(ORAL ARGUMENT NOT SCHEDULED)

Nos. 19-5005 & 20-5192 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COOK INLET TRIBAL COUNCIL, INC.
Plaintiff-Appellee,

v.

EVANGELYN DOTOMAIN, Director, Alaska Area Office, U.S. Indian Health Service, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR DEFENDANTS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to District of Columbia Circuit Rule 28(a)(1), counsel for defendants-appellants hereby certifies the following information as to Parties, Rulings, and Related Cases:

A. Parties and Amici

Plaintiff-appellee is the Cook Inlet Tribal Council, Inc. Defendants-appellants are Evangelyn Dotomain (substituted for her predecessor, Christopher Mandregan, Jr.) in her official capacity as Director, Alaska Area Office, Indian Health Service; Alex M. Azar II (substituted for Sylvia Mathews Burwell), in his official capacity as Secretary, U.S. Department of Health & Human Services; and the United States of America. There were no additional parties and no amici in district court.

B. Rulings Under Review

The rulings of the district court (Sullivan, J.) under review are the court's Memorandum Opinion and Order of November 7, 2018 (JA 561-99), its Memorandum Opinion and Order issued of August 14, 2019 (JA 605-46), and its Final Judgment and Order of April 29, 2020 (JA 664-65).

C. Related Cases

This case has not previously been before this Court. Undersigned counsel is unaware of any related cases pending before this Court or any other court.

/s/ John S. Koppel
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GLOSSARY

CSC – CONTRACT SUPPORT COSTS

FY – FISCAL YEAR

HHS – DEPARTMENT OF HEALTH AND HUMAN SERVICES

IHS – INDIAN HEALTH SERVICE

ISDEAA – INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

JA – JOINT APPENDIX

STATEMENT OF JURISDICTION

Plaintiff Cook Indian Tribal Council, Inc. (plaintiff or the Council) invoked the jurisdiction of the district court pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 5331(a). *See* Compl., Joint Appendix (JA) 13. On November 7, 2018, the district court granted in part plaintiff's motion for summary judgment. Mem. Op., JA 562; Order, JA 559. On December 6, 2018, and January 14, 2019, the parties filed timely cross-motions for reconsideration. *See* Docket Entries 43, 52; *see also* Fed. R. Civ. P. 59(e) (28 days to file motion for reconsideration). On January 7, 2019, the government filed a timely notice of appeal, JA 600, which this Court held in abeyance pending disposition of the district court proceedings. *See Cook Inlet Tribal Council, Inc. v. Mandregan*, No. 19-5005 (D.C. Cir.). By Memorandum Opinion and Order of August 14, 2019, JA 605-46, the district court disposed of the reconsideration motions, while "direct[ing] the parties to negotiate the appropriate amount for facility support costs, and submit to the Court a joint proposed order and final judgment." JA 641. After negotiation and further proceedings, the district court entered an Order and Final Judgment on April 29, 2020. JA 664. On June 29, 2020, defendants filed a second timely notice of appeal. JA 666; *see* Fed. R. App. P. 4(a)(1)(B) (60-day time limit); Fed. R. App. P. 26(a)(1)(C) (time limits continue to next day if last day is a Sunday); *see also* Fed. R. App. P. 4(a)(4)(B)(i) (notice of appeal filed before motion to alter or amend judgment is disposed of "becomes effective . . . when the order disposing of the last such

remaining motion is entered"). By Order of July 2, 2020, this Court consolidated the two appeals. *See Cook Inlet Tribal Council, Inc. v. Mandregan*, Nos. 19-5005 & 20-5192 (D.C. Cir. Jul. 2, 2020). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

When Indian tribes or tribal organizations assume responsibility for operating health-care programs that the Indian Health Service (IHS) would otherwise run, the ISDEAA authorizes them to receive: (1) an amount not less than the amount that the Secretary of Health and Human Services (HHS), through IHS, would have provided for the program (often referred to as the "Secretarial amount"), 25 U.S.C. § 5325(a)(1); and (2) an additional amount for "contract support costs," which are costs that "(A) normally are not carried on by the . . . 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). The question presented is whether an entity operating a health-care program under the ISDEAA can spend more than it received in the Secretarial amount for a particular activity and recover the difference as "contract support costs."

RELEVANT STATUTES AND REGULATIONS

Pertinent statutes and regulatory materials are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

IHS delivers health care to more than two million American Indians and Native Alaskans. IHS provides health care to American Indians and Native Alaskans at IHS service units that it operates directly. *See* 25 U.S.C. §§ 13 (Snyder Act); 1601-1683 (Indian Health Care Improvement Act).[1] In addition, IHS provides health care indirectly through mechanisms including ISDEAA contracts with tribes and tribal organizations. *See* 25 U.S.C. § 5301 *et seq.*

At the request of a tribe or tribal organization, the ISDEAA requires the Secretary of HHS, through IHS, to enter into an ISDEAA contract for the tribal contractor to take over a health-care program, function, service, or activity (collectively referred to as "federal program"), or a portion thereof, that IHS was performing for the benefit of the tribe and its members. *See* 25 U.S.C. §§ 5321(a)(1), 5396. IHS can decline a proposal to obtain or renew an ISDEAA contract pursuant to one or more statutory criteria. *See id.* §§ 5321(a)(2)(A)-(E), 5387(c)(1)(A)(i)-(iv). A putative contractor can obtain *de novo* federal court review of an agency declination. *See id.* § 5331(a).

[1] In 1954, Congress transferred the health-care related functions of the Snyder Act from the Department of the Interior to the Department of Health, Education, and Welfare, the predecessor of the Department of Health and Human Services. *See* Act of Aug. 5, 1954, Pub. L. No. 83-568, 68 Stat. 674 (codified at 42 U.S.C. § 2001).

Once the parties enter into a contract, IHS transfers to the tribal contractor the amount of appropriated funds the agency would have allocated for its continued operation of the program. 25 U.S.C. § 5325(a)(1). This is known as the "Secretarial amount" because it is the amount the Secretary, through IHS, would have allocated from its appropriated funding for the agency's continued operation of the program.

The ISDEAA not only requires the agency to pay the Secretarial amount, but also requires the agency to add "an amount" to the contract to reimburse the tribal contractor for its contract support costs (CSC). *See* 25 U.S.C. § 5325(a)(2), (3)(A). Specifically, Congress requires IHS to pay:

> 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.

Id. § 5325(a)(2). The first category covers costs that are unique to the contractor and that the Secretary normally does not incur. One example is workers' compensation paid to states for employees of the health facility, as federal agencies do not pay into state-run workers' compensation programs. The second category covers the cost of activities that the Secretary also carries on, but for which the Secretary did not transfer any of the related funding as part of the Secretarial amount. Legal fees are an example of such an activity, as the Secretary continues to need his own legal counsel and,

therefore, cannot transfer funding for that purpose in the Secretarial amount. By defining CSC to cover these two categories, Congress ensured that CSC funding would prevent any "diminution in program resources when [federal] programs . . . are transferred to tribal operation." 140 Cong. Rec. H11140-44 (daily ed. Oct. 6, 1994) (statement of Rep. Bill Richardson). In other words, this ensures that a contracting tribe has the same funding amount that IHS had to perform the same activities that IHS previously performed.

Congress later amended the ISDEAA to clarify that CSC may be direct or indirect in nature. 25 U.S.C. § 5325(a)(3)(A)(i)-(ii). When adding the definitions, Congress additionally affirmed that CSC funding cannot "duplicate" what has been provided in the Secretarial amount. *Id.* § 5325(a)(3)(A). Congress recently amended the language of the indirect CSC provision, *Id.* § 5325(a)(3)(A)(ii), although it did not amend any of the language discussed in this brief. *See* PROGRESS Act, Pub. L. No. 116-180, § 204(1)(B), 134 Stat. 857, 880-81 (2020).

The statute contains no formula for computing CSC. IHS has promulgated a chapter in its Indian Health Manual (Manual) that specifies a methodology for computing such costs, which is typically incorporated by reference into ISDEAA contracts (as it was here, *see* JA 49).[2]

[2] The Manual provisions cited herein are found at IHS, HHS, *Indian Health Manual, Chapter 3—Contract Support Costs*, https://go.usa.gov/xvvZn (last visited Dec. 14, 2020). They are also reproduced in the addendum to this brief. The Manual

B. Factual and Procedural History of this Case

1. This case involves a dispute over whether an ISDEAA contractor can spend more than it received in the Secretarial amount for a particular activity and then compel IHS to fund the difference as CSC. Plaintiff entered into an ISDEAA contract in 1992 to provide residential treatment and recovery facilities for substance abusers; its initial Secretarial amount, for Fiscal Year (FY) 1992, was approximately $150,000, including (as alleged in plaintiff's complaint) $11,838.50 for rent and a facilities coordinator position. *See* JA 565. By FY 2014, the Secretarial amount had increased to approximately $2,000,000. *See id.* In 2014, the Council sought $479,040 in CSC funding for certain facility costs, which IHS declined on the ground that the agency normally would have experienced such costs when operating the program, and the Council's budget and Secretarial amount explicitly included IHS's resources for that activity; accordingly, the Council's costs were not CSC. *See* JA 565-66.

2. Plaintiff brought this action in district court to challenge the declination. The parties filed cross-motions for summary judgment. The district court granted the Council's motion in part and denied the government's, and remanded the case to the agency for further proceedings.

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provisions were significantly revised in 2016, after extensive tribal consultation, and amended again in 2019. For purposes of the instant case, there is no material distinction between the prior version of the Manual and the current version.

The district court held that the relevant ISDEAA provisions are ambiguous, and that plaintiff's "reasonable" interpretation of the statute therefore carries the day, in light of legislative history and the "Indian canon" requiring construction of ambiguities in the Council's favor. *See* JA 570, 579-85; *see also* 25 U.S.C. § 5329. Characterizing the expenses at issue in this case as "facility support costs," the court believed that this case presented the question "whether facility support costs may be provided only in the Secretarial amount, pursuant to 25 U.S.C. § 5325(a)(1), or whether they may also be eligible as contract support costs, pursuant to subsections 5325(a)(2), (3)," and stated that "[t]he ISDEAA does not clearly answer" that question. JA 579.

The court also opined that the statute and regulations did not address "what activities are 'normally not carried on' by an agency in operating a program." JA 580 (quoting 25 U.S.C. § 5325(a)(2)(A)). And the court further asserted that it had "been provided with no such information about typical agency practice," JA 581, although it acknowledged that facility costs had been included in the Secretarial amount since the inception of plaintiff's ISDEAA contract in 1992. *See* JA 582-83. According to the district court, "IHS [did] not sufficiently explain why facility support costs cannot be funded by both types of funding, to the extent the funding is not duplicative." JA 583.

Turning to IHS's Manual, the district court noted that the Manual defining direct CSC states that facility costs such as rent and utilities may be eligible as CSC "to

the extent not already made available." *See* JA 583-84 (quoting Manual § 6-3.2(D)). The court acknowledged that the Manual makes clear that facility costs may be funded as CSC only in "extremely rare" circumstances, JA 584 n.8 (quoting Manual Ex. 6-3-G § C), but construed the Manual's explanation that those "'extremely rare circumstances' exist 'when the awardee did not receive funds' in the Secretarial amount" as supporting its view that such costs may be funded as CSC if the Secretarial amount is deemed inadequate. *Id.*

The court also relied on an ISDEAA regulation interpreting a different statutory provision, 25 U.S.C. § 5324(l), to refute the "argument that activities are funded exclusively in one category." JA 594-95. Finally, the court held that the anti-duplication provision of the CSC statute itself undermines the agency's interpretation, maintaining that "the ISDEAA provision prohibiting duplicate funding is necessary only because activities may be funded in *both* the Secretarial amount and as contract support costs." JA 595.

Having thus disposed of the merits, the district court next determined that remand to the agency was the appropriate remedy. *See* JA 596-99.

3. The parties thereafter filed timely cross-motions for reconsideration that focused primarily on the propriety of the district court's remand order, and the court stayed its remand order during the pendency of the reconsideration cross-motions.

After further proceedings, *see* JA 605-63, the district court ultimately entered final judgment awarding the Council the sum of $302,000 for 2014.[3] JA 664.

SUMMARY OF ARGUMENT

This case is resolved by the plain text of the ISDEAA. Under that statute, a tribe or tribal organization that assumes responsibility for operating a health program is entitled to receive the appropriated funds that the federal government would have allocated for its operation of the program, known as the Secretarial amount, and an additional amount for CSC to cover activities that either IHS did not undertake or for which IHS did not transfer its resources through the Secretarial amount. The costs at issue here are facility costs that IHS also typically incurs and funds through the Secretarial amount—and that were indisputably funded in plaintiff's Secretarial amount. Accordingly, plaintiff is not entitled to recover them as CSC.

The ISDEAA draws a sharp distinction between activities funded through the Secretarial amount and activities funded as CSC. It defines the Secretarial amount as an amount that "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). CSC, by contrast, are defined as the tribe's reasonable costs for activities that are required for contract compliance and prudent

[3] Out of an abundance of caution, the government filed a notice of appeal from the district court's initial ruling. JA 600. This Court held that appeal in abeyance pending completion of the district court proceedings, and thereafter consolidated it with the government's later appeal (JA 666) from the district court's final judgment.

management and that normally are not carried on by the IHS. *Id.* § 5325(a)(2)(A). The only exception, which is set out in the same provision but has not been invoked here (*see* JA 580 n.6), is for activities that IHS normally carries on but for which the IHS did not transfer the related funding as part of the Secretarial amount. *Id.* § 5325(a)(2)(B).

Accordingly, as the Secretary has recognized, the ISDEAA essentially establishes a categorical separation between activities funded through the Secretarial amount and activities funded as CSC. The latter are specifically defined as activities that are not funded through the Secretarial amount, either because they are not normally carried on by IHS at all when the federal government is running the program or because they are funded using sources other than those transferred in the Secretarial amount. The district court, however, elided this distinction, holding instead that the ISDEAA prohibits only *actual* duplication (*i.e.*, double payment of the same amount, paid once in the Secretarial amount and again as CSC). In doing so, the district court failed to give any meaning to the precise distinctions required under § 5325(a)(2)(A)–(B). This view is untenable. CSC are not available to make up any perceived shortcoming in the Secretarial amount funding for a covered activity; rather, they are available only for costs of specific activities, enumerated by statute, that are performed by the contractor but not by IHS, or that are funded from sources that are not transferred to the contractor.

STANDARD OF REVIEW

The district court's summary judgment order is subject to *de novo* review. *See, e.g., Mayo v. Reynolds*, 875 F.3d 11, 19 (D.C. Cir. 2017). If the statute is ambiguous, it must be construed in favor of the Indian tribe, 25 U.S.C. § 5329, but the Indian canon "does not permit reliance on ambiguities that do not exist." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986).

ARGUMENT

THE SECRETARY PROPERLY DECLINED THE COUNCIL'S CSC PROPOSAL, BECAUSE ACTIVITIES THAT ARE FUNDED THROUGH THE SECRETARIAL AMOUNT ARE NOT CSC UNDER THE ISDEAA

A. For Indian tribes that elect to assume responsibility for operating health facilities, Congress provided two sources of funding relevant here, the Secretarial amount and CSC. 25 U.S.C. § 5325(a)(1), (2). There is no dispute in this case that plaintiff received the Secretarial amount to which it was entitled under its ISDEAA contract, including an earmarked, large increase to that Secretarial amount, *see* Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241 (2003) (noting "$1,500,000 for Cook Inlet Tribal Council's substance abuse prevention and treatment programs").

This case concerns instead the second source of funding, CSC. Congress specified that items are eligible to be funded as CSC only if they are "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 . . . 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). The costs at issue here comprise costs related to the basic maintenance and operation of the facility, including costs of property, maintenance personnel, and communications equipment. Such routine costs of operating a federal program undoubtedly are "normally" incurred by the Secretary "in his direct operation of the program" and, therefore, are not CSC. *Id.* § 5325(a)(2)(A). And as the district court acknowledged (*see* JA 580 n.6), there has been no argument in this case that these costs were historically provided from resources other than those under contract. 25 U.S.C. § 5325(a)(2)(B). Because costs are payable as CSC only if they fall into one of these two categories, the costs at issue in this case are not CSC under the plain language of the ISDEAA.

The history of the CSC provision buttresses this understanding of the statute's plain language. As originally enacted, the ISDEAA authorized only the transfer of the Secretarial amount. Pub. L. No. 93-638, § 106(h), 88 Stat. 2203, 2211-12 (1975). Congress later determined that the Secretarial amount had to be clarified and revised because "the Federal agencies provide[d] less funding to Indian tribes to operate programs than [was] provided to the Federal agencies." S. Rep. No. 100-274, at 9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2628. As a result, tribes were struggling to administer the contracts and were suffering financial management problems. *Id.*

The solution was two-fold. First, Congress amended the ISDEAA to require that "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 or portions thereof for the period covered by the contract, . . . including supportive administrative functions that are otherwise contractable." 25 U.S.C. § 5325(a)(1). This amendment strengthened the requirement that the Secretarial amount transferred to the contractor must include all of the appropriated funds that the agency used to cover the activities carried on by the agency, and the associated costs.

Second, Congress added the authority for CSC funding, a new category of ISDEAA funding. This funding is intended to cover those costs of contract administration unique to tribal contractors, which are not part of the federal program carried on by IHS, as well as for the rare circumstance where the agency cannot transfer its resources for a particular activity that is part of the federal program. *See* 25 U.S.C. § 5325(a)(2)-(3). In 1994, Congress further clarified that the purpose of CSC funding was to prevent the "diminution in program resources when [federal programs] are transferred to tribal operation." 140 Cong. Rec. H11140-01, 11144 (daily ed. Oct. 6, 1994). CSC thus was designed to reimburse contractors for expenses such as state workers' compensation costs, which the agency did not incur in administering the program in question, or legal fees, which the agency covers from resources not transferred in the Secretarial amount.

This history confirms the natural reading of the statutory text: CSC funding under the ISDEAA provides separate funding to cover the unique costs of administering their ISDEAA contracts, thereby preventing tribal contractors from having to use the Secretarial amount for the contract administration costs and avoiding a reduction in the level of services that the tribe can provide with the Secretarial amount. The ISDEAA does not authorize CSC funding to augment the Secretarial amount for activities IHS normally carried on and transferred to the contractor, along with IHS's resources in the Secretarial amount. Once it assumes operation of the program, the contractor also assumes the responsibility for operating the federal program within the same budget that IHS would have otherwise used to operate the program. CSC are not intended to be a backstop to supplement the federal program because of a contractor's operating decisions.

If the rule were otherwise, the statutory scheme would be significantly undermined. Congress did not create a scheme in which a tribal contractor could operate the program as it saw fit and then submit bills to the federal government because it opts to spend more on a particular activity than the Secretary would otherwise spend. Rather, the Secretary has discretion to allocate appropriated funds as he sees fit, *see Lincoln v. Vigil*, 508 U.S. 182 (1993), and while a tribal contractor is entitled to assume control of the funds that IHS would otherwise have allocated to its program, *see* 25 U.S.C. § 5325(a)(1), it is not entitled to override IHS's allocation to any particular federal program. Nor is a contractor entitled to expend unlimited sums

and claim all such costs are CSC. 25 U.S.C. § 5325(a)(2). Such an incongruous interpretation would effectively eliminate the limitations of § 5325(a)(2)(A)-(B) and create an open-ended funding scheme that allows a contractor to submit bills, under the guise of CSC, when it decides to spend more than IHS on an activity funded by the Secretarial amount. The ISDEAA does not promise full funding for all of a tribe's health-related needs—indeed, tribes estimate an unfunded need of $36.83 billion for FY 2020 (*see* Nat'l Indian Health Bd., IHS, *The National Tribal Budget Formulation Workgroup's Recommendations on the [IHS] Fiscal Year 2020 Budget* 1, 6, 11 (Apr. 2018)),[4] while the IHS Services appropriation for FY 2020 was approximately $4.32 billion (*see* Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, 133 Stat. 2534, 2730 (2019))—but rather merely ensures the tribal contractors will receive resources equivalent to those the Secretary would have had to operate the same federal program.

B. The district court erred in concluding that activities funded through a tribe's Secretarial amount also can be funded as CSC for the same tribe. As discussed, that conclusion cannot be reconciled with the relevant statutory text, which limits CSC to "costs . . . which normally are not carried on by the . . . Secretary in his direct operation of the program." 25 U.S.C. § 5325(a)(2)(A).

[4] https://www.nihb.org/legislative/budget_formulation.php (scroll down to the IHS Tribal Budget Formulation for "FY 2020," then click the link "National Tribal BFWG Testimony to the Department of Health and Human Services").

The district court highlighted its error by noting "facility support costs may be activities 'normally' carried on by IHS but may also be '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.'" JA585 (quoting 25 U.S.C. § 5325(a)(2)). While it is certainly true that tribes have reasonable costs for activities that both IHS and the tribe carry on, under the plain language of the statute, such costs qualify as CSC only if they also meet the requirements of § 5325(a)(2)(A)-(B). The statutory excerpt quoted by the court regarding "reasonable costs for activities" does not itself create a category of CSC, separate from the additional requirements of subparagraphs (A) and (B). Rather, § 5325(a)(2) must be read in its entirety: the quoted clause must be satisfied, and the cost also must fall into either subparagraph (A) or (B). Indeed, any other reading would render subparagraphs (A) and (B) of § 5325(a)(2) superfluous.

The district court observed that in § 5325(a)(3)(A) Congress prohibited CSC funding from "duplicat[ing] any funding provided" as part of the Secretarial amount furnished under § 5325(a)(1), and treated that prohibition as the only restriction on CSC. But § 5325(a)(2) serves as a gatekeeper for § 5325(a)(3), before one even reaches the latter provision. Section 5325(a)(2) describes what "contract support costs . . . shall consist of," while section 5325(a)(3) provides more detail, clarifying that CSC include both direct and indirect expenses, and making clear that CSC cannot duplicate any funding in the Secretarial amount. Congress's affirmation in 1994 that

tribal contractors may not receive payment for the same activities twice does not carry the negative implication that any portion of the statutory definition of CSC in § 5325(a)(2) should be disregarded. To the contrary, if Congress intended to change the requirements of § 5325(a)(2), it would have done so when it added § 5325(a)(3), or when it subsequently amended that provision.

The statutory text thus clearly precludes the treatment as CSC of costs for activities that IHS normally carries on in the operation of the program and funds with resources transferred to the tribal contractor in the Secretarial amount. Because the statutory text is clear, the district court's reliance on the canon of construction requiring ambiguities to be resolved in favor of Indian tribes, *see* 25 U.S.C. § 5329, was misplaced. The Indian canon "does not permit reliance on ambiguities that do not exist." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). Nor is plaintiff's interpretation of the statute reasonable, because it renders an entire provision, 25 U.S.C. § 5325(a)(2), superfluous.

There is likewise no basis to disregard the statutory text based on a Senate report accompanying the 1994 amendments, which stated that "[i]n the event the Secretarial amount . . . for a particular function proves to be insufficient in light of a contractor's needs for prudent management of the contract, contract support costs are to be available to supplement such sums." S. Rep. No. 103-374, at 9 (1994). Although the meaning of that statement is not entirely clear, in the context of the report and in light of the clear statutory text, it is best read to refer to contract

management costs that the contractor incurs that would not have been incurred had the federal government continued to operate the program. As explained above, the statutory text that Congress enacted made plain that CSC were available only in those circumstances. And other language in the report underscores the role of CSC: to ensure that the contractor gets all appropriated funds that would have been allocated to the program if the federal government were running the program (the Secretarial amount), plus funding for the contractor's own, unique costs and for resources that IHS used but did not transfer as part of the Secretarial amount: "Throughout this section the Committee's objective has been to assure that there is no diminution in program resources when programs, services, functions or activities are transferred to tribal operation." *Id.* Although Congress' goal was to prevent the reduction in funding for the programs, services, functions, and activities upon transfer to a tribal contractor, the district court's interpretation of the statute would result in an *increase* in such funds upon transfer. But in any event, even if the Senate report contradicted the statutory language, it does not alter the meaning of the text that Congress enacted. *See National Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 212 (D.C. Cir. 2013) ("[W]e do not resort to legislative history to cloud a statutory text that is clear." (alteration in original) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994)); *accord, Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020).

The district court also cited provisions of the Indian Health Manual,[5] but those provisions are, in fact, consistent with the government's position and do not override the statutory text. The Manual indicates that facility costs such as rent and utilities may be CSC only "to the extent not already made available" (Manual § 6-3.2(D)(1)(E)), which occurs only in "extremely rare circumstances" (Manual Ex. 6-3-G § C). In doing so, the Manual recognizes that § 5325(a)(2)(B) authorizes CSC in the event that IHS cannot transfer its resources for an activity in a tribe's Secretarial amount. Because resources are "not already made available" in that case, the contractor's costs for that activity are CSC. The Manual goes on to explain that this standard may be met "when the awardee did not receive the funds in the [Secretarial] amount *because the facility in question continued to be used to operate IHS or other tribally-operated programs*." *Id.* (emphasis added). This provision applies to a multi-tribal facility, for which IHS cannot transfer funding for the rent and utilities because that funding is still needed for the IHS-operated portion of the facility; as such, the contracting tribe's costs would specifically qualify as CSC under 25 U.S.C. § 5325(a)(2)(B). It does not and could not mean that any time a tribe chooses to spend more than IHS used

[5] The current version of the Manual, which was updated during the pendency of this litigation, recognizes the ongoing dispute over this issue. *See* Manual Ex. 6-3-G n.1 ("IHS and Tribal members of the CSC Workgroup have differing interpretations of what costs are eligible to be paid as CSC under the ISDEAA."). Therefore, while the updated policy attempts to maintain some level of neutrality, the Manual also contains longstanding guidance, discussed below, that is consistent with the government's position.

and transferred in the Secretarial amount for a particular activity, the tribe can obtain supplemental funds under the guise of CSC, as illustrated by the description of such costs qualifying as CSC only in an "extremely rare circumstance[]."

At times, the district court suggested that plaintiff's claimed costs might represent activities that "normally are not carried on by the . . . Secretary in his direct operation of the program," 25 U.S.C. § 5325(a)(2). The court stated that it was "not persuaded that Congress has 'unambiguously expressed' its intent" regarding whether such costs were for activities normally conducted by the Secretary. JA 584. The question whether residential treatment centers normally are in buildings that must be maintained by the operating agency is not a question of congressional intent, but rather a question of what activities the agency in fact normally conducts. It should be self-evident that IHS, like any federal agency, normally maintains facilities to provide services in the course of operating the program—especially residential programs—and even the district court acknowledged that "it may well be *reasonable* to assume that an agency . . . 'normally' incurs facility support costs when operating a treatment center." *Id.* Similarly, the fact that IHS provided funding for those activities in the Secretarial amount in this case is further evidence that IHS normally would incur such costs, since the Secretarial amount covers what IHS "would have otherwise provided for the operation of the program." 25 U.S.C. § 5325(a)(1). But to the extent that the point requires further citation, it is provided by the Indian Health Manual provision

discussed above, which confirms that such costs normally are "duplicative" and that it would be "extremely rare" for such costs to qualify as CSC. Manual Ex. 6-3-G § C.

Moreover, IHS's budget documents demonstrate its costs for activities such as rent, while also showing that such costs are *not* funded as CSC. *See, e.g.*, IHS, HHS, *Fiscal Year 2015: Justification of Estimates for Appropriations Committees* 32-34 (Feb. 6, 2014)[6] (identifying "rents, communications, & utilities" on line 10 of each page, as activities funded from the Services account, from "Clinical" in the Services account, and from "Hospital & Health Clinics" in the Services account); *cf. id.* at 50 (identifying $0 for such activities under CSC). And as discussed above, even the exceptionally rare circumstance where such costs are CSC occurs not because the Secretary does not need a building to run a treatment facility, but rather because in some circumstances IHS may not be able to transfer its resources to a particular contracting tribe because the resources are still required for IHS to operate a facility.

The district court committed a similar error when it stated that "IHS accepted as eligible contract support costs activities that included 'training' and 'certification' for various treatment professionals." JA 582. The court did not account for the possibility that certain training and certification that tribal contractors require might not be required at all for federal employees. Indeed, the Manual specifically recognizes that training can be included "to the extent the awardee must provide

[6] https://go.usa.gov/xAB6R.

training to comply with requirements not applicable to the Federal government and, therefore, not transferred in the [Secretarial] amount." Manual Ex. 6-3-G § C. Thus, even if some training and certification may be a normal cost to IHS, that is not true for all such activities that are required of tribes. As a result, proposals for such activities must include details sufficient for IHS to determine whether the training and certification is the type that IHS already funds in the Secretarial amount, or is unique to the contractor and is therefore eligible as CSC. In any event, the district court's misunderstanding about why some costs that are not at issue in the case might be eligible CSC does not change the plain language of the statute that prohibits treating the specific costs at issue here as CSC.

The district court also observed that fringe benefits might be paid partially through the Secretarial amount and partially as CSC. JA 594. Again, however, that comports with the application of 25 U.S.C. § 5325(a)(2): some fringe benefits are unique to tribal contractors, and thus qualify as CSC under § 5325(a)(2)(A), while some fringe benefits that IHS also pays qualify as CSC under § 5325(a)(2)(B) because IHS does not transfer any resources for those costs in the Secretarial amount.

Similarly, the district court relied on a different ISDEAA provision, 25 U.S.C. § 5324(l), concerning leasing costs, for the proposition that "some activities may be funded from multiple sources." JA 594. But nothing in § 5324(l) changes the plain language in § 5325(a)(2), which specifically provides that activities that are normally carried on by IHS and funded with appropriated funds transferred in the Secretarial

amount do not qualify as CSC. Neither 25 U.S.C. § 5324(l) nor cases or regulations interpreting or applying it speak to that question.

In sum, none of the district court's analogies or examples from other parts of the statute negates the clear statutory text. CSC are limited to activities that are (A) not normally conducted by the Secretary in the operation of the program, or (B) conducted by the Secretary using funds or resources not transferred to the contracting tribe. *See* 25 U.S.C. § 5325(a)(2). The Secretary normally incurs the facility costs at issue here, and it is undisputed that IHS transferred resources for these activities in the Secretarial amount. Thus, the facility costs are not eligible CSC, and the district court's contrary ruling is erroneous.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,830 words, excluding exempt material, according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2021, I electronically filed the foregoing brief and the Joint Appendix with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and that I served counsel for Appellee by the same means.

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ADDENDUM

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25 U.S.C. § 5325. Contract funding and indirect costs. (Excerpts)

(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 or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(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.

Indian Health Manual (Excerpts)
§ 6-3.2

D. Direct CSC.

Direct costs eligible for CSC funding, pursuant to 25 U.S.C. § 5325(a)(2)-(3), may be incurred directly by the awardee or by an eligible sub-awardee. DCSC amounts are generally awarded on a recurring basis.

(1) Examples of DCSC are described in the standards for the review and approval of CSC in Manual Exhibit 6-3-G. These may include, but are not limited to:
   a. unemployment taxes on salaries funded in the Secretarial amount;
   b. workers compensation insurance on salaries funded in the Secretarial amount;
   c. cost of retirement for converted civil service and United States Public Health Service Commissioned Corps Officer salaries;
   d. insurance, but only for coverage not included in the IDC pool (or indirect-type-costs budget) and not covered by the Federal Tort Claims Act;
   e. facility support costs to the extent not already made available;
   f. training required to maintain certification of direct program personnel to the extent not already made available; and
   g. any other item of cost that meets the definition of CSC at 25 U.S.C. § 5325(a)(2)-(3), but is not included in the awardee's IDC pool (or indirect-type-costs budget) or the 25 U.S.C. § 5325(a)(1) amount.

(2) Funds for DCSC need not be recalculated each year and will be provided to the awardee on a recurring basis, except for in the following instances:
   a. If an awardee submits a proposal or request and renegotiates DCSC.
   b. If a cost that has previously been funded as DCSC is moved to the Tribe's IDC pool (See Section 6-3.2E).
   c. In the case of a withdrawal as outlined in Section 6-3.3A.
   d. To add amounts in connection with IPA or MOA employees who have converted after the effective date of the preceding DCSC negotiation. This shall not require a renegotiation of ongoing DCSC amounts.

Renegotiated DCSC requirements become effective for the contract period covered by the DCSC request and are awarded on a recurring basis. IHS will provide technical assistance at the request of the Tribe.

(3) Unless a negotiation occurs under the preceding subparagraph, the amount of each awardee's ongoing DCSC need shall be adjusted at the end of the first quarter of the Federal fiscal year (FY) by the most recent OMB medical inflation rate in order to account for the normal increased DCSC need.

(4) Unless otherwise requested by the awardee, DCSC calculated on new PFSA and expanded PFSA shall not require a recalculation of DCSC on ongoing PFSAs, as long as the additional DCSC is allocable only to the new or expanded PFSA being awarded.

Exhibit 6-3-G

Footnote 1: IHS and Tribal members of the CSC Workgroup have differing interpretations of what costs are eligible to be paid as CSC under the ISDEAA. This summarizes the differing interpretations and clarifies that any changes to language from the prior version of this Chapter or the Exhibits are not to be construed as a change in the IHS or Tribal position on this issue. The IHS position is that the plain language of the ISDEAA makes it clear that, to be eligible for CSC funding, a cost and the underlying activity must meet the definition of CSC in 25 U.S.C. § 5325(a)(2), which requires (among other things) that the underlying activity is one that IHS does not normally carry on or provided from resources not transferred in the contract. Accordingly, under the IHS position, activities performed by a Tribe that are also activities IHS normally carries on and provides from resources transferred in the contract are not eligible for CSC funding. The IHS position is that the statute cannot be construed in any other manner and that reliance on legislative history is unnecessary given the plain meaning of the statute. Therefore, reference to legislative history is not necessary under the IHS position, though the IHS refers to Senate Reports 100-274 and 103-374, as well as 140 Cong Rec. H11140-01, as affirming this interpretation of the statute's clear requirements. Tribal representatives' position is that the plain language of the ISDEAA, including 25 U.S.C. § 5325(a)(3), expressly defines CSC to include both funds required for administrative and other overhead expenses and "direct" type expenses of program operation, and that in the event the Secretarial amount for a particular function, activity or cost proves to be insufficient in light of a contractor's needs for prudent management of the contract, CSC funding is to be available to supplement such sums so that health services do not have to be reduced in order to pay for the insufficiency. Tribal representatives' position is that the plain meaning of this language is supported by the

legislative history adding § 5325(a)(3) to the ISDEAA, see Senate Report 103-374, at 8-9; 140 Cong. Rec. 28,631 (1994). Tribal representatives also note that the ISDEAA also requires that "[e]ach provision of the [statute] and each provision of [the] Contract shall be liberally construed for the benefit of the Contractor[.]." § 5329(c) (Model Agreement Section 1(a)(2)).

Section C. Guidelines for Proposal Preparation and Cost Analysis of Tribal Requests for DCSC Funding

LINE ITEMS	GENRAL GUIDELINES Ex[a]mples of Allowable DCSC	DOCUMENTATION REQUIRED FROM TRIBE	STANDARDS FOR REVIEW AND DUPLICATION UNDER 25 U.S.C. § 5325(a)(3)
TRAINING	This is generally included in the DCSC requirement to the extent the awardee must provide training to comply with requirements not applicable to the Federal Government and, therefore, not transferred in the Section 5325(a)(1) amount. (Footnote /16)	Awardees should provide details on the cost and purpose of the training.	Duplication will be determined by reviewing: (a) the Secretarial amount provided to the Tribe for all PFSA transferred to the Tribe, and (b) amounts paid to the Tribe under other existing IHS grants or contracts. This likely will be considered duplicative of the Section 5325(a)(1) amount. (Footnote /17)

RENT/UTILITIES	This generally is not included in the DCSC requirement. It has been allowed in extremely rare circumstances when the awardee did not receive the funds in the Section 5325(a)(1) amount because the facility in question continued to be used to operate IHS or other Tribally-operated programs.	This is allowable when a program is being divided and space currently used in the delivery of the program cannot be divided and provided to the awardee due to ownership or lease restrictions.	Duplication will be determined by reviewing: (a) the Secretarial amount provided to the Tribe for all PFSA transferred to the Tribe, and (b) amounts paid to the Tribe under other existing IHS grants or contracts. This is considered duplicative of the Section 5325(a)(1) amount absent these rare circumstances. (Footnote /19)