comports with applicable law.

ARGUMENT

I. THE "FEDERAL PROGRAM" FOR WHICH CSC MUST BE PAID INCLUDES "PROGRAM INCOME."

IHS's failure to address the Tribe's central arguments is telling. IHS does not confront the Tribe's argument that, regardless of whether program income is part of the "Secretarial amount," the Act mandates payment of CSC to cover costs related to the entire "Federal program" operated by a tribe, which includes the earning, collection, and spending of reimbursements from Medicare, Medicaid, and other third parties. Nor does IHS address the Tribe's showing that the underpinning of the District Court's opinion – its selective definition of the word "supplemental" – was erroneous. *See* Tr. Br. 38-41. And IHS does not deny that its construction of the Act forces the Tribe to subsidize the Federal program it has taken over, in direct contradiction of the Act's mandate of full payment of CSC.

A. The Act Ties CSC to the Total Costs of the "Federal Program," Not to the Amount of Funding Provided by IHS from Appropriations.

IHS is required to pay CSC to cover "direct program expenses for the operation of the *Federal program* that is the subject of the contract" and overhead expenses incurred "in connection with the operation of the *Federal program*, function, service or activity pursuant to the contract." 25 U.S.C. § 5325(a)(3)(A)(i), (ii) (emphases added). The Act ties CSC to the total costs of the "Federal program" that a tribe operates, *not* to the amount of funding provided by IHS from appropriations under 25 U.S.C. § 5325(a)(1), as IHS contends. Had Congress wanted to restrict a tribe's CSC entitlement to only the part of the Federal program funded by money "apportioned to the Indian Health Service" or "provided to the Office of Tribal Self-Governance" (phrases used in 25 U.S.C. § 5393) and "allocated pursuant to [IHS's] discretion," IHS Br. 18,[2] it would have said so. IHS avoids grappling with the controlling statutory language.

The "Federal program" at issue includes the collection and expenditure of reimbursements from third parties, including Medicaid and Medicare and, in this case, the Upper Skagit Tribe, for whose members the Tribe provided medical services

[2] *Cf. Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1344, 1347 (D.C. Cir. 1996) (Congress "left the Secretary with as little discretion as feasible" in funding matters under the Act).

under the Compact. *See* JA 48-49 (Funding Agreement § 2(B)(iii), (iv)), 202 ¶ 5; *see generally* JA 40 (Compact Art. III § 5 (concerning the earning and spending of third-party revenues), 49 (Funding Agreement § 2(B)(ix) (requiring the Tribe to "maintain a system of third party payment collection for services provided to patients"). These third-party revenues are part of the Federal program the Tribe operates; Congress termed them "program income." 25 U.S.C. § 5388(j); *see* Tr. Br. 27.

By requiring that tribal (and IHS) health programs be the "payers of last resort," Congress required that the Tribe seek reimbursements from Medicare, Medicaid, and other entities (including the Upper Skagit Tribe) for the costs of operating the program whenever possible. 25 U.S.C. § 1623(b);[3] *Navajo Health Fdn.- Sage Mem. Hosp., Inc. v. Burwell* ("*Sage Hospital*"), 263 F. Supp. 3d 1083, 1165 (D.N.M. 2016), *app. dism'd*, No. 18-2043, 2018 WL 4520349 (10th Cir. July 11, 2018). The Compact and the Funding Agreement effectuate this statutory requirement by requiring the Tribe to collect and properly use third-party reimbursements. JA 40, 49.

IHS dismisses the requirements of § 1623 because it is "not even a part of the

[3] 25 U.S.C. § 1623(b) mandates that "Health programs operated by the Indian Health Service [and] Indian tribes . . . (as those terms are defined in section 1603 of this title) shall be the payer of last resort for services." Subsections 1603(14) and 1603(25) define "Indian tribe" and "tribal health program" to encompass the Swinomish Tribe and its compacted healthcare program.

ISDEAA [the Self-Determination Act]." IHS Br. 23. But § 1623 is federal law that the Tribe must obey. And IHS does not dispute *Sage Hospital*'s ruling and the Tribe's argument that the Improvement Act (of which § 1623 is a part) and the Self-Determination Act are *in pari materia* and therefore must read as one law. Tr. Br. 43.

The Tribe compacted the Federal program that IHS had formerly operated at Swinomish. IHS had been required to and did collect and spend program income in support of the program. IHS admits that such third-party revenue is essential to the operation of the Federal healthcare program. *E.g.*, IHS Manual § 5-1.1.B ("The revenue generated from third-party billing and collections plays a major role in augmenting and enhancing the health services that are provided to the [Indian] community. Safeguarding this revenue stream . . . is vital to IHS health care programs."). The Tribe assumed the same obligations with respect to program income by entering into the Compact and the Funding Agreement.

Thus, the Tribe does not have an option whether to earn, collect, and spend third-party revenues, as IHS repeatedly contends. IHS Br. 7, 18, 23. The Improvement Act requires that either IHS or a tribe, as the case may be, earn, collect, and spend program income. The only "option" is deciding who will do so, and IHS and the Tribe decided – by entering into the Compact and Funding Agreement – that the Tribe would. JA 40, 49. So even assuming *arguendo* that the Tribe did have an

"option" to earn and collect third-party revenue, once the Tribe exercised that "option," the plain language of 25 U.S.C. § 5325(a)(3)(A) would still entitle it to CSC for undertaking those activities.

Moreover, the CSC provisions, like the rest of the Self-Determination Act, must "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), and for IHS to prevail, it "must demonstrate that its reading is clearly required by the statutory language," *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 194 (2012).[4] Read naturally, § 5325(a)(2) and (3) show that CSC must be paid with respect to program income. But even if those provisions were less clear, they would still have to be construed in the Tribe's favor. There is no way the Act can be construed consistent with § 5392(f) to exclude program income from IHS's obligation to provide CSC.

[4] IHS's view that the application of the Indian canon of construction in this case is merely permissible, IHS Br. 16, and that "[t]he Indian canon of construction . . . is not determinative of how to read the ISDEAA," *id*. 17, is incorrect. IHS's reliance on *Chickasaw Nation v. United States*, 534 U.S. 84 (2001), is misplaced because *Chickasaw* involved a statute of general applicability that did not mandate application of the Indian canon and, indeed, was subject to its own long-standing canon requiring tax exemptions to be clearly expressed. *Id*. at 95.

B. Even if CSC Were Owed Only on the § 5325(a)(1) Amount, That Would Still Include Program Income.

Even if IHS were correct that the amount of CSC is tied to the amount provided under § 5325(a)(1), the Tribe would still be entitled to the additional CSC it seeks. Section 5325(a)(1) provides that "[t]he amount of funds provided under the terms of self-determination contracts . . . shall not be less than the . . . Secretary would have otherwise provided for the operation of the programs or portions thereof . . ." So, under IHS's theory, the focus of the inquiry is the amount that the "Secretary would have otherwise provided" for the operation of the Federal program compacted by the Tribe. This amount includes program income.

Several federal district courts have so ruled. *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 543-44 (D.D.C. 2014) ("the applicable funding level for a contract . . . is determined based on what the Secretary would have spent, not on the source of the funds the Secretary uses"), *app. dism'd*, No. 15-5076, 2015 WL 5237730 (D.C. Cir Aug. 14, 2015); *Sage Hospital*, 263 F. Supp. 3d at 1165-68 (third-party revenue must be included in the CSC calculation); *Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 103-04 (D.D.C. 2019) (§ 5325(a)(1) "ensures that the tribes receive funding equal to what the government would have *spent* if it provided the services") (emphasis added); *Cook Inlet Tribal Council v. Mandregan*, 348 F.

Supp. 3d 1, 6 (D.D.C. 2018) (Secretarial amount is "'the amount that the IHS would have *spent* for costs associated with its programs'" under the Act) (quoting IHS; emphasis added), *app. filed*, No. 19-5005 (D. C. Cir. Jan. 17, 2019), *order vac. in part on reconsideration*, 2019 WL 3816573 (D.D.C. Aug. 14, 2019); *Fort McDermitt Paiute and Shoshone Tribe v. Azar*, No. 17-837 (TJK), 2019 WL 4711401 at *5-*8 (D.D.C. Sept. 26, 2019) (third-party revenues are part of the direct program costs under § 5325(a)(1)), *app. filed*, No. 19-5336 (D.C. Cir. Nov. 27, 2019); *see also* H. R. Rep. No. 100-393 (Oct. 26, 1987) at 7 (funding should be "determin[ed by] the amount of funds *expended* on such programs in the previous fiscal year") (emphasis added).[5]

In *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005), the Supreme Court discussed § 5325(a)(1) and stated that the Government must pay tribal contractors "[a]dministrative expenses [that] include (1) the amount that the agency would have *spent* 'for the operation of the federal program.'" *Id*. at 634 (quoting § 5325(a)(1))(emphasis added). The Court paraphrased the provision and substituted "spent" for "provided" immediately before quoting § 5325(a)(1). IHS characterizes

[5] IHS criticizes the Tribe for citing two of these cases because they do not deal directly with CSC, IHS Br. 30, but the Tribe cited them for a different reason, to show that the "Federal program" on which CSC must be paid includes program income, *see* Tr. Br. 31-33, 36-37.

this as a Supreme Court colloquialism, IHS Br. 31, but it was not inadvertent and cannot be so easily dismissed, *see, e.g.*, *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996); *Sierra Club v. EPA*, 322 F. 3d 718, 724 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004).

IHS obtains money from Congress and provides it to fund the Federal program. IHS also obtains program income from third-party payers and provides it to fund the Federal program. Those appropriations and third-party revenues are the funds the "Secretary would have otherwise provided for the operation of the programs" to which CSC must be added under § 5325(a)(1) and (2).

II. NEITHER THE FUNDING AGREEMENT NOR THE IHS MANUAL BARS THE TRIBE'S CLAIM FOR ADDITIONAL CSC.

Lacking a sound argument based on statutory text, IHS attempts to shift the focus to the Funding Agreement and the IHS Manual. IHS contends that the amounts set forth in the Funding Agreement are binding on the Tribe and that "the statute does not override the Funding Agreement to which plaintiff agreed." IHS Br. 24 (heading; bolding and capitalization omitted). IHS's misdirection fails because it ignores the relevant provisions of the Funding Agreement and the Manual.

The Tribe is not subject to any IHS manual provision or rule unless the Tribe expressly agrees otherwise. 25 U.S.C. § 5397(e); JA 38 (Compact Art. II § 11(a)).

The Tribe did agree to calculate CSC in accordance with the Act and "IHS CSC Policy (Indian Health Manual - Part 6, Chapter 3) or its successor, *to the extent it is consistent with the ISDEAA* . . ." JA 51-52 (emphasis added); IHS Br. 20. Likewise, the section of the Funding Agreement concerning CSC states that "[n]othing in this provision shall be construed to waive any statutory claim that the compactor may assert it is entitled to under the ISDEAA, as amended." JA 52. Therefore, if application of the Manual would result in the Tribe being reimbursed its CSC for only a part of the compacted Federal program, the Manual would not control because 25 U.S.C. § 5325(a)(2) and (3) require CSC to be paid on the entire "Federal program."

In addition, the Funding Agreement provides that the negotiated CSC is not final but will be adjusted to reflect "tribal CSC need." JA 52 (Funding Agreement § 6); IHS Br. 11, 20. The Manual provides that indirect CSC is negotiated "in advance of the contract year" but is only an "estimate of the awardee's IDC [indirect CSC] need." Manual § 6-3.2(E)(1)(a). The Tribe has demonstrated additional "tribal CSC need" – its operation of the compacted Federal program in 2010 resulted in a $468,952 shortfall that will be only partially reduced by the $245,867 of CSC sought in this suit.

IHS contends that the Manual requires that indirect CSC be determined by applying the Tribe's 31.91% rate to the "direct cost base," which the Manual defines

as "[t]he eligible funding in the Secretarial amount" plus the direct CSC amount. IHS Br. 22 (quoting Manual § 6-3.2(E)(1)(a)(i)(a)). But the Tribe's Indirect Cost Negotiation Agreement defines the "base" as the "[t]otal direct costs, less capital expenditures and passthrough funds,"[6] JA 58, and the Act defines "direct program costs" as the "costs that can be identified specifically with a particular contract objective." 25 U.S.C. § 5304(c). Thus, using these definitions, the Tribe's program income *is* in the direct cost base. But even if it were not, IHS's self-serving Manual provisions must yield to § 5325(a)(2) and (3).

III. THE DUPLICATION PROHIBITION IN 25 U.S.C. § 5325(a)(3)(A) IS INAPPLICABLE.

IHS contends that it need not pay CSC to support the Tribe's earning and spending of program income because at least *some* part of Medicare and Medicaid payments should be assigned to overhead and, to that extent, payment of CSC to the

[6] The Agreement also defines "passthrough funds" as "normally defined as major subcontracts, payments to participants, stipends to eligible recipients, and subgrants, all of which require minimal administrative effort." JA 58; *see SUFI Network Services, Inc. v. United States*, 785 F.3d 585, 594 (Fed. Cir. 2015). IHS's notion that the Tribe's earning, collection, and expenditure of payments from Medicare and Medicaid involves minimal administrative effort and might be analogized to "passthrough funds," IHS Br. 30, is simply fanciful. *See also* H. R. Rep. No. 100-393 (Oct. 26, 1987) at 7 ("The Committee believes that the Federal agencies must pay contractors for the administrative costs they incur in operating all programs contracted . . . even if such programs are referred to as 'pass-through' programs.").

Tribe based on program income would be duplicative. IHS misunderstands both the meaning of the duplication prohibition and its burden of proof under the Act, and its position would violate the central tenet of the Self-Determination Act – that tribes be provided with at least the amount of federal funding that the Secretary would obtain and spend to provide and enhance health care to tribal members.

IHS misunderstands the meaning of the duplication prohibition of § 5325(a)(3), which provides that CSC "funding shall not duplicate any funding provided under subsection (a)(1) of this section." The limited purpose of this prohibition was explained by Rep. Richardson on behalf of the House Committee that crafted it: "In section 102(14), the Amendment adds language to assure against any inadvertent double payment of contract support costs duplicative of the Secretarial amount already included in the contract. The Committee wishes to make clear that by adding a new paragraph (3) [25 U.S.C. § 5325(a)(3)], the Congress is not creating a third funding category in addition to direct and contract support costs." 140 Cong. Rec. H11142 (daily ed. Oct. 6, 1994).[7] The Tribe does not seek any "third category" of funding or any funds already received by the Tribe in the lump sum amount pursuant

[7] The legislative history cited by at page 4 of IHS's brief concludes with the following, which IHS elides: "In the absence of section 106(a)(2), as amended [now § 5325(a)(2)], a tribe would be compelled to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid." 140 Cong. Rec. H11144. But that is precisely the result IHS seeks. *See* Tr. Br. 17, 42.

to the Funding Agreement. Rather, the Tribe seeks direct and indirect CSC on its earning and expenditure of program income. Therefore, the Tribe's request for CSC on program income does not implicate the duplication prohibition.

Basing its duplication argument on the erroneous proposition that the Tribe has the "burden of proving its position under the law," IHS Br. 9, IHS claims victory because the Tribe "cites no evidence that its third-party revenues fail to cover any costs associated with the expenditures of those revenues," *id.* 26. IHS overlooks 25 U.S.C. § 5398, which explicitly places on *IHS* the burden to demonstrate the existence and amount of any prohibited duplicative funding by "clear and convincing evidence." *See* Tr. Br. 50-52. To show prohibited duplication, IHS has the burden to demonstrate that it already paid for a "specific, individuated activity" for which the Tribe seeks CSC. *See Sage Hospital*, 263 F. Supp. 3d at 1177-78. Here, IHS merely asserts that Medicare and Medicaid payments include some unquantified amount for overhead. IHS's duplication defense fails to meet the Act's burden of proof.

IHS's argument is also inconsistent with § 5325(a)(1) and IHS's own practices. By law, IHS does not use any program income that it receives from Medicare or Medicaid to pay overhead costs; instead, it *must* use that income either for facilities improvements or for reducing "health resource deficiencies." 25 U.S.C. § 1641(c)(1). The overhead costs incurred by IHS for its operations, whether the funding comes

from appropriations or program income, are reimbursed from a separate budget component. *Amici* Br. 22. IHS's argument thus violates the requirement that the amount of funds received by the tribes "shall not be less than the . . . Secretary would have otherwise provided," 25 U.S.C. § 5325(a)(1), because the Tribe is not provided with the overhead needed to support its program income while IHS is provided that money from a separate fund and is able to use all of its program income for enhanced healthcare, *see* 25 U.S.C. § 5325(a)(2)(B) (CSC shall be paid for activities undertaken by tribes that "are provided by the Secretary in support of the contracted program from resources other than those under contract").

Notably, IHS's duplication argument contradicts its main argument that third-party revenue can never be a part of the "Secretarial amount." But any overhead component included in Medicare and Medicaid payments would violate the duplication prohibition only if those amounts *are* considered to be part of the so-called "Secretarial amount" already provided to the Tribe under Section 5325(a)(1). *See* 140 Cong. Rec. H11142. IHS cannot have it both ways. If IHS were correct in its main argument that program income is entirely separate from what it terms the "Secretarial amount," there could be no violation of the duplication prohibition.[8]

[8] If, on the other hand, program income *is* determined to be a part of the § 5325(a)(1) amount, as the Tribe argues, and if CSC on program income were somehow deemed a "third funding category," 140 Cong. Rec. H11142, the Tribe would still prevail. As discussed

IV. 25 U.S.C. § 5326 IS INAPPLICABLE TO A SUBCHAPTER V TRIBE WITH ONLY ONE RELEVANT CONTRACT.

IHS also raises an argument in this Court that the court below did not address or adopt. IHS argues that 25 U.S.C. § 5326 relieves it of the obligation to provide CSC to cover costs associated with the Tribe's earning and expenditure of program income. IHS contends that the Tribe "cannot account for this provision." IHS Br. 33. Once again, IHS is wrong.

Section 5326 appears in subchapter I of the Self-Determination Act. With enumerated exceptions that do not include § 5326, the provisions of subchapter I do not apply to subchapter V funding agreements unless the Tribe so chooses. 25 U.S.C. § 5396(a), (b). The Tribe chose to include in its Funding Agreement some provisions of subchapter I, but not § 5326. JA 54 (Funding Agreement § 13). Thus, Section 5326 does not apply.

Even if § 5326 applied to the Tribe's Funding Agreement, the section is not implicated by the facts of this case. Section 5326 provides that funds made available to IHS for CSC "may be expended only for costs directly attributable to . . . compacts pursuant to the Indian Self-Determination Act and no funds appropriated by this or any other Act shall be available for any [CSC] associated with any . . . compact or

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above, the burden is on IHS to establish the existence and amount of any particular prohibited duplication and IHS failed to do so.

funding agreement entered into between an Indian tribe . . . and any entity other than the [IHS]." Congress added this limitation to subchapter I in response to *Ramah Navajo Chapter v. Lujan* ("*Lujan*"), 112 F.3d 1455 (10th Cir. 1997). *Lujan* had ruled that the Bureau of Indian Affairs had to augment its CSC support to make up for the failure of *other* federal and state agencies (the New Mexico criminal justice and juvenile offender restitution programs funded by the Department of Justice) to pay *their* share of indirect costs. *Id.* at 1458-59, 1464.

In contrast, the program income for which the Tribe seeks CSC is "directly attributable" to its Compact and Funding Agreement with IHS. As IHS asserts, it is an "obvious principle that a tribal contractor cannot use program income for any purpose other than carrying out the contract," IHS Br. 28, and it is uncontroverted that the Tribe used all of its third-party revenues for proper healthcare purposes, JA 203 ¶ 7, 206 ¶ 8(B), 174. In this case, there are no other agencies and no other contracts to which the costs of earning and expending this program income could be allocated. Therefore, the case cited by IHS, *Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382 (D.D.C. 2008), is inapposite because it rejected a tribe's attempt to require IHS to pay CSC attributable to "non-IHS" contracts. *See id.* at

417-22; *accord Seminole Tribe of Fla.*, 376 F. Supp. 3d at 109.[9]

The Tribe has only one relevant compact. It is with IHS. The Tribe's request for CSC to support the entire Federal program it compacted does not involve any other contract or any other agency. 25 U.S.C. § 5326 is not implicated in any way.

V. THE TRIBE'S DAMAGES COMPUTATION IS SUFFICIENT.

A. The Tribe's *Indirect* Cost Base Properly Includes Receipts from the Upper Skagit Tribe and Book Sales.

IHS does not challenge the Tribe's manner of computing the indirect CSC it is owed, *i.e.*, by applying the agreed-upon indirect cost rate of 31.91% to program income. *See* IHS Br. 22. Percentage calculations like this are necessary and reasonable expedients. *See* 2 C.F.R. part 200 App. VII ¶ (A)(1), (3) (indirect costs "cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved" and "are normally charged to Federal awards by the use of an indirect cost rate"). Rather, IHS contends that program income should not be included in the cost base to which the indirect cost rate is applied, but,

[9] IHS criticizes the *Sage Hospital* court for not considering § 5326, IHS Br. 33, but it did. 263 F. Supp. 3d at 1097-98 (referring to *Tunica* and § 5326 by its old cite, 25 U.S.C. § 450j-2). However, the tribal organization in that case also had only one relevant contract with IHS, did not use the percentage method of calculating CSC but rather agreed with IHS on specific categories of costs that would qualify for CSC, and had no contracts with other federal or state agencies at issue. Section 5326 was therefore not relevant to the outcome in *Sage Hospital*.

for reasons already discussed, that argument fails.

IHS challenges two specific items that the Tribe included as program income: reimbursements for medical and dental services provided to the Upper Skagit Tribe and sales of a book the Tribe produced. IHS Br. 21-22. IHS offers no argument or authority for its position. *Id.* The record supports the Tribe.

The Tribe received a total of $79,991.44 from the Upper Skagit Tribe as reimbursement for the Tribe's delivery of health care services to Upper Skagit members. The Tribe was required to provide those services under the Compact. JA 202 ¶ 5; *see* JA 48-49 (Funding Agreement requires listed medical services to be provided to "eligible individuals,"[10] including providing a model diabetes project for the Upper Skagit Tribe). The payments from the Upper Skagit Tribe "resulted from an oral government-to-government negotiation based on what the [two tribes] believed was fair to compensate the Swinomish Tribe for its provision of health services to Upper Skagit patients." JA 202 ¶ 5. There is no basis for differentiating the payments for health care services provided under the Compact to members of the Upper Skagit Tribe from payments for services provided to persons covered by

[10] An "eligible individual" is a person eligible to receive services from IHS, generally an American Indian or Alaska Native, but also certain non-Indians with familial relationships with Indians. *See* Manual § 2-1.2(A), (B). A member of the Upper Skagit Tribe is therefore an "eligible individual" required to be served under the Funding Agreement.

Medicare, Medicaid, or other third parties. *See* 25 U.S.C. § 5388(j) (treating equally "[a]ll Medicare, Medicaid, or other program income").

The book sales of $2,542.25 assailed by IHS are receipts from one book published by the Tribe to enhance the mental health status of tribal people. The book, *A Gathering of Wisdoms: Tribal Mental Health, a Cultural Perspective*, "represents a collaboration by tribal mental health workers, tribal elders, a psychologist, a psychiatrist, and a community health administrator to gather knowledge regarding the aspects of culturally competent mental health care for Native Americans." JA 202-03 ¶ 6. The Tribe paid for the publication of this teaching tool, and the revenues from the book sales did not cover the publication costs. The Tribe's publication and sale of the book conforms to the Funding Agreement, requiring the Tribe to "provide . . . patient and community health education" and social work/mental health services to tribal members. JA 49 (Funding Agreement § 2(B)(vi), (vii)).

The Tribe's revenues for providing health care services to eligible individuals of the Upper Skagit Tribe and from its publication of the mental health book are program income. The receipts from both the Upper Skagit Tribe and from these book sales were reported to IHS in the Tribe's audit report, without objection from IHS. JA 202 ¶¶ 5, 6; JA 174; Tr. Br. 28. IHS's contention regarding the revenues from providing health services to members of the Upper Skagit Tribe and producing the

mental health book is without merit, and the Act provides that IHS must pay CSC the Tribe incurred with respect to this program income. 25 U.S.C. § 5325(a)(2), (3).

B. The Tribe's Calculation of *Direct* CSC on Program Income Is Reasonable.

Finally, the Tribe bases its claim for direct CSC on a percentage calculation. *See, e.g.*, Tr. Br. 16. IHS correctly observes that direct CSC is not *negotiated* on a percentage basis but on a line-item basis. IHS Br. 21. From that premise, IHS argues that the Tribe "should be held to the [direct CSC] figure it negotiated, unless it can demonstrate a change falling within the terms of the contract." *Id*. But there is no requirement that the Tribe prove its damages concerning direct CSC in the same manner as it would negotiate a particular amount of direct CSC for purposes of a Funding Agreement. Rather, the amount of damages for both direct and indirect costs may be proved "by any available and reasonable technique." *Kansas Gas & Elec. Co. v. United States*, 685 F.3d 1361, 1369 (Fed. Cir. 2012).

The Tribe's use of the same ratio of direct CSC to direct program costs for computing direct CSC owed on program income as for the operation of the majority of the Federal program is reasonable and is the only practicable method available. IHS's view that the Tribe should be required to itemize its additional direct costs, IHS Br. 21, ignores the fact that "[t]he Tribe runs a single, unified healthcare program. Clinic personnel are not assigned to see particular patients or provide particular

services on the basis of a funding source for the clinic. The Tribe's clinics do not have health providers who provide only services funded by third-party revenues." JA 202 ¶ 4.

The Tribe met its burden to show with reasonable certainty that it was damaged and met its duty to show that its damages are not based on speculation. The Tribe took the direct CSC figure it negotiated on a line-item basis and calculated its negotiated direct CSC figure as a percentage of total direct program costs and then applied that percentage to its program income to calculate the amount of additional direct CSC to which it is entitled. This approach is both reasonable and proper. Damages "need not be ascertainable with absolute exactness or mathematical precision." *See, e.g., Arkansas Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1379 (Fed. Cir. 2013) (citations and internal quotation marks omitted).

The Tribe's approach is similar to the approach taken to determine damages for the government's failure to pay indirect overhead expenses in *Energy Nw. v. United States*, 641 F.3d 1300 (Fed. Cir. 2011). There, the government appealed an award of damages for overhead incurred when plaintiff undertook mitigation activities after the government breached a contract. The government argued that plaintiff had failed to prove that its overhead costs actually increased as a result of the government's breach. In contrast, plaintiff contended that its mitigation activities generally were

supported by certain overhead services and estimated the percentage of those overhead costs allocable to the mitigation. The Federal Circuit ruled that this allocation adequately established both the fact and quantum of damages. *Id.* at 1309.

IHS itself employs percentage estimates as an acceptable method to calculate the amount of CSC payable to tribes. IHS calculates indirect costs associated with so-called "tribal shares"[11] by using the "80/20 Method," in which "80% of the Tribal shares amounts will be considered as part of the [Tribal] awardee's direct cost base" and "20% of the Tribal shares amounts will be considered as [indirect cost] funding." Manual § 6-3.2(E)(4)(b) & Ex. 6-3-C. Similarly, IHS calculates indirect costs associated with "Service Unit Shares"[12] based on its "97/3 Method," an analogous calculation in which 97% of Service Unit funding is deemed by IHS to be direct cost funding and 3% indirect cost funding. Manual § 6-3.2(E)(3)(b) & Ex. 6-3-E. The Tribe's percentage calculation of the direct CSC claimed is more accurate, as it is based on actual data and not the more abstract percentages IHS uses for calculating CSC.

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[11] "Tribal shares" are "an awardee's equitable share of PFSA [programs, functions, services, and activities] associated with [IHS] Area Office or Headquarters resources . . . " Manual § 6-3.1G(35).

[12] "Service Unit Shares" are "an awardee's equitable share of PFSA associated with Service Unit resources." Manual § 6-3.1G(31).

IHS does not dispute that the Tribe necessarily incurs additional personnel and other direct costs in earning and spending third-party revenues to cover a substantial amount of the healthcare services it provides under its federal compact. Nor does IHS demonstrate that the amount of the Tribe's direct CSC related to third-party revenues is proportionately less than the direct CSC that IHS agreed to pay for the rest of the compacted Federal program. Thus, the Tribe has adequately proved its damages regarding direct CSC.[13]

CONCLUSION

The judgment of the District Court should be reversed and the case remanded for an award of damages in the amount of $245,867 and a determination of attorney fees and costs owed to the Tribe.

[13] If the Court concludes otherwise with respect to direct CSC, this damages issue should be remanded to the District Court for further factual development.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Reply Brief of Appellant complies with the type-volume limitations of Fed. R. App. 32(a)(7)(B) and Circuit Rule 32(a). Excluding the Table of Contents, Table of Authorities, Glossary, Addendum of Statutes and Regulations, and counsel's Certificates, this Brief contains 5,870 words, including footnotes. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface in Corel Word Perfect X7 (2014) using Times New Roman, 14-point font.

Dated: June 12, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2020, copies of the foregoing Reply Brief of Appellant with Appellant's Supplemental Addendum were served by electronic means using the Court's CM/ECF system and by first-class U.S. Mail, postage prepaid and addressed as follows:

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