IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

NORTHERN ARAPAHO TRIBE,

Plaintiff,

vs.

NORRIS COCHRAN, in his official capacity as Acting Secretary, U.S. Department of Health and Human Services; Elizabeth Fowler, in her official capacity as Acting Director, Indian Health Service; UNITED STATES OF AMERICA,

Defendants.

Case No. 21-CV-0037

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

The Northern Arapaho Tribe brings this case against the Government for violation of law and breach of contract by the Indian Health Service ("IHS") in failing to pay full funding of contract support costs ("CSC") for the operation of its federal health program under a Contract and Annual Funding Agreement authorized by the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 5301 *et seq*. CM/ECF Document ("Doc.") 1. Funding for CSC reimburses the Tribe for the additional, reasonable direct and indirect costs for contract administrative expenses[1] and overhead to ensure contract compliance and prudent management. 25 U.S.C. § 5325(a)(3)(A). This case

[1] A common example is workers' compensation paid to states for employees of the health facility. Doc. 19, fn. 1.

focuses on IHS's refusal "to pay CSC associated with that portion of the Tribe's health care program funded with third-party revenues – payments from Medicare, Medicaid, private insurers, and others"[2] for fiscal year 2016 and FY2017.[3] *Id*. at ¶¶ 3-4. With regard to FY2016, the Tribe claims it is entitled to $538,936.00 for IHS's failure to pay CSC on expended third party-revenues. Doc. 1, ¶ 34. For FY2017, the Tribe claims $1,001,201.00. Doc. 1, ¶ 37.

Defendants move to dismiss the Tribe's case arguing neither the law nor the contract with the Tribe support the Tribe's claim that IHS must pay CSC on that portion of the Tribe's federal health care program funded by third-party revenues such as payments from Medicare, Medicaid, private insurers and others. Doc. 18. The Tribe opposes dismissal, arguing Defendants misread the ISDEAA. The Tribe argues it is required by law and contract to collect third-party revenues and use them for additional services within the scope of the Tribe's contract with the Secretary of Health and Human Services. Further, the Tribe argues these additional services made possible by third-party revenue generate additional administrative and overhead costs of precisely the kind that Congress required be funded by CSC.

The Court concludes that the ISDEAA and the Tribe's contract entitle the Tribe to receive CSC funding on expenditures of funds received under the contract with the IHS,

[2] The other third-party payers include workers' compensation and tortfeasors. 25 U.S.C. §§ 1621e(b) and 1621e(e)(3)(A).

[3] Neither the Secretarial amount paid as required by 25 U.S.C. § 5325(a)(1), nor the negotiated indirect cost rate are in dispute. *See Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 104–05 (D.D.C. 2019) (describing indirect cost rate system).

which does not include expenditures of third-party income. Therefore, the Court grants Defendants' motion to dismiss.

## Background

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). Pursuant to this authorization, the Northern Arapaho Tribe has entered into a contract with the Secretary of Health and Human Services to assume responsibility for the Tribe's federal health care program. 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 of Okla. v. Leavitt*, 543 U.S. 631, 639 (2005).

The ISDEAA requires the amount of funds provided to the Tribe "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 is commonly referred to as the "Secretarial amount." Further, the ISDEAA requires, in addition to the Secretarial amount, payment of direct and indirect CSC to cover the administrative and overhead expenses for activities which must be carried on by the Tribe as a contractor to ensure compliance with, and prudent management of the terms of the contract. 25 U.S.C. § 5325(a)(2).

This dispute involves funding for both direct and indirect CSC to cover the Tribe's expenditures of third-party income to further the general purposes of the Tribe's contract with IHS. The Tribe pursued its claims for underpaid CSC for FY2016 and FY2017, which the IHS denied by letter dated February 20, 2020. Doc. 1, ¶ 7. This civil action was filed within twelve months of receipt of the IHS decision, as required by the Contract Disputes Act, 41 U.S.C. § 7104(b)(3). *Id*. Therefore, this Court has jurisdiction to review the IHS denial under the Contract Disputes Act and Section 110 of the ISDEAA. 41 U.S.C. § 7104(b); 25 U.S.C. § 5331(a), (d).

Applicable law

*Standard of Review*

In determining a Rule 12(b)(6) motion to dismiss, a court "must accept as true all well-pleaded facts, as distinguished from conclusory allegations, and those facts must be viewed in the light most favorable to the non-moving party." *Moss v. Kopp*, 559 F.3d 1155, 1159 (10th Cir. 2009). As this dispute arises under the Contract Disputes Act, the Court's review is *de novo*, and the Tribe has the burden of proof. 41 U.S.C. § 7104(b)(4); *J.C. Equip. Corp v. England*, 360 F.3d 1311, 1318 (Fed. Cir. 2004). When interpreting the ISDEAA, the Court begins with the "language of the statute." *Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 450 (2002).

*Applicable Provisions of the ISDEAA*

**§ 1623. Special rules relating to Indians**

**(b) Payer of last resort**

Health programs operated by . . . Indian tribes . . . shall be the payer of last resort for services provided by such . . . tribes . . . to individuals eligible for services through such programs, notwithstanding any Federal, State, or local law to the contrary.

**§ 5325. Contract funding and indirect costs**

**(a) Amount of funds provided**

**(1)** The amount of funds provided under the terms of self-determination contracts entered into pursuant to this chapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs . . . covered by the contract ["the Secretarial amount"]. . . .

**(2)** There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

**(A)** normally are not carried on by the respective Secretary in his direct operation of the program; or

**(B)** are provided by the Secretary in support of the contracted program from resources other than those under contract.

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

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

**(ii)** any additional administrative or other expense incurred by the governing body of the Indian Tribe or Tribal organization and any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

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

* * *

**(m) Use of program income earned**

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

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

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

**§ 5326. Indian Health Service: availability of funds for Indian self-determination or self-governance contract or grant support costs**

Before, on, and after October 21, 1998, and notwithstanding 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 Indian Self-Determination Act 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.

*Applicable Provisions of the Tribe's Scope of Work Incorporated in its Annual Funding Agreement*

The Tribe's Business Office . . . will have an established accounting system to monitor the number of billings submitted, claims completed and total payments received. It will maintain accreditation standards in order to qualify for funds through third party-payers. . . .

Doc. 20-3, pp. 15-16. [4]

[4] The Tribe did not attach copies of its contract at issue, annual funding agreement, or the scope of work to the Complaint. The Tribe attached these documents to its response brief. The Court considers these documents without converting to summary judgment as they are referenced in and central to the Complaint, and their authenticity is

Discussion

By its complaint, the Tribe relies on 25 U.S.C. § 5325(a)(3)(A) for its claim that "the entire 'Federal program' that is the subject of the contract – including program income from that Federal program – generates CSC requirements." Doc. 1, ¶ 18. The Tribe also alleges that it is required by law and contract to collect third-party revenues in order to assure that the Indian health program is a payer of last resort. *Id*. at ¶ 20; 25 U.S.C. § 1623(b). The third-party revenues (or program income) must be expended on PFSAs included in the Tribe's Annual Funding Agreement, thus the expenditures from third-party program income must be included in the base for calculation and payment of CSC. Doc. 1, ¶ 22; 25 U.S.C. § 5325(m). Defendant disagrees, arguing it paid the Tribe's full CSC on expenditures from the Secretarial amount that was transferred and funded by IHS, but that neither the ISDEAA nor the contract requires or allows the IHS to pay CSC on the Tribe's expenditure of its earned program income received from third parties.

The requirement to pay and the definition of CSC is in 25 U.S.C. § 5325(a)(2). This statute speaks only of the reasonable costs for activities which "**must** be carried on" by the Tribe "**as a contractor** to ensure compliance with the terms of **the** contract and prudent management [emphasis added]." The statute refers to "the contract" which is limited to the one contract between the Tribe and IHS.[5] Section 5325(a)(2) does not mention activities carried on by the Tribe in the expenditure of third-party program income received from

undisputed. Doc. 1, ¶¶ 13, 21 (alleging the Scope of Work is incorporated into the Annual Funding Agreement, which is in turn incorporated in the Tribe's contract). *Gee v. Pacheco,* 627 F.3d 1178, 1186 (10th Cir. 2010).

[5] As noted, the Tribe's contract incorporates Annual Funding Agreements and a related Scope of Work. See Doc. 20-1, 20-2 and 20-3.

Medicaid, Medicare, private insurers and others. Even though these expenditures "further the general purposes of the contract" (25 U.S.C. § 5325(m)), neither the ISDEAA nor the IHS contract suggests that, in spending third-party program income, the Tribe is acting "as a contractor" for IHS. *See Swinomish Indian Tribal Community v. Becerra,* 993 F.3d 917, 920 (D.C. Cir. 2021) ("[t]he scope of [CSC] is thus limited to those under one "contract" — the one between a "contractor" (the tribe) and the contracting agency [IHS]"). Consequently, the ISDEAA repeatedly reinforces the limited scope for CSC and does not mention or include the Tribe's earned program income received from third-party payers.

The Tribe argues the statute does not exclude from the definition of CSC the portion of the federal program funded by third parties and the logic of the ISDEAA does not support rewriting the statute to insert such an exclusion. This argument is unavailing. As noted above, the Tribe bears the burden of proof. *See also Pennsylvania Dept. of Transp. v. United States,* 643 F.2d 758, 762 (Ct. Cl. 1981) (noting "the well-established rule in this court that a 'government contractor bears the burden of establishing the fundamental facts of liability, causation and resultant injury,'" (citations omitted)), *cert. denied,* 454 U.S. 826 (1981). Thus the Tribe may not rely on statutory silence to support liability in the form of an obligation to pay CSC on expenditures of tribal earned program income received from third parties, particularly in the face of a statutory scheme which repeatedly reinforces a limited scope for the contract support costs it requires to be paid.

Further, the IHS contract specifies and limits the activities which "**must** be carried on" by the Tribe as an IHS contractor. The overarching objective is for the Tribe "to administer the resources and programs **provided by the Indian Health Service** as

authorized by [the ISDEAA]…". Doc. 20-1, p. 3. Thus, it is this IHS contract which operates "to transfer the funding and . . . related functions, services, activities, and programs . . . including all related administrative functions, from the Federal Government to the Contractor for the operation of its health division." *Id*. There is no mention of third-party reimbursements in the contract, which makes sense as these resources are not "provided by the Indian Health Service." *Id*. Rather, this income is "earned by an Indian tribe" and is "treated as supplemental funding to that negotiated in the funding agreement." 25 U.S.C. § 5388(j).

There also is no contractual requirement to collect third-party program income. Contrary to the Tribe's argument, the statute (25 U.S.C. § 1623(b)) provides only that the health program operated by the Tribe is the payer of last resort. This law protects and enhances[6] the health program operated by the Tribe; it does not impose any obligation on the Tribe other than to use earned program income to further the general purposes of the contract. 25 U.S.C. § 5325(m)(1), (2). And while the Tribe/contractor must maintain accreditation standards to qualify for funds through third-party payers (See Doc. 20-3, p. 16), this only assures eligibility to receive earned program income – again, a benefit to the Tribe/contractor. The requirement to remain eligible certainly does not convert the Tribe's earned program income into a resource provided by the IHS. These reimbursements constitute "program income earned by" the Tribe (25 U.S.C. § 5325(m)), not contractual payments from IHS. Finally, while the Tribe must use its earned program income to further

[6] The law enhances the Tribe's health program because the reimbursement revenue cannot be a basis for reducing the amount of funds otherwise obligated by the IHS to the contract. 25 U.S.C. §§ 5325(m)(2) & 5388(j).

the general purposes of the IHS contract, such expenditures of program income are by the Tribe, not by the Tribe as an IHS contractor spending IHS resources.

In arguing that the law and contract allow an expanded cost base (to include expenditures of third-party income) in calculating CSC, the Tribe argues the canon of construction favoring Native Americans. This canon is reflected in the following contractual provision:

> Each provision of the [ISDEAA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor for operation of its health division, the Wind River Family and Community Health Care System (WRFCHCS).

Doc. 20-1, p. 3; *see also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"); *S. Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1078 (10th Cir. 2011) ("[t]he canon of construction [favoring Native Americans] controls over more general rules of deference to an agency's interpretation of an ambiguous statute").

Obviously, this canon of construction applies only if terms of a statute are ambiguous. "If the terms of the statute are clear and unambiguous, they are controlling absent rare and exceptional circumstances." *Id*. (citing *Chickasaw Nation v. United States*, 208 F.3d 871, 876 (10th Cir. 2000)). The Court finds the terms in 25 U.S.C. § 5325(a)(2) clearly and unambiguously define the "cost base" for calculation and payment of CSC to include only the Secretarial amount, and these terms do not sweep into the calculation

program income earned by the Tribe (third-party reimbursements).[7] The Tribe's expenditures of its earned program income are not activities which **must** be carried on by the Tribe/contractor under the IHS contract. Further, the Tribe/contractor is not ensuring compliance with the terms of the IHS contract in spending its earned program income. The Tribe/contractor is also not administering the resources and programs provided by the IHS under the contract when it is spending its earned program income. Because of this, CSC may not be calculated based on the Tribe's expenditures of its earned program income.

Even if these weren't the Court's conclusions based on 25 U.S.C. § 5325(a)(2), the Court finds persuasive *San Carlos Apache Tribe v. Azar*, 482 F. Supp. 3d 932 (D. Ariz. 2020), *appeal pending,* which concluded that 25 U.S.C. § 5326 prohibits payment of CSC on expenditures of reimbursements from Medicare, Medicaid and any other third-party payers. As noted above, this statute provides:

> Before, on, and after October 21, 1998, and notwithstanding 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 Indian Self-Determination Act 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.

Congress passed § 5326 expressing "concern" about the Tenth Circuit decision in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). *See* H.R. Rep. 105-609

[7] The Tenth Circuit concluded the phrase "reasonable costs" in 25 U.S.C. § 5325(a)(2) is ambiguous. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1463 (10th Cir. 1997). This Court's decision does not rely on the phrase "reasonable costs," nor the phrase "associated with" in 25 U.S.C. 5325(d)(2).

at 57, 108 (1998) (expressing "concern" about the decision made by the court in the 1997 *Ramah Navajo* case and "recommend[ing] . . . specifying that IHS funding may not be used to pay for non-IHS contract support costs [CSC]."); *id*. at 110 (same); *see also Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 418 (D.D.C. 2008), *recon. den'd,* 655 F. Supp. 2d 62 (D.D.C. 2009).

Defendant argues § 5326 bars the Tribe's claim because IHS is specifically precluded from paying CSC or indirect costs associated with any contract or agreement between the Tribe and any entity other than IHS. The Tribe argues there is no contract other than the IHS contract to which the indirect costs associated with spending the reimbursements could be allocated. The Tribe's argument is not persuasive. The issue isn't how or where to allocate indirect costs but whether these costs are "directly attributable" to the Tribe's IHS contract. The Court concludes they are not. The only contract support costs (CSC) **directly attributable** to the IHS contract are the costs the Tribe/contractor incurs to administer the resources and programs provided by the IHS. Administrative and indirect costs associated with the Tribe's expenditures of its earned program income are not directly attributable to the IHS contract, but rather are associated with agreements with Medicare, Medicaid and other third-party payers which result in reimbursements to the Tribe. This is further explained by the court in *San Carlos Apache*:

> The Tribe's third-party revenue could not have been obtained pursuant to its contract with IHS and therefore was not "directly attributable" to it. Even though the Tribe obtained third-party revenue "while administering programs under its contract with IHS," [citation omitted], it only could have done so by first entering into agreements with third-party payors and then billing and collecting from them pursuant thereto. *See, e.g.*, Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs., Pub. No. 100-01, Medicare General Information,

> Eligibility, and Entitlement Manual, Ch. 5, § 10.1 [web citation omitted] (listing hospitals, skilled nursing facilities, clinics, rehabilitation agencies, and community mental health centers among "[t]he following provider types" that "must have provider agreements under Medicare"); 42 C.F.R. § 431.107(b) ("A State plan must provide for an agreement between the Medicaid agency and each provider or organization furnishing services under the plan ...."); *see also In re TLC Hosps., Inc*., 224 F.3d 1008, 1011 (9th Cir. 2000) ("In accordance with the terms of the Medicare statute and the regulations promulgated by the Secretary of HHS, a participating facility is reimbursed for the 'reasonable costs' of services rendered to Medicare beneficiaries. *See* 42 U.S.C. §§ 1395x(v)(1)(A), 1395f(b); 42 C.F.R. pt. 413. In order to be reimbursed, however, the participating facility, must agree to certain terms as set forth in 42 U.S.C. § 1395cc." (footnote omitted)); *Neighborcare Health v. Porter*, CASE NO. C11-1391JLR, 2012 WL 13049188, at *1 (W.D. Wash. July 24, 2012) ("As a condition of receiving federal Medicaid funding, the Health Care Authority must have written agreements with medical providers who want to participate in the Medicaid program." (citing 42 U.S.C. § 1396a(a)(27); 42 C.F.R. § 431.107; *Banks v. Sec'y of Ind. Family and Soc. Servs. Admin*., 997 F.2d 231, 235 (7th Cir. 1993)). Indeed, the Tribe's IHS contract expressly contemplates the Tribe entering into contracts with third parties. [Citation] While such contracts are not alleged in the Complaint, revenue from third parties such as Medicare and Medicaid cannot be collected by virtue of an agreement to which they are absent. It can therefore hardly be said that the Tribe's third-party revenue was "directly" attributable to its contract with IHS.

*San Carlos Apache,* 482 F. Supp. 3d at 938-939.

The Tribe urges the Court to follow the reasoning in *Navajo Health Foundation-Sage Memorial Hospital, Inc. v. Burwell*, 263 F. Supp. 3d 1083 (D.N.M. 2016) (*Sage Memorial*), *appeal dismissed,* 2018 WL 4520349 (10th Cir. July 11, 2018), to conclude that "expenditures made with third-party revenues in support of programs administered under a self-determination contract are spent on the federal program and are therefore eligible to be reimbursed as CSC." *Id*. at 1162. In reaching this conclusion, the court appears to rely on 25 U.S.C. § 5325(a)(3)(A) which identifies the direct and indirect CSC that "are eligible costs for the purposes of receiving funding." Upon reading this subpart in conjunction with 25 U.S.C. § 5325(a)(2), the Court concludes subpart (a)(2) **defines**

CSC, while (a)(3)(A) further limits CSC by **eligibility**. Consequently, unless a cost satisfies the definition of CSC under § 5325(a)(2), it cannot be an "eligible" cost under § 5325(a)(3)(A). Because the Court has already concluded that the administrative and indirect costs associated with spending the Tribe's earned program income does not fall within the definition of CSC under § 5325(a)(2), the statutory language in subpart (a)(3)(A) does not change this conclusion.

Further, the reference to "the operation of the Federal program" in subpart (a)(3)(A) means the program that is "the subject of the contract." 25 U.S.C. § 5325(a)(3)(A)(i). *See also* 25 U.S.C. § 5325(a)(3)(A)(ii) ("any additional administrative or other expense incurred by the tribal contractor in connection with the operation of the Federal program . . . **pursuant to the contract**"). As explained above, the expenditure of program income earned by the Tribe is not subject or pursuant to the IHS contract, which is silent on such expenditures. The law requires any expenditures by the Tribe of its earned income be to further the purposes of the contract, but it does not bring expenditures within the IHS contract nor does it convert the Tribe into an IHS contractor in spending its earned income. In short, the Tribe's earned income from third-party payers is not spent "on the program" (as concluded by the court in *Sage Memorial*), but it is spent as required by law. For these reasons, the Court finds *Sage Memorial* to be unpersuasive.

Finally, the Tribe argues that an outcome which excludes earned program income from the calculation of CSC disadvantages the Tribe in its operation of the federal health program because it is then 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." Doc. 20, p. 15. The Court sees no disadvantage to having supplemental funding for the tribal-operated health program. The law advantages the Tribe by allowing it to retain and spend this earned income without any offset or reduction in the amount of funds the Tribe is authorized to receive under its funding agreement. Even if the Court were to detect a disadvantage to this arrangement, the statute defines the base for the calculation of CSC – which is the contract funding from IHS for the operation of the program. While the federal program in fact includes supplemental funding from third-party payers above and beyond that provided for the operation of the program by IHS, Congress allowed only for the funding of **contract** support costs, not **program** support costs. The Tribe's complaint about this arrangement is with Congress, not the courts.

Conclusion

For all the above-stated reasons, the Court concludes Defendants have met their contractual obligation by paying all CSC required by the ISDEAA, and the Tribe has not identified a contractual provision that obligates Defendants to pay CSC on the Tribe's expenditures of its earned program income. Accordingly, Defendants' motion is GRANTED. The complaint is DISMISSED WITH PREJUDICE. The Clerk shall enter judgment and close this case.

Dated this 7th day of July, 2021.

Nancy D. Freudenthal

NANCY D. FREUDENTHAL
UNITED STATES DISTRICT JUDGE