(ORAL ARGUMENT SCHEDULED FOR MAY 13, 2021)

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

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

BRIAN M. BOYNTON
Acting Assistant Attorney General

DANIEL TENNY
JOHN S. KOPPEL
Attorneys, Appellate Staff
Civil Division, Room 7264
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-2495

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Legislative Materials:

Other Authorities:

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

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. §§ 5301-5423, a tribal contractor is entitled to operate a health-care program with the same amount of appropriated funds that the federal government would have allocated to the program if it had continued to operate the program. The contractor thus receives the amount the federal government would have provided for that particular program, known as the "Secretarial amount." In addition, the contractor may also recover, as "contract support costs" (CSC), the costs that the contractor must incur to prudently manage the program, but for which the federal government would not have needed to use those program funds. As we demonstrated in our opening brief (U.S. Br.), a contractor may not spend more than it received in the Secretarial amount for a particular activity and then recover the difference as CSC. The plain language of the key statutory provision, 25 U.S.C. § 5325(a), and the structure, purpose, and history of the ISDEAA compel this conclusion. In holding otherwise, the district court misread the statute and mistakenly relied on an opaque statement in the legislative history and provisions of the Indian Health Manual (Manual) that, by their own terms, are applicable only in "extremely rare circumstances."

Plaintiff Cook Inlet Tribal Council, Inc. (plaintiff or the Council) embraces these errors in its responsive brief (Pl. Br.). Although the Council characterizes the

government's position as "extreme" (*see* Pl. Br. 1, 45), it is plaintiff's interpretation of the ISDEAA rather than the government's that is extreme. Plaintiff asserts that, notwithstanding the statutory scheme for identifying how much funding a tribal contractor should receive, contractors are in fact entitled to receive reimbursement for all funds that they elect to spend on a health-care program. But the ISDEAA's CSC provisions were not crafted to serve as the blank check that the Council envisions. The district court's judgment should be reversed.

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

In declining the Council's proposal for additional CSC, the Indian Health Service (IHS) did nothing more than reject the misguided notion that CSC are a boundless supplement to the Secretarial amount. Plaintiff confirms the extraordinary breadth of its position in its brief, arguing that "tribal contractors are entitled to full reimbursement for all relevant 'direct program expenses,' 'administrative or other expense[s]' and 'overhead expense[s],' . . . subject only to standard accounting requirements and a duplication offset to prevent any overpayment." Pl. Br. 32-33 (alterations in original) (quoting 25 U.S.C. § 5325(a)(3)(A)). In other words, plaintiff urges that the government must pay, as CSC, all otherwise-unreimbursed costs incurred by the program, effectively

requiring full reimbursement of all costs incurred and rendering meaningless the calculation of the amount the federal government would have provided if it had continued to operate the program, *see* 25 U.S.C. § 5325(a)(1). The text, context, and history of the provisions at issue here make clear that they do not support such a dramatic rewriting of the program.

A. The fundamental premise of the ISDEAA is that when a tribal contractor wants to take over a health care program from IHS the tribal contractor can assume control of the resources that IHS would have expended from its appropriation, and thus will be able to provide the same amount of health care that IHS provided. Accordingly, under 25 U.S.C. § 5325(a)(1), IHS must pay a tribal contractor an "amount of funds … not . . . less than the appropriate Secretary would have otherwise provided for the operation of the programs . . . for the period covered by the contract." *Id*. This is known as the "Secretarial amount."

When Congress initially enacted the ISDEAA in 1975, it provided for funding only through the Secretarial amount with no provision for additional expenses. *See* ISDEAA, Pub. L. No. 93-638, § 106(h), 88 Stat. 2203, 2211-12 (1975). By 1988, however, Congress concluded that such funding was insufficient, because "the Federal agencies provide[d] less funding to Indian tribes to operate programs than [was] provided to the Federal agencies," thereby causing financial hardship to the tribes. S. Rep. No. 100-274, at 9 (1988), *reprinted in* 1988

U.S.C.C.A.N. 2620, 2628. In particular, there were costs that the tribal contractors had to incur for which they did not receive funding through the Secretarial amount, either because they were costs that the tribal contractor had to incur that the federal government did not—such as workers' compensation costs—or because they were activities that the federal government carried out using funding sources that were not transferred to the contractor—such as legal fees and certain audit expenses.

Accordingly, in 1988 Congress enacted the CSC provision now codified at 25 U.S.C. § 5325(a)(2),[1] which 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). Both categories focus on costs unique to the tribal contractor. By providing the specified CSC, Congress ensured that the tribal contractor has the same amount of funding to use on program expenses that the federal government would have had, rather than needing to divert the Secretarial amount to pay for other necessary expenses unique to the tribal contractor.

[1] Unless otherwise indicated, all citations are to the current codification of the ISDEAA.

In 1994, however, motivated by continuing concern over the diminution of program resources when federal responsibilities were transferred to tribal contractors under the ISDEAA, Congress adjusted the ISDEAA again. Congress addressed this concern in two ways.

First, Congress amended the Secretarial amount provision to specifically "includ[e] supportive administrative functions that are otherwise contract-able[] . . . ." 25 U.S.C. § 5325(a)(1). This amendment was not motivated by a concern about CSC being underfunded, but instead that Secretarial amount funds were not being provided from all organizational levels of agency operations (*i.e.*, both Area and Headquarters). *See* Pub. L. No. 103-413, tit. I, § 102, 108 Stat. 4257-59 (1994).

Second, Congress refined and elaborated on CSC by adding 25 U.S.C. § 5325(a)(3)(A), which provides as follows:

> 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 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 subsection (a)(1) of this section.

Id. § 5325(a)(3)(A).[2]

Congress added § 5325(a)(3)(A) to "more fully define the meaning of the term 'contract support costs' as presently used in the Act, defining it to include both funds required for administrative and other overhead expenses and 'direct' type expenses of program operation." 140 Cong. Rec. H11140-41, H11144 (daily ed. Oct. 6, 1994). The overarching "objective" was "to assure that there is no diminution in program resources when programs, services, functions or activities are transferred to tribal operation." *Id.* "In the absence of [25 U.S.C. § 5325(a)(2)], as amended, a tribe would be compelled to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid." *Id.*

In sum, the 1988 and 1994 amendments ensure that tribal contractors have the same resources available to them that the federal government would have. The federal government transfers, as the Secretarial amount, the funds from its appropriation that the federal government would have expended directly on the program in question. *See* 25 U.S.C. § 5325(a)(1). If there are expenses for unique

[2] As we indicated in our opening brief (U.S. Br. 5), Congress recently amended the indirect CSC provision, 25 U.S.C. § 5325(a)(3)(A)(ii). *See also* Pl. Br. 21 n.8 (noting "minor amendments to subsection (a)(3)(A)"). The current language of this provision is set forth in the addendum to our opening brief. *See* U.S. Br. Add. 1. Plaintiff acknowledges that "[t]his appeal concerns reimbursement of the Council's facility costs as 'direct' contact support costs under subparagraph (i)." Pl. Br. 5.

activities that the tribal contractor must incur that the federal government would not have needed to incur, the federal government must fund a reasonable amount for them through CSC so that the contractor need not divert funds from the Secretarial amount to cover them. *See id.* § 5325(a)(2)(A). And if there are activities that the federal government carries out but for which it does not transfer any funds, the federal government must cover those reasonable expenses as well, again permitting the tribe to use the Secretarial amount in the same manner that the federal government would have. *See id.* § 5325(a)(2)(B). The 1994 amendments made clear that these principles operate regardless of whether the expenses at issue are direct costs of operating the program or other types of costs such as administrative or overhead costs. *See id.* § 5325(a)(3).

Plaintiff urges, however, that the 1994 amendments marked a sea change, whereby any expense associated with the program is subject to reimbursement. By plaintiff's interpretation, if a contractor spends more on the program than the federal government would have provided, it can obtain reimbursement for all of its expenditures; the Secretarial amount would cover the expenditures that the federal government would have made from its appropriation, and CSC would cover the rest. *See* Pl. Br. 32-33. As we explained in our opening brief, "tribes estimate an unfunded need of $36.83 billion for FY 2020, while the IHS Services appropriation for FY 2020 was approximately $4.32 billion." U.S. Br. 15 (citation omitted).

There is no indication that Congress intended to provide billions of additional dollars to expand health care programs in the guise of CSC, which would render irrelevant the calculation of the amount the federal government would have provided, *see* 25 U.S.C. § 5325(a)(1).

Plaintiff's extraordinary reading of the statute finds no support in Congress's inclusion, in subsection 5325(a)(3)(A), of the proviso that "such funding shall not duplicate any funding provided under [the Secretarial Amount]." This language was added to the final bill within hours of its passage by both houses of Congress, and the only explanation for its late inclusion is a statement from the sponsoring member that it was intended "to assure against any inadvertent double payment of contract support costs duplicative of the Secretarial amount already included in the contract," and "to make clear that by adding a new paragraph (3), the Congress is not creating a third funding category in addition to direct and contract support costs." 140 Cong. Rec. H11140 (daily ed. Oct. 6, 1994) (statement of Rep. Bill Richardson); *see also* 140 Cong. Rec. S14433 (daily ed. Oct. 6, 1994) (statement of Sen. McCain) (bill sponsor)) (repeating explanation given by Rep. Richardson). Its inclusion does not carry the negative implication that the non-duplication principle is the only limitation on the amount of federal funds that contractors must receive to carry out the programs that have been transferred to them, regardless of the other provisions of the statute that specify the amount to be transferred. The

provision is relevant here only insofar as it illustrates what a true non-duplication provision looks like, as distinguished from the two-part definition of CSC contained in 25 U.S.C. § 5325(a)(2), which Congress sought not to displace and which plaintiff essentially seeks to read out of the statute.

Contrary to plaintiff's suggestion (*see, e.g.*, Pl. Br. 17), § 5325(a)(3)(A) does not somehow supersede or take precedence over the original, core CSC provision, § 5325(a)(2), but rather underscores and clarifies it. These two provisions in tandem are designed to ensure that CSC funding prevents any "diminution in program resources when [federal] programs . . . are transferred to tribal operation." 140 Cong. Rec. H11140-41 (daily ed. Oct. 6, 1994) (statement of Rep. Bill Richardson). They ensure that a tribal contractor has the same funding amount that IHS had to perform the same activities that IHS previously performed; as IHS has recognized in the Indian Health Manual (*see* Manual § 6-3.2(D); Manual Ex. 6-3-G § C),[3] however, they are not intended to supplement funding already provided as part of the Secretarial amount established in § 5325(a)(1), even if a contractor considers that funding inadequate.

[3] All Manual provisions cited in this brief are found at IHS, HHS, *Indian Health Manual, Chapter 3—Contract Support Costs*, https://go.usa.gov/xvvZn (last visited Mar. 19, 2021). They also are reproduced in the addendum to our opening brief.

To the extent that the Council makes any effort to grapple with the terms of 25 U.S.C. § 5325(a)(2), it fundamentally misunderstands the provision. That provision states that CSC "shall consist of" reasonable costs for activities falling in two categories: those which "normally are not carried on by the . . . Secretary in his direct operation of the program," and those that "are provided by the Secretary . . . from resources other than those under contract." *Id.* § 5325(a)(2)(A)-(B). The core purpose of CSC is to make a tribal contractor whole for taking upon itself the responsibility under ISDEAA to operate a federal program. If an activity is "normally . . . carried on by the . . . Secretary in his direct operation of the program," *id.* § 5325(a)(2)(A), it will be accounted for in the Secretarial amount; conversely, if it is not, but it is required for the prudent management of the program, the contractor should be reimbursed for this reasonable expense. The Council's effort to dismiss this provision as a mere "non-duplication provision," Pl. Br. 25, all but ignores its text.

Similarly off base is plaintiff's related argument that "the agency could avoid responsibility for paying any overhead costs as CSC by transferring trivial amounts toward those items in the Secretarial amount." Pl. Br. 12; *see also* Pl. Br. 24 (suggesting possibility of $1 payment in Secretarial amount to avoid payment of CSC). Plaintiff does not suggest that the government has ever attempted to do this,

nor does the government's position here imply that the ISDEAA allows for this type of gamesmanship.

The relevant inquiry under § 5325(a)(2)(A) is whether the Secretary "normally" carries out the relevant activity when the federal government is operating the program. CSC is "added" (*id.* § 5325(a)(2)) to the Secretarial amount, which comes with its own requirements—i.e., to transfer the amount that IHS would have spent from its appropriations on the program. There would be no way for the government to spend, and transfer in the Secretarial amount, only a single dollar on an activity when it operates health care programs, in order to thwart a hypothetical tribal contractor's efforts to have adequate funding for that activity if it were to take over operation of a program—even if the government were tempted to engage in such a bizarre maneuver.

The government is not arguing, as the Council suggests, that it may exempt a category of costs from being considered CSC merely by "declar[ing] the costs are 'normally' covered by agency appropriations when the government runs similar programs." Pl. Br. 1; *see also* Pl. Br. 29 (arguing that agency may not "remove an entire cost from eligibility simply by asserting in a brief that the agency 'normally' covers that cost itself"). The issue is not what the government "declares," Pl. Br. 1, but rather whether the activities, in fact, "normally are not carried on by the . . . Secretary in his direct operation of the program," or are "provided by the

Secretary . . . from resources other than those under contract." 25 U.S.C. § 5325(a)(2). As we explained in our opening brief, and the Council does not contest as a factual matter, the government does normally maintain buildings that house residential treatment centers. U.S. Br. 20. And there has never been any argument in this case that such maintenance is paid for "from resources other than those under contract," 25 U.S.C. § 5325(a)(2)(B), or that the government failed to provide any resources in the Secretarial amount for the activity for some other reason. Therefore, the only inquiry here is whether the costs are eligible under 25 U.S.C. § 5325(a)(2)(A). Because the costs for which plaintiff seeks reimbursement do not fall within the definition of CSC, they are not recoverable.

In short, although the CSC provisions do not make up for purported shortfalls in Secretarial amount funding, the 1988 and 1994 ISDEAA amendments continue to serve the important purpose for which they were created—to provide tribal contractors with reimbursement for necessary, reasonable expenses for activities that the contractor must carry out but that are not funded in the Secretarial amount. Therefore, plaintiff's assertion that "[i]f IHS is right, everything Congress did to strengthen tribal contract support cost reimbursements in the 1980s and 1990s was for naught," Pl. Br. 45, is meritless. Under IHS's interpretation, CSC is doing exactly what it is supposed to do.

B. The Supreme Court's decisions in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), and *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012), do not bolster the Council's cause here. Both cases are about the government's obligation to pay CSC when appropriations are insufficient, not about the meaning of the CSC statutory provisions. *Cherokee* involved a breach of contract claim challenging the government's failure to pay individual tribal CSC claims based on the global inadequacy of CSC appropriations, while *Ramah* concerned a breach of contract claim arising out of the government's refusal to pay individual tribal CSC claims due to across-the-board annual caps imposed by Congress on CSC payments. In both cases, the Court held that the government remained obligated to pay each Tribe's CSC claim, regardless of the insufficiency of appropriations (capped or uncapped) to satisfy the CSC claims of tribes in the aggregate. These cases have nothing to do with the calculation of CSC in the first place, which is at issue here, and are relevant only insofar as they highlight the absence of any limit to the Council's theory of this case. According to the Council, regardless of IHS appropriations or the congressional definitions set out for the Secretarial amount and CSC, tribal contractors are entitled to full reimbursement for any funds they spend on Indian health care.

The Council's invocation of this Court's decision in *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), is equally misplaced. In that

case, the Court merely held that the government could not impose a penalty on a tribe for its late filing of an application for CSC. This ruling has nothing to do with the issue before the Court in the case at bar. Indeed, the Court's recognition in *Ramah Navajo School Board* that CSC is intended to "cover the full administrative costs the Tribe will incur—and which, absent the self-determination contract, the federal government would incur—in connection with the operation of these programs," *id.* at 1341, is completely consistent with the government's position in this case.

C. Plaintiff is mistaken to suggest that the government's treatment of indirect CSC—which are not at issue in this case, *see* Pl. Br. 5 (noting that this appeal relates to "'direct' contact support costs"); *see also* Compl., JA 19, 21—is somehow inconsistent with the position the government has taken here. Plaintiff asserts, without citation, that such costs are reimbursed "subject only to standard accounting requirements and a duplication offset to prevent any overpayments." Pl. Br. 33. That is incorrect. To the extent that the cited provisions of the Indian Health Manual address the subject, they confirm that "[a]s with all [Indirect Costs] . . . the negotiation of indirect-type CSC funding must ensure the amounts are consistent with the definition of CSC in 25 U.S.C. § 5425(a)(2)-(3)." Manual, § 6-3.2E(2).

The Council's insistence that the same general types of costs may be funded as indirect CSC while also sometimes being incurred by the federal government (*see* Pl. Br. 33-34) misses the point. The provisions cited by plaintiff establish only that an item may be eligible to be indirect CSC depending on the facts. For example, utilities at a hospital would be included in the Secretarial amount, but in the "extremely rare circumstance" in which the funds for utilities cannot be transferred because IHS continues to use the facility for other programs, a reasonable amount may be included as contract support costs. Manual Ex. 6-3-G § C. It is immaterial that particular types of expenses may be paid for either through the Secretarial amount or through indirect CSC. The critical point is that if the costs for an activity were, and are normally, transferred in the Secretarial amount, the statute closes the door on the contractor's obtaining additional funding as CSC, direct or indirect.

D. Finally, although the Council alludes repeatedly to the $11,838.50 it received in facilities costs in Fiscal Year (FY) 1992 (*see* Pl. Br. 7, 24, 39, 41)—out of a total Secretarial amount of $150,000 that year —that figure must be placed in context. By FY 2014, plaintiff's Secretarial amount had grown to approximately $2,000,000.00, *see* JA 565, reflecting in part an earmarked, large increase, *see* Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241 (2003); U.S. Br. 11. Although the record is silent as

to the amount of the facilities costs component of the FY 2014 Secretarial amount (*compare* JA 461, ¶¶ 6-7, *with* JA 548, ¶¶ 6-7), it is eminently reasonable to infer that it increased substantially, if not proportionately, during the relevant time frame. There is no support for the notion that the Secretarial amount for facilities costs has remained frozen in time at the FY 1992 level.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

DANIEL TENNY
/s/ John S. Koppel
JOHN S. KOPPEL
(202) 514-2495
Attorneys, Appellate Staff
Civil Division, Room 7264
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001
Counsel for Defendants-Appellants

MARCH 2021

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 Times New Roman, 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 3,714 words, excluding exempt material, according to the count of Microsoft Word.

/s/ John S. Koppel

JOHN S. KOPPEL
Counsel for Defendants-Appellants
john.koppel@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2021, I electronically filed the foregoing brief 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.

/s/ John S. Koppel
JOHN S. KOPPEL
Counsel for Defendants-Appellants
john.koppel@usdoj.gov