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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMIMG

NORTHERN ARAPAHO TRIBE,	)	
	)	
PLAINTIFF,	)	
	)	
v.	)	Case No. 21-cv-00037-NDF
	)	
XAVIER BECERRA, in his official capacity as Secretary, U.S. Department of Health & Human Services, et al.	)	
	)	
DEFENDANTS.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

The Northern Arapaho Tribe (Tribe) is entitled to the full amount of contract support costs (CSC) required by the Indian Self-Determination and Education Assistance Act (ISDEAA).

Defendants' motion to dismiss the complaint is based on a misreading of the statute. Pursuant to U.S.D.C.L.R 7.1, this brief sets forth the argument and authorities in opposition to the motion, which should be denied.

I. INTRODUCTION AND SUMMARY

The Northern Arapaho Tribe has assumed responsibility, under the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. 93-638, 25 U.S.C. § 5301 *et seq*., to provide health care services that the Indian Health Service (IHS) would otherwise have been obligated to provide. Carrying out this federal program, the Tribe incurs administrative and overhead costs that the ISDEAA requires be paid by the Department of Health and Human Services (HHS) as contract support costs (CSC). The ISDEAA requires full payment of CSC, but tribes have been fighting for many years with IHS and the Bureau of Indian Affairs about what that means, with the agencies attempting unsuccessfully to restrict CSC obligations in various ways. *E.g.*, *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005); *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012).

In this case, the Tribe challenges another agency attempt to narrow the ISDEAA's mandate to pay full CSC. Specifically, IHS refused to pay CSC to support the portion of the Tribe's health care program funded with third-party revenues—payments from Medicare, Medicaid, private insurers, and others. The Tribe is required by law and contract to collect these revenues, also called "program income," and to use them for additional services within the scope of the Tribe's contracts with IHS. The additional services made possible by program income generate additional administrative and overhead costs of precisely the kind that Congress required be funded by CSC. The language and logic of the ISDEAA are clear; as the Supreme Court has said, "The [ISDEAA]

specifies that the Government must pay a tribe's costs, including administrative expenses." *Cherokee Nation*, 543 U.S. at 634 (citing 25 U.S.C. § 5325(a)(1), (2)). Services funded by program income are entitled to CSC just like funds appropriated to and transferred by IHS. Defendants have not met their burden under Federal Rule of Civil Procedure (Rule) 12(b)(6), and the Court should deny their motion to dismiss.

II. LEGAL AND FACTUAL BACKGROUND

A. Disparities in Health Care Funding and Outcomes

Despite the federal trust responsibility and statutory duties, the health care services provided to tribes and their citizens have been woefully inadequate to the need, resulting in wide disparities between the health of Native Americans and that of the general United States population. The differences in mortality rates and other indicia of health between the general population and American Indians and Alaska Natives are well documented. *See, e.g.*, INDIAN HEALTH SERVICE, *Disparities* (Oct. 2019), https://www.ihs.gov/newsroom/factsheets/disparities/. These disparities fully warrant Congress's finding, in the Indian Health Care Improvement Act, that "the unmet health needs of the American Indian people are severe and the health status of the Indians is far below that of the general population of the United States." 25 U.S.C. § 1601(5).

The chronic underfunding of tribal health programs is also well documented. *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans* at 66 (Dec. 2018). To ensure that the federal funding tribes do receive goes as far as it can, Congress has established, in the ISDEAA, a statutory framework for the exercise of tribal self-determination and self-governance.

B. Self-Determination under Title I of the ISDEAA

The ISDEAA authorizes Indian tribes and tribal organizations to assume responsibility to administer programs, functions, services, and activities (PFSAs) the Secretary would otherwise be obligated to provide under federal law to American Indians and Alaska Natives. 25 U.S.C. § 5321(a)(1). The purpose of the ISDEAA is to reduce federal domination of Indian programs and promote tribal self-determination and self-governance. *See* 25 U.S.C. § 5302(b); *Cherokee Nation*, 543 U.S. at 639. The ISDEAA reflects the United States' commitment "to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." 25 U.S.C. § 5302(b).

Section 106(a)(1) of the ISDEAA establishes that the amount of funds to be provided "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract[.]" 25 U.S.C. § 5325(a)(1). The amount the Secretary otherwise would have provided to operate the program as provided in Section 106(a)(1) is commonly referred to as the "Secretarial amount." Importantly, when IHS carries out a program using funds appropriated by Congress *and* third-party revenues, a tribe that assumes that program under the ISDEAA is entitled to the full amount IHS would have provided, including third-party revenues. *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 544 (D.D.C. 2014).

C. Contract Support Costs

The ISDEAA mandates that, in addition to the Secretarial or Section 106(a)(1) amount, IHS must include a second type of funding:

> (2) There shall be added to the [Section 106(a)(1)] amount . . . contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which --
>
> (A) normally are not carried on by the respective Secretary in his direct operation of the program; or
>
> (B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

25 U.S.C. § 5325(a)(2). This dispute involves funding for both direct and indirect CSC, the administrative and overhead expenses associated with carrying out the Tribe's health care program. *See id*. at § 5325(a)(3)(A).

The U.S. Supreme Court has held—twice—that the ISDEAA requires full payment of CSC. *Salazar*, 567 U.S. at 185 ("[W]e hold that the Government must pay each tribe's contract support costs in full."); *Cherokee Nation*, 543 U.S. at 634 ("The [ISDEAA] specifies that the Government must pay a tribe's costs, including administrative expenses.").

Congress funds CSC through a separate, indefinite appropriation—"such sums as may be necessary." *E.g.*, Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat 647 (2018). The indefinite appropriation reflects the importance Congress attaches to full payment of CSC. Without CSC, tribes carrying out ISDEAA agreements would be at a disadvantage compared to tribes served directly by IHS—which does not have to prepare annual audits, pay workmen's compensation insurance, or incur many other administrative and compliance costs that tribes do. *See* S. Rep. No. 100-274, at 8–9 (1987), *as reprinted in* 1988 U.S.C.C.A.N. 2620, 2627–28; discussion *infra* pp. 14–15.

For the Tribe, as for most tribes, the full amount of indirect CSC is determined by multiplying a negotiated indirect cost rate by the amount of the direct cost base. *See Seminole*

Tribe of Fla. v. Azar, 376 F. Supp. 3d 100, 104–05 (D.D.C. 2019) (describing indirect cost rate system); *see also* 25 U.S.C. § 5325(c) (requiring annual agency reports on, *inter alia*, indirect cost rates and direct cost bases). IHS accepts the Tribe's rates. BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS (Defendants' Brief) at 5. The controversy is over the amount of the direct cost base—specifically, whether it includes expenditures on PFSAs paid for by third-party revenues within the scope of the funding agreement.

Direct CSC are expenses directly attributable to a certain PFSAs but not captured in either the Secretarial amount or the indirect cost pool, such as workers' compensation insurance or other expenses the Secretary would not have incurred. *See* 25 U.S.C. § 5325(a)(3)(A)(i).

D. Third-Party Revenues

Medicare and Medicaid reimbursement for IHS and tribally operated facilities was provided by special legislation. Title IV of the Indian Health Care Improvement Act, Pub. L. 94-437, 90 Stat. 1408 (1976) amended the Social Security Act by adding sections 1880 and 1911, 42 U.S.C. §§ 1395qq and 1396j respectively, to make IHS health care facilities, whether operated by the IHS or an Indian tribe or tribal organization, eligible for Medicare and Medicaid reimbursement. The legislative history in the House Report emphasizes that these revenues were to expand the federal-tribal programs:

> It is the intent of the Committee that any Medicare and Medicaid funds received by the Indian Health Service program be used to supplement—and not supplant—current IHS appropriations. In other words, the 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.

H.R. Rep. No. 94-1026(I), at 108 (1976) (Comm. on Interior and Insular Affairs), *reprinted in* 1976 U.S.C.C.A.N. 2652, 2746.

Given the enormous unmet health care needs in Indian country, third-party collections are critical both when IHS provides services directly and when tribes provide services under ISDEAA agreements. When IHS provides direct services to eligible beneficiaries, the PFSAs are funded not only by funds appropriated by Congress, but by third-party revenues billed to and collected from Medicare, Medicaid, the Children's Health Insurance Program, private insurers, and others. *See generally* 42 U.S.C. Ch. 7, Subchs. XVIII, XIX, XXI. Each year in its budget request to Congress, IHS estimates how much third-party revenue will be collected and available to spend on services, based on past collections. *See, e.g.*, DEP'T OF HEALTH & HUMAN SERVS., *Fiscal Year 2021 Indian Health Serv. Justification of Estimates for Appropriations Committees*, at CJ-188 (Feb. 5, 2020) (reporting that in FY 2020, IHS collected an estimated $1.194 billion from third-party insurers). "Public and private collections represent a significant portion of the IHS and Tribal health care delivery budgets." *Id*. The Indian Health Care Improvement Act requires IHS to spend third-party revenues on facility improvements or additional services. 25 U.S.C. § 1641(c)(1)(B).

By the same token, the Tribe, when carrying out PFSAs under its Contract Between the Secretary of Health and Human Services and Northern Arapaho Business Council (Contract) (Ex. A) and CY 2016 Annual Funding Agreement (AFA) (Ex. B), is required by law and contract to collect third-party revenues. Like IHS, the Tribe is required to bill responsible third parties because IHS and tribal programs are both "payer[s] of last resort." 25 U.S.C. § 1623(b). The Tribe is required by contract to collect third-party revenues as well. The Scope of Work, which is incorporated into the AFA, *see* AFA § 6, Ex. B, which itself is incorporated into the Contract, Art. VII, § 2, Ex. A, requires the Tribe to bill and collect from third parties such as Medicare and Medicaid.

> The Tribe's Business Office . . . will maintain accreditation standards in order to qualify for funds through third party-payers [sic]. Medicare and Medicaid numbers for billing purposes will be secured in order to meet the requirements of the Centers for Medicaid and Medicare Services (CMS) and Medicaid contracts with Managed Care Organizations (MCOs). Other requirements will be met for periodic renewal of accreditation or certification in order to continue to maintain eligibility for these funds.

Scope of Work, § IV.C, Ex. C.

All third-party revenue or "program income" must be, and is, expended on PFSAs included in the Tribe's AFA with IHS. Title I of the ISDEAA mandates as follows:

> The program income earned by a tribal organization in the course of carrying out a self-determination contract—
>
> (1) shall be used by the tribal organization to further the general purposes of the contract; and
>
> (2) shall not be a basis for reducing the amount of funds otherwise obligated to the contract.

25 U.S.C. § 5325(m). *See also id.* §§ 1621f(a)(1), 1641(c)(1)(B), and 1641(d)(2)(A) (requiring tribes to spend third-party revenues on health care programs).

The IHS's Indian Health Manual (IHM) acknowledges that a tribe's "Total Health Care Program" includes the portion funded by "collections from Medicare, Medicaid, and private insurance[,]" not just IHS appropriations. *Indian Health Serv.*, *Indian Health Manual* § 6-3.1G(34) (Aug. 6, 2019), https://www.ihs.gov/ihm/pc/part-6/p6c3/. It follows that this portion must be included when calculating the amount of CSC owed to the tribe. This conclusion derives

from the statute itself: the entire "Federal program"—including program income—carried out by the Tribe under the ISDEAA generates CSC requirements. *See* 25 U.S.C. § 5325(a)(3)(A)(i).[1]

III. STANDARD OF REVIEW

The resolution of Defendants' motion depends on statutory interpretation, which is a question of law, *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 573 F.3d 997, 1001 (10th Cir. 2009), that the Court reviews *de novo. United States v. Hampshire*, 95 F.3d 999, 1005 (10th Cir. 1996) The IHS decisions denying the Tribe's claims under the Contract Disputes Act are also reviewed *de novo*. 41 U.S.C. § 7104(b). When assessing a challenge under Rule 12(b)(6), as here, the court presumes that all well-pleaded allegations are true, resolves all reasonable doubts and inferences in the pleader's favor, and views the pleading in the light most favorable to the non-moving party. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The burden of proof lies with the moving party. *See Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991).

IV. RULE OF CONSTRUCTION

Statutes enacted for the benefit of Indians, such as the ISDEAA, "are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). "If the ISD[EA]A can reasonably be construed as the Tribe would have it construed, it must be construed that way. This canon of construction controls over more general rules of deference to an agency's interpretation of an

[1] Any ambiguity in the use of these terms should be resolved in favor of the Tribe. *Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243, 247 (D.D.C. 2016); *S. Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1078 (10th Cir. 2011).

ambiguous statute." *S. Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1078 (10th Cir. 2011) (internal citation omitted).

This interpretive rule is explicitly included in Title I of the ISDEAA, which provides the statutory basis for the Tribe's Contract and Annual Funding Agreement with IHS: "[E]ach provision of [the ISDEAA] and each provision of a contract or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian tribe." 25 U.S.C. § 5321(g). Referring to this rule of construction, the U.S. Supreme Court wrote that, when interpreting the ISDEAA, "[t]he Government, in effect, must demonstrate that its reading is clearly required by the statutory language." *Salazar*, 567 U.S. at 194.

V. ARGUMENT

A. The ISDEAA requires payment of CSC in support of the entire "Federal program" carried out under the contract and annual funding agreement.

Defendants' motion hinges on its contention that the ISDEAA does not require IHS to pay CSC on that portion of the Tribe's health care program funded by program income. *See* Defs.' Br. at 10–17. But health care services funded by third-party revenues are part of the "Federal program" entitled to CSC under 25 U.S.C. § 5325(a)(3)(A). The Tribe's contracts with IHS require the Tribe to bill third parties, and the resulting "program income" must, by law and contract, be used for the purposes of the IHS contract. 25 U.S.C. § 5325(m). Because these funds are "earned . . . in the course of carrying out" an ISDEAA agreement, *id.*, they cannot be excluded from the direct cost base for purposes of the CSC calculation. *Navajo Health Foundation—Sage Memorial Hospital, Inc. v. Burwell*, 263 F. Supp. 3d 1083, 1166–67 (D.N.M.

2016); *Seminole Tribe*, 376 F. Supp. 3d at 113. The history, language, and logic of the ISDEAA compel this conclusion.

Prior to the 1988 amendments, when Congress added the CSC mandate, the ISDEAA required only that the agency provide the "Secretarial" amount discussed above—the amount the Secretary would otherwise have spent in providing the services directly. 25 U.S.C. § 5325(a)(1). Congress quickly realized that this failed to compensate tribes for the full costs, particularly indirect costs, of administering the federal program. Tribes must carry out administrative activities that the Secretary does not need to carry out because they are done by other federal agencies, for example the Office of Personnel Management, the General Services Administration, the General Accountability Office, and the Department's Office of General Counsel. In addition, Tribes incur costs to carry out ISDEAA contracts that the Secretary does not incur at all when providing direct service, such as obtaining insurance, and completing annual audits under the Single Agency Audit Act, 31 U.S.C. § 7501 *et seq*. Tribes typically had to reduce services in order to cover these costs, resulting in a self-determination penalty, or use their own funds to subsidize the federal program.

> The consistent failure of federal agencies to fully fund tribal indirect costs has resulted in financial management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements . . . . It must be emphasized that tribes are operating federal programs and carrying out federal responsibilities when they operate self-determination contracts. Therefore, the Committee believes strongly that Indian tribes should not be forced to use their own financial resources to subsidize federal programs.

S. Rep. No. 100-274, at 8–9 (1987), *as reprinted in* 1988 U.S.C.C.A.N. 2620, 2627–28. To address the problem of tribes having to cannibalize Secretarial (or tribal) funding to pay the indirect costs associated with the federal program, Congress required payment of CSC, as defined in 25 U.S.C.

§ 5325(a)(2). Congress understood that the "widely accepted" indirect cost rate system would be used to calculate indirect CSC. S. Rep. No. 100-274, at 8–9 (1987), *as reprinted in* 1988 U.S.C.C.A.N. 2620, 2628; *Cherokee Nation*, 543 U.S. at 635 (noting that most CSC are indirect costs calculated by application of an indirect cost rate to funds otherwise payable to tribe) (internal citations omitted).

In the 1994 amendments, Congress added a definition clarifying that CSC includes both direct and indirect costs associated with the federal program under contract:

> The contract support costs that are eligible costs for the purposes of receiving funding under this Act shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—
>
> (i) direct program expenses **for the operation of the Federal program that is the subject of the contract**, and
>
> (ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with **the operation of the Federal program, function, service, or activity pursuant to the contract**,
>
> except that such funding shall not duplicate any funding provided under section [5325](a)(1).

25 U.S.C. § 5325(a)(3)(A) (emphasis added).

When the Tribe provides services under its ISDEAA funding agreement, it incurs indirect and direct costs related to all those services—whether funded with dollars appropriated to IHS by Congress or dollars collected by the Tribe from third parties. The statute does not exclude from the definition of CSC the portion of the federal program funded by third parties. The statute does not say, as Defendants would like, that CSC is available to reimburse only that portion of the program funded by IHS-appropriated dollars. Nor does the logic of the ISDEAA support such a rewriting of the statute. Congress added CSC to level the playing field so that tribes would not

have to bear costs that IHS, when providing direct services, either did not incur at all or were provided by another agency within or outside HHS. *See discussion supra* pp. 10–11 (discussing S. Rep. No. 100-274). Every dollar of third-party revenue expended on the federal program increases the direct cost base and the need for support services funded through the indirect cost pool. Therefore, Congress properly dictated that all such funds be included in the base for the purpose of calculating indirect CSC. *Sage Memorial*, 263 F. Supp. 3d at 1164–66 (holding that third-party funding is part of federal programming for the purpose of reimbursement under the ISDEAA); *Seminole Tribe*, 376 F. Supp. 3d at 113.

Similarly, expenditures of program income on salaries and wages increase the costs of fringe benefits typically funded by direct CSC. *See* IHM § 6-3.2D.

Strongly supporting the Tribe's reading is that program income, like program funding in the funding agreement, must be used for purposes consistent with that agreement. 25 U.S.C. § 5325(m) (program income "shall be used by the tribal organization to further the general purposes of the contract"). In fact, the IHM defines a tribe's "Total Health Care Program" to include the portion funded by "collections from Medicare, Medicaid, and private insurance," not just IHS appropriations. IHM § 6-3.1G(34). Services funded with program income generate administrative and overhead costs just like services funded with appropriated funds. They are part of the "Federal program" supported by CSC, and the statute provides no reason to treat them differently. 25 U.S.C. § 5325(a)(3).

The Tribe's reading of Section 5325 accords better with the plain meaning of "supplemental," is more consistent with the nature, purpose, and use of program income, and harmonizes Section 5388(j) better with Section 5325(a). "It is a fundamental canon of statutory

construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (internal citations and quotation marks omitted). This rule favors the Tribe's reading, but if the court finds both readings reasonable, it should defer to the Tribe's interpretation due to the rule of construction embedded in the ISDEAA itself. 25 U.S.C. § 5321(g); discussion *supra* at p. 9.

B. CSC on program income is required to place ISDEAA contractors on an equal footing with direct service tribes.

The Tribe's reading of the ISDEAA accords with its purpose, while Defendants' clashes with it by perpetuating the self-determination penalty described above. Paying CSC in support of services funded by IHS-appropriated dollars avoids part of that penalty—but not all of it. Without CSC on expenditures of program income, ISDEAA contractors remain at a disadvantage compared to direct service tribes—an outcome at odds with the language and intent of the ISDEAA.

IHS, when providing direct services, bills and collects from third-party payers such as Medicare, Medicaid, and private insurers, and uses these funds to improve facilities or provide further services. *See, e.g.*, 25 U.S.C. § 1641(c); 42 U.S.C. § 1396j; discussion *supra* pp. 9–10. As discussed above, when doing so IHS benefits from other agencies both within Health and Human Services (such as the Office of General Counsel and the Office of the Chief Technology Officer) and outside HHS (such as the General Services Administration and the Office of Personnel Management). Contracting tribes do not have access to such resources, and the costs of maintaining those HHS resources are not included in the Secretarial amount because IHS does not pay for them. Tribes also have insurance costs and audit requirements that IHS does not have.

Congress's purpose in requiring payment of CSC was to allow tribes to provide the same level of services as IHS with the Secretarial amount rather than diverting some of those funds to cover services that IHS either does not need or does not pay for. S. Rep. No. 100-274, at 8–9 (1987), *as reprinted in* 1988 U.S.C.C.A.N. 2620, 2627–28. This same dynamic applies whether the services provided by a tribe under the ISDEAA are funded by appropriated funds or program income.

When the Tribe supplements health program funding with third-party expenditures, it not only provides additional services in accordance with its Contract, Annual Funding Agreement, and the ISDEAA, but it also creates additional administrative, overhead, and other expenses of the kind CSC was designed to fund. In other words, expenditures of third-party funding on health care PFSAs enlarge the direct cost base to which the indirect cost rate is applied, generating additional indirect CSC need. Without that additional CSC, tribes are forced to cannibalize the third-party funding for administrative and overhead costs, reducing the level of health care services that can be provided, or subsidize the federal program with tribal funds. By contrast, when IHS uses third-party revenues to provide expanded health care services, it does not have to spend any of these funds on services provided by other HHS or outside agencies, or on costs it simply does not incur, like workman's compensation and liability insurance. To put tribes in the same position as IHS, which benefits from the extensive federal administrative support structure, tribes must be able to recover CSC on all third-party expenditures. Congress ensured this would be the case by refusing to exclude program income from the Secretarial amount or from the Federal program.

The D.C. Circuit recently addressed the self-determination penalty—though incorrectly—in the *Swinomish* decision. *Swinomish Indian Tribal Cmty. v. Becerra*, 993 F.3d 917, 922 (D.C. Cir. 2021) (*Swinomish II*). The court noted that when IHS provides direct services and collects

$200,000 in third-party revenues, it can and must spend all $200,000 on additional services. *Id*.[2] When a tribe collects $200,000 in revenues, however, it remains "on the hook for additional compliance costs the federal government doesn't have to pay." *Id*. In the court's hypothetical, these costs amount to 25% of expenditures (a figure congruent with the Tribe's indirect cost rate of 24.49% in FY 2016, Compl. ¶ 27, so the tribe would have to use $50,000 on these compliance costs, leaving just $150,000 for additional services. *Id*. The direct service tribe receives $50,000 more in resources than the ISDEAA tribe—a direct contravention of Congress's intent that the CSC and program income provisions encourage self-determination by removing financial disincentives to contracting. *See* discussion *supra* pp. 14–15. Rather than grapple with this contradiction, however, the *Swinomish II* court stated vaguely that "it is not at all clear that this hypothetical reflects the reality[,]" *Swinomish II*, 993 F.3d at 922, when the reality is borne out by simple math and tribes' government-wide, negotiated indirect cost rates. *See* discussion *supra* pp. 8–9.

The court further stated that "even under the hypothetical, the government still fully funded '*the* contract.'" *Swinomish II*, 993 F.3d at 922 (citing 25 U.S.C. § 5325(a)(2)) (emphasis in original). But as discussed above, "the contract" includes the requirement to collect program income and to use it to further the purposes of the contract. The *Swinomish II* court fails to read the two words "the contract" in context, as the very next paragraph defines CSC as the direct costs for the operation of "the **Federal program** that is the subject of the contract," and the indirect

[2] The additional services must be provided at the same service unit from which the revenues were collected. 25 U.S.C. § 1641(c)(1)(A).

costs incurred "in connection with the operation of the **Federal program** . . . pursuant to the contract." 25 U.S.C. § 5325(a)(3)(A) (emphasis added). The court erred in reading section 5325(a) to impose a penalty on contracting tribes, when a more plausible interpretation is available that would treat them equitably as Congress intended. "If the ISD[EA]A can reasonably be construed as the Tribe would have it construed, it must be construed that way. This canon of construction controls over more general rules of deference to an agency's interpretation of an ambiguous statute." *S. Ute*, 657 F.3d at 1078 (internal citations and quotation marks omitted).

C. *Sage Memorial* Is Persuasive, while *Swinomish* and *San Carlos Apache* Are Flawed

Defendants rely heavily on two cases from outside the Tenth Circuit, while downplaying the *Sage Memorial* decision by a court within the Circuit. In a thorough and well-reasoned decision, the U.S. District Court for the District of New Mexico addressed the question "whether funding that third parties such as Medicare, Medicaid, and private insurers provide is considered part of federal programming for the purposes of reimbursement [through CSC] under the ISDEAA." *Sage Memorial*, 263 F. Supp. 3d at 1164. The court held that it is. *Id*.

Like this case, *Sage Memorial* involved claims for past-year underpayments of CSC under the Contract Disputes Act. *Id.* at 1085–91. The hospital presented claims for FY 2009 through FY 2013 in the amount of $62,569,681; IHS asserted a counterclaim for the same years for $4,218,357. *Id*. at 1088. The parties' radically different valuations resulted primarily from their divergent treatment of third-party revenues. Sage Memorial maintained, as the Tribe does here, that IHS owed CSC on all of the expenses of the total federal health care program provided under the IHS contract, including those paid with appropriated funds from IHS *and* those paid with third-party

revenues expended for contract purposes. *Id*. at 1091–92. IHS insisted on an "allocation" process in which indirect costs were prorated between IHS and third-party funding. *Id*. at 1089–90.

The court granted summary judgment to Sage Memorial. The court first noted that the hospital's funding agreements established third-party billing and collections as firmly within the scope of the funding agreements with IHS. *Id*. at 1164–65. Not only were these activities written into the contracts, but Congress had included them in federal Indian health legislation—for example, when it authorized tribes to submit claims and recover directly from Medicare and Medicaid, *see* 25 U.S.C. § 1641(d), and when it made tribes payers of last resort, 25 U.S.C. § 1623(b). *Id*. at 1165.

The court concluded with a detailed review of the ISDEAA's language and legislative history to show that "[t]he ISDEAA interprets CSCs broadly" and prohibits reducing the amount of funds made available to a tribe on the basis that the tribe received program income. *Sage Memorial*, 263 F. Supp. 3d at 1166–67. By refusing to credit any CSC needs to third-party revenue expenditures, IHS's "allocation" method reduced the amount of funds that otherwise would be due. *Id*. at 1168. In short, "Sage Hospital's third-party funding falls within the scope of federal programming for purposes of reimbursement under the ISDEAA." *Id*.

In *Swinomish II*, the D.C. Circuit disagreed with *Sage Memorial*, holding that program income is not part of the "Federal program" that generates CSC, as the phrase refers only to "the Federal program that is the subject of *the* contract." *Swinomish II*, 993 F.3d at 920 (quoting 25 U.S.C. § 5325(a)(3)(A)(i)–(ii)) (emphasis in original). The court's emphasis on the singular ("*the* contract") reflects its conclusion that the ISDEAA limits CSC to only one contract—the funding agreement with IHS—and that third-party revenues are not part of that contract. Swinomish

pointed out that the contract required all program income to be spent on health care services in accordance with its funding agreement. The court dismissed this argument by noting that the Tribe can also spend money from its general fund or from private or public grants, potentially placing IHS on the hook for "unlimited contract support costs based on the unlimited sources of outside-the-contract funding available to a tribe." *Swinomish II*, 993 F.3d at 921. But tribal or private funding would clearly not be part of the federal program—and the Tribe has not argued that it is—while IHS uses third-party revenues to expand its own direct services, 25 U.S.C. § 1641(c); discussion *supra* at p. 15, making this type of funding part of the Federal program. Collection of program income is required by the federal contract, and that income must be spent in accordance with the federal contract.

The District of Arizona has reasoned along very similar lines, noting that CSC covers expenses incurred in the operation of "*the* Federal program" and concluding that "[i]t would be unreasonable to construe this program as anything other than the program or programs IHS would be charged with operating absent an ISDEAA contract." *San Carlos Apache Tribe v. Azar*, 482 F. Supp. 3d 932, 935 (D. Ariz. 2020) (internal footnotes omitted, emphasis in original). As in *Swinomish*, the *San Carlos Apache* court failed to explain why this IHS program would not include services funded by third-party revenues, when IHS is charged by statute to collect and spend such revenues for additional services. So is the Tribe.

The *San Carlos Apache* court found an independent bar to the Tribe's claims in 25 U.S.C. § 5326, 482 F. Supp. 3d at 936, but that provision supports the Tribe's interpretation of § 5325(a) more than Defendants'. Section 5326 says that "contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the [ISDEAA]"

and not any agreement with a non-IHS entity. 25 U.S.C. § 5326. The Tribe's contract and funding agreement require the Tribe to bill and collect from third parties and to use those collections to provide additional services within the scope of the funding agreement. Scope of Work, § IV.C, Ex. C. This program income is therefore directly attributable to the ISDEAA agreements, and payment of CSC in support of additional services funded by program income is expressly authorized by Section 5326.

Congress enacted section 5326 in response to the Tenth Circuit's decision in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). That case illustrates precisely what Section 5326 does—and why it does not apply here. In *Ramah*, the tribal plaintiff sought to recover CSC for indirect costs allocable to *other federal—and even state—agencies*. *Ramah*, 112 F.3d at 1458–59. In 1999, Congress responded by enacting a new provision prohibiting CSC from being paid to cover costs attributable to any contract other than one with IHS:[3]

> [N]otwithstanding any other provision of law, funds available to the Indian Health Service in this Act or any other Act for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the [ISDEAA] and no funds appropriated by this or any other Act shall be available for any contract support costs or indirect 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 Indian Health Service.

25 U.S.C. § 5326.

The question posed by § 5326 is not whether third-party revenues are "IHS" or "non-IHS" funds. It is whether third-party revenues—i.e., program income generated by services provided

[3] An analogous provision, at 25 U.S.C. § 5327, covers the Bureau of Indian Affairs.

under the IHS compact and funding agreement and spent in accordance with those agreements—are "directly attributable" to the ISDEAA agreement with IHS, or to an agreement with "any entity *other than* the [IHS]" *Id*. (emphasis added). Here the answer is clear. The IHS contract requires the Tribe to bill third parties, to collect those billings, and to expend those revenues on further services within the scope of the contract. The third-party funds at issue here, collected and spent pursuant to the IHS contract and funding agreement, are "directly attributable" to those IHS agreements. Defendants can point to no other agency and no other contract to which the indirect costs associated with expending these funds could possibly be allocated. Therefore, section 5326 in no way prevents the payment of CSC in support of these funds.

In *San Carlos Apache Tribe*, the court acknowledged that third-party revenues are undoubtedly "attributable" to the IHS contract, but concluded they are not "directly attributable" to the contract as required by section 5326. 482 F. Supp. 3d at 937. The court relied on dictionary definitions of "directly" to conclude that "third-party revenue does not emanate from IHS 'without interruption or diversion.'" *Id*. at 938. The court's reasoning is not persuasive. First, the court rewrites Section 5326 by requiring the "revenue," rather than the "costs," be directly attributable to the contract. The ISDEAA contract directly and proximately imposes obligations to incur costs associated with the additional health care services made possible by program income. Second, this program income—the vast majority of it, at least—**is** directly and proximately attributable to the ISDEAA contract. The primary legal meanings of "direct" are "immediate" and "proximate." BLACK'S LAW DICTIONARY (6th ed. 1990). But for its ISDEAA contract, the Tribe would not be authorized to bill Medicare and Medicaid under the Indian Health Care Improvement Act. *See* 25 U.S.C. § 1641(d)(1) (authorizing billing by "a tribal health program"); *id*. § 1603(25) (defining

"tribal health program" as "an Indian tribe or tribal organization that operates any health program, service, function, activity, or facility funded, in whole or part, by the [Indian Health] Service through, or provided for in, a contract or compact with the [Indian Health] Service under the Indian Self-Determination and Education Assistance Act[.]"). The ISDEAA contract with IHS makes program income possible.

The costs associated with the additional services made possible by program income are "directly attributable" to the Tribe's ISDEAA agreements with IHS and are thus the kind of costs for which "contract or grant support costs may be expended" under section 5326.

The recent decision in *Seminole Tribe* underscores this point. In that decision, the court remarked that the Tribe's attribution of expenditures of its own tribal funds to IHS would be a "problem" in light of Section 5326. *Seminole Tribe*, 376 F. Supp. 3d at 114. But the court said there would be **no** problem if the additional expenditures were of third-party revenues or program income: "unless those other resources turn out to be 'program income' within the meaning of the ISDEAA, there is a problem, as the Tribe's estimate would be based on costs that are not actually 'attributable to' or 'associated with' the Tribe's self-determination contract." *Id.* (citing 25 U.S.C. § 5326). The Court could not tell what the additional funds were, precluding summary judgment on the issue, but repeated to be clear: "If the Tribe can show that its other money is program income, *Sage Memorial* may ultimately govern[,]" and the funds would have to be included in the direct cost base for the purpose of the CSC calculation. *Seminole Tribe*, 376 F. Supp. 3d at 114; *see also id*. at 113 (discussing *Sage Memorial*, 263 F. Supp. 3d at 1114, 1166–67). Here, the third-party revenues at issue clearly *are* program income, so they are "attributable to" and "associated with" the ISDEAA contract, and § 5326 expressly authorizes IHS to pay CSC on those amounts.

D. Payment of CSC would not be duplicative.

Finally, Defendants argue that payment of CSC to support services funded by program income would generate a "windfall" for the Tribe because Medicare and Medicaid payments reimburse both direct and indirect costs. Defs.' Br. at 15. Defendants do not demonstrate that this is true as a matter of law or fact, or that the statement applies to other third parties such as private insurers or tortfeasors. More importantly, even if Defendant's claim is true, it is irrelevant, because the issue is not whether the third-party payments fully reimbursed the Tribe for past services. The issue is that, when the Tribe expends these revenues on *additional* services, those services generate administrative and overhead costs of the kind the ISDEAA requires be reimbursed as CSC. Once the third-party payments become part of the "Federal program" and are expended to provide additional health care services under the contract, they generate new direct and indirect expenses eligible for payment as CSC.

For example, in *Pyramid Lake*, the Secretarial amount awarded the tribe to carry out the emergency medical services (EMS) program was composed overwhelmingly of third-party revenues, yet the Tribe also received CSC in support of that amount without any duplication offset, and properly so. 70 F. Supp. 3d at 539. The Court ordered the parties to negotiate how much the Secretary would have otherwise provided—including third-party revenues—"plus the administrative and start-up cost authorized under the Act." *Id.* at 545. Even if Medicaid and other third parties fully reimbursed IHS for its previous services, those funds were transferred to the tribe to operate an EMS program that would generate new CSC needs.

As discussed above, the Secretarial amount alone is not sufficient to allow tribes to provide the same level of services that IHS would have delivered directly, because tribes incur costs that

IHS either does not incur at all or are covered by other agencies. *See* S. Rep. No. 100-274, at 8–9 (1987), *as reprinted in* 1988 U.S.C.C.A.N. 2620, 2627–28. When IHS expended its $1.194 billion in third-party collections in FY 2020,[4] it continued to benefit from all of the services provided by these other agencies, just as it did when expending appropriated funds. By contrast, when the Tribe expends its third-party revenues, it incurs all of the costs that IHS avoids and for which CSC compensates. Unless CSC are added to support the third-party-funded portion of the program, tribes are forced to use such third-party funds to pay for administrative costs, a result that violates the letter and spirit of the statute. The possibility that Medicaid or another third-party may have fully paid direct and indirect costs *for past services* has no bearing on the issue presented in this case.

CONCLUSION

The plain language of the ISDEAA, when read in context and with the history and purpose of the statute in mind, requires IHS to pay CSC in support of the federal health program the Tribe carries out under its ISDEAA funding agreement—including the portion of the program funded by program income. Defendants' contrary interpretations are not persuasive and do not support their motion to dismiss, which should be denied.

[4] *See* discussion *supra* p. 7 (discussing IHS' budget justification to Congress).

RESPECTFULLY SUBMITTED this 4th day of June, 2020.

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CERTIFICATE OF SERVICE

This is to certify that on the 4th day of June, 2021, a true and correct copy of the foregoing was served upon counsel as follows:

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