[ORAL ARGUMENT NOT YET SCHEDULED]

Case 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
No. 1:14-CV-1835 (EGS)

APPELLEE'S RESPONSE BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before the District Court and in this Court were listed in the Brief for Appellants.

B. Rulings under Review

The rulings on review are the following rulings issued by the District Court (Sullivan, J):

1. Memorandum Opinion and Order (Nov. 7, 2018), JA 559-99
   Reported at: 348 F. Supp. 3d 1 (D.D.C. 2018)
2. Memorandum Opinion and Order (Aug. 14, 2019), JA 605-46
   Unreported; available at: 2019 WL 3816573
3. Order and Final Judgment (Apr. 29, 2020), JA 664-65

C. Related Cases

This case has not previously been before this Court, and to the best of undersigned counsel's knowledge, there are no related cases pending before this Court. Two related cases are currently pending in the District Court: Nos. 14-cv-2005 (EGS) and 18-cv-632 (EGS). Both cases involve the same parties and closely related legal issues, but later fiscal years. By order of the District Court, both cases are stayed pending the resolution of this appeal.

STATEMENT PURSUANT TO RULE 26.1

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Appellee Cook Inlet Tribal Council, Inc. ("Council") hereby states that the Council is an Alaska Native tribal health organization designated to provide certain health care services to beneficiaries of Indian Health Service programs in the Anchorage Area. The Council qualifies as a "tribal organization" under 25 U.S.C. § 5304(*l*), and is organized as a not-for-profit Alaska corporation. The Council's Board is controlled by representatives of the following eight federally recognized Tribes: the Chickaloon Village Traditional Council, the Native Village of Eklutna, the Kenaitze Indian Tribe, the Knik Tribal Council, the Ninilchik Traditional Council, the Salamatof Tribal Council, the Seldovia Village Tribe, and the Native Village of Tyonek. The Council has no parent corporation, stockholders, or members; as such, no publicly held corporation owns 10% or more of its stock.

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GLOSSARY

BIA	Bureau of Indian Affairs
Council	Cook Inlet Tribal Council
CSC	Contract support costs
IHS	Indian Health Service
ISDEAA	Indian Self-Determination and Education Assistance Act
JA	Joint Appendix
Manual	Indian Health Manual

INTRODUCTION

In this appeal the Indian Health Service (IHS) debuts the government's latest (and in some ways most extreme) theory for illegally reducing contract support cost reimbursements to Indian tribal contractors under the Indian Self-Determination and Education Assistance Act (ISDEAA).

In *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), the government unsuccessfully argued it could avoid reimbursing tribal contractors under the Act by choosing to spend agency appropriations on other purposes. In *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012), the government unsuccessfully argued it could avoid reimbursing tribal contractors by requesting insufficient appropriations from Congress. And in *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338 (1996), the government unsuccessfully argued it could cut contract support cost reimbursements in half as a penalty for late tribal contract support cost applications. Now the government stakes out a more extreme position: it need not reimburse entire categories of costs that Tribes incur if the government simply declares the costs are "normally" covered by agency appropriations when the government runs similar programs.

But that position cannot be squared with the ISDEAA, which declares in no uncertain terms that Tribes shall be reimbursed for all of their "direct program expenses for the operation of the [contracted] Federal program" and all of their

"additional administrative or other expense[s]" and "any overhead expense incurred" in connection with the program. 25 U.S.C. § 5325(a)(3)(A). It cannot be squared with the statutory provision which *assumes* that categories of costs will overlap and expressly addresses what to do about the resulting duplication. *Id.* It cannot be squared with this Circuit's statement that "the Act requires the Secretary to allocate [contract support costs] 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." *Ramah Navajo Sch. Bd.*, 87 F.3d at 1341. It cannot even be squared with the agency's own regulations and guidance, which throughout anticipate and address overlapping costs. And most fatally, it cannot be squared with the statutory command that "[t]he Government . . . must demonstrate that its reading [of the ISDEAA] *is clearly required* by the statutory language," *Ramah Navajo Chapter*, 567 U.S. at 194 (emphasis added), something that is simply impossible here.

Since the costs of a facility within which to run a contracted program fall comfortably within the ISDEAA's statutory terms, the government's appeal must fail.

STATEMENT OF THE ISSUE

The ISDEAA permits IHS to decline a Tribe's proposal to add costs to an ISDEAA contract only if IHS "clearly demonstrates" that reimbursement of the

requested costs "is in excess of" the amount permitted under section 5325(a) of the ISDEAA. 25 U.S.C. § 5321(a)(2), (a)(2)(D). In any appeal from such a declination, IHS carries "the burden of proof to . . . clearly demonstrat[e] the validity of" its position. 25 U.S.C. § 5321(e)(1). The issue presented is whether IHS's refusal to reimburse the Council's facilities support costs satisfies this heavy burden.

STATUTES AND REGULATIONS

Certain statutory provisions and regulations are reproduced in the addendum to this brief. All other applicable statutes and regulations are contained in the Brief for Appellants.

STATEMENT OF THE CASE

A. Statutory Background: The Indian Self-Determination and Education Assistance Act

The Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA), as amended, 25 U.S.C. §§ 5301–5423, was enacted to give Indian tribes greater control over the federal services they receive and to assure "maximum Indian participation" so that these services would be "more responsive to the needs and desires of those communities." § 5302(a).[1] The Act achieves this purpose by the "establishment of a meaningful Indian self-determination policy"

[1] All statutory citations refer to Title 25 of the United States Code unless otherwise noted.

that encourages the transition from federal dominance of programs serving Indian tribes to tribal operation of these programs. § 5302(b).

In recognition of this core objective—and in direct response to the agencies' continuing refusal to fulfill that objective—the ISDEAA today tightly constrains the federal agencies' discretion and reverses the usual balance of power between a typical contractor and the government. *See Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996), *amended* (Aug. 6, 1996). For instance, in Title I of the ISDEAA Congress dictated that "upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract," the Secretary of Health and Human Services "is directed to" contract with the tribe to administer the federal program that otherwise would be administered by the Secretary. § 5321(a)(1). The Act gives the Secretary little discretion in the matter.

The same is true of a tribe's "proposal to amend" a contract. § 5321(a)(2). Once a tribe submits a proposed amendment, the Secretary must timely "approve the proposal and award the contract" unless he identifies one of five narrow grounds for declining the proposal. *Id*. One of those grounds (and the only one at issue here) is if "the amount of funds proposed under the contract is in excess of

the applicable funding level for the contract." JA 31 (emphasis added) (citing § 5321(a)(2)(D)).[2]

The "applicable funding level" for an ISDEAA contract is in turn dictated by section 5325(a). Subsection 5325(a)(1) sets the base program funding level for a contract, which "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs." (This is commonly referred to as the "Secretarial amount.") In addition, Congress directed that "contract support costs" "shall be added" to the Secretarial amount. § 5325(a)(2). In subsection 5325(a)(3)(A), Congress then defined these costs with particularity to include both "direct" contract support costs, § 5325(a)(3)(A)(i), and "administrative" (or indirect) contract support costs, § 5325(a)(3)(A)(ii). This appeal concerns reimbursement of the Council's facility costs as "direct" contract support costs under subparagraph (i).

Subsection 5325(a)(3)(A) concludes by stating that contract support cost funding "shall not duplicate any funding provided under" subsection 5325(a)(1) (the Secretarial amount provision). This "duplication provision" is at the core of this case. As the Council and the District Court read it (and as IHS reads it in its guidance manual, but not in this appeal) the duplication clause requires an offset in

[2] The ISDEAA was recodified during the pendency of this case. The citations here have been updated to reflect the current code sections where necessary.

contract support cost funding to the extent certain costs are already being reimbursed through the Secretarial amount. *See* JA 592-95. This dollar-for-dollar offset ensures the contractor is paid in full, but never overpaid.

The ISDEAA strictly limits the Secretary's ability to decline a tribe's contract proposal or proposed contract amendment. Any declination must be made within ninety days and "provide[] written notification . . . that contains a specific finding that *clearly demonstrates* that, or that is supported by a *controlling legal authority* that" the proposed amount exceeds the funding levels specified in section 5325(a). § 5321(a)(2), (a)(2)(D) (emphasis added). Any declination is subject to appeal. *See* § 5331(a), (d); 25 C.F.R. pt. 900, subpt. L; 43 C.F.R. pt. 4, subpt. D. And in any appeal, the Secretary carries "the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal." § 5321(e)(1).

B. Facts

Cook Inlet Tribal Council is an Alaska Native tribal organization providing substance abuse and other services to Alaska Native clients in the greater Anchorage Area. JA 459, ¶ 1. The Council is a not-for-profit corporation that

qualifies as a "tribal organization" under 25 U.S.C. § 5304(*l*), and its Board includes representatives of eight federally recognized Tribes.[3] JA 459-60, ¶ 1.

In 1992, the parties entered into an ISDEAA contract under which the Council operates residential treatment and recovery services at its Alaska Native Alcohol Recovery Center in Anchorage (later renamed the Ernie Turner Center). JA 460, ¶ 2. The Center provides treatment "to reduce relapse potential and prevent continuing alcoholism and drug abuse." JA 460, ¶ 2. Under the 1992 contract, the Secretarial amount was $150,000, JA 460, ¶ 3, and included $11,838.50 for facilities support costs: $6,051.00 for rental costs and $5,787.50 to fund a portion of a facilities coordinator's salary, JA 460, ¶ 4; JA 547 (challenging only materiality, not fact itself).

By fiscal year 2014, the contracted program had expanded to also include an outpatient treatment center, an intensive transitional program, and outpatient day treatment and assessment services. JA 461, ¶ 5. That year the Council received a total of $2,518,559.00 under the IHS contract. JA 461, ¶ 6.

The 2014 program amount paid by IHS did not include any additional facilities support costs above the $11,838.50 originally included in the Secretarial

[3] The eight Tribes are the Chickaloon Village Traditional Council, the Native Village of Eklutna, the Kenaitze Indian Tribe, the Knik Tribal Council, the Ninilchik Traditional Council, the Salamatof Tribal Council, the Seldovia Village Tribe, and the Native Village of Tyonek. JA 459-60, ¶ 1.

amount in 1992. JA 461, ¶¶ 6-7. Nonetheless, by this time the Council's independently audited facilities costs had grown to $479,040. IHS's refusal to reimburse the Council for any additional costs, JA 461, ¶¶ 7-8, forced the Council to divert program funds to make up the difference. JA 461, ¶ 8.

In April 2014, the Council submitted a formal proposed contract amendment seeking $479,040 in additional facilities support costs. JA 462, ¶ 11. On July 7, 2014, the IHS Alaska Area Director issued a letter declining the proposal. JA 30-31. The Area Director asserted that "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract." JA 31. The Director explained that "[f]acility costs were included as part of [the Council]'s program base" in 1992, and therefore "[t]o pay these costs again as CSC [contract support costs] would violate" the ISDEAA's provision against paying duplicate costs. JA 31. The declination letter did not specify the amount of the facility costs that IHS alleged was paid as part of the Secretarial amount. JA 31.

C. Proceedings Below

On appeal, the District Court granted summary judgment for the Council. JA 599. After reviewing statutory construction principles and the heavy burden of proof the government bears in an ISDEAA case, the District Court framed the inquiry as "whether the ISDEAA *clearly requires* that [the Council]'s facility support costs be funded exclusively from the Secretarial amount." JA 571

(emphasis added). The District Court held it does not, concluding that "IHS' interpretation is not compelled by the ISDEAA and may in fact be contradicted by its own regulations and guidance." JA 572.

The District Court specifically rejected IHS's argument—advanced again here—that under section 5325(a)(2) facilities costs are categorically ineligible to be reimbursed as contract support costs. IHS had argued that facilities costs are ineligible because they are "normally" incurred by IHS in running a healthcare program. JA 578. In IHS's view, they therefore did not fit section 5325(a)(2)'s reference to costs that "normally are not carried on by the respective Secretary in his direct operation of the program." *See* JA 578-81. But the District Court found this subsection ambiguous because there is "nothing in the statute that suggests" which costs are "a 'normal' program cost" and which costs are not. JA 582. The District Court also noted that IHS had not provided any explanation for "why facility support costs cannot be funded by both types of funding"—the Secretarial amount and contract support costs—"to the extent the funding is not duplicative." JA 583. And the court pointed out that IHS's own guidance and regulations contradict IHS's interpretation of the statute. JA 583-94.

Given what it viewed as a statutory ambiguity, the District Court applied the Indian canon of construction and found the Council's interpretation to be a reasonable construction of § 5325(a). JA 585. It noted that IHS's key guidance

document for calculating contract support costs, chapter 6-3 of the Indian Health Manual ("Manual"), "suggests that facility support costs may be funded as both Secretarial funding *and* contract support costs funding, so long as there are no duplicate payments," JA 588.[4] The court also noted that the ISDEAA's legislative history supports the same conclusion. JA 589 (citing S. Rep. No. 103-374, at 9 (1994)).

The District Court added that interpreting the statute to permit recovery of facility costs as contract support costs (to the extent not fully paid in the Secretarial amount) was "[e]minently reasonable." JA 589. IHS's contrary interpretation, the court ruled, was not compelled by the statute because (among other reasons) the provision "prohibiting duplicate funding is necessary only because activities may be funded in *both* the Secretarial amount and as contract support costs." JA 595 (emphasis in original).

The District Court initially remanded the matter to IHS. JA 599. But on cross-motions for reconsideration, the court vacated its remand, "grant[ed] injunctive and mandamus relief" to the Council, and "direct[ed] IHS to award [the

[4] The District Court cited the current version of the Manual, which is available at https://www.ihs.gov/ihm/pc/part-6/p6c3/. *See* JA 583 n.7. For the sake of convenience, the Council does the same here. As the government notes, updates made to the Manual in 2017 did not materially affect the portions of the Manual relied on by the parties here. *See* Appellant Br. at 19 n.5.

Council] facility support costs." JA 639. Given the court's uncertainty about the correct award amount, JA 639-40, the court directed the parties to negotiate the appropriate amount, JA 641. The parties then stipulated to entry of final judgment in favor of the Council in the amount of $302,000. JA 662, 664. On appeal, IHS challenges only the District Court's conclusion that facilities costs are ineligible as contract support costs; IHS does not challenge the appropriateness of the District Court's remedy. *See* Appellant Br. at 9-24.

SUMMARY OF ARGUMENT

1. Because the Council's facilities costs easily fall within the ISDEAA's broad contract support cost provisions, IHS cannot meet its high burden to clearly demonstrate the validity of its refusal to reimburse these costs. In response to IHS's longstanding reluctance to fully fund overhead and administrative costs associated with ISDEAA contracts, Congress crafted a pair of contract support cost provisions designed to ensure that such costs are paid in full. § 5325(a)(2)-(3). Reading these subsections together, particularly in light of the overall structure and purpose of the ISDEAA, facilities costs are plainly eligible for contract support cost funding either as "direct program expenses [necessary] for the operation of the Federal program that is the subject of the contract" or as an "overhead expense." § 5325(a)(3)(A)(i)-(ii). IHS's contrary argument—that facilities support costs can *never* qualify as contract support costs—was not raised in the agency's declination

letter, and in any event conflicts with the statutory text, the legislative history, and IHS's own regulations, guidance, and practice.

2. Facilities support costs remain reimbursable as contract support costs even if some minimal amounts toward these costs are included in the Secretarial amount. The statute is clear on this point: costs that fall within the statutory description of contract support costs under § 5325(a)(2)-(3) are eligible for contract support cost funding so long as such funding does not overpay the Tribe by duplicating amounts already paid under the Secretarial amount. § 5325(a)(3). The government's contrary position would lead to absurd results, in which the agency could avoid responsibility for paying any overhead costs as contract support by transferring trivial amounts toward those items in the Secretarial amount. Such a result would defy congressional intent to fully fund, and *not* cut, contract support costs.

3. The Council is entitled to full reimbursement for its facilities costs as contract support costs, subject only to an offset for whatever portion was already paid by the inclusion of facility costs in the Secretarial amount. The parties stipulated that IHS would pay $302,000 to compensate the Council for that difference. Since full reimbursement of the Council's remaining facility costs produces no overpayment, awarding $302,000 is not "in excess of the applicable

funding level for the contract," § 5321(a)(2)(D), and the decision below should be affirmed.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150 (D.C. Cir. 1996). Summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

Under the ISDEAA, the Secretary bears a heavy burden of proof both in the declination process and in subsequent judicial review of the decision. The Secretary's declination of a contract proposal or amendment must provide a "specific finding" that either "clearly demonstrates" or "is supported by a controlling legal authority" demonstrating that one of the five permissible grounds for the declination has been met. § 5321(a)(2). When a tribal contractor appeals a declination, the Secretary bears the burden of proof in the appeal to "clearly demonstrat[e] the validity of the grounds for declining the contract proposal." § 5321(e)(1).

Unlike actions brought under the Administrative Procedure Act (APA), judicial review of agency actions under the ISDEAA is *de novo*. *Pyramid Lake*

Paiute Tribe v. Burwell, 70 F. Supp. 3d 534, 542 (D.D.C. 2014); *Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, 945 F. Supp. 2d 135, 141-42 & n.5 (D.D.C. 2013); *see also* JA 567 (noting that IHS did not contest the *de novo* standard in this case). Further, the ISDEAA eliminates the agency deference typical in APA cases, instead codifying the Indian canon of statutory construction by mandating that both the Act and all contracts entered thereunder "shall be liberally construed for the benefit of" the contracting Tribe or tribal organization. § 5329(c) (model agreement § (1)(a)(2)); *see* JA 42 (Council's contract expressly incorporating this language); *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"). As the Supreme Court has commanded, this means that in order to prevail the government "must demonstrate that its reading is clearly required by the statutory language." *Salazar*, 567 U.S. at 194 (citing § 5329(c) (model agreement § 1(a)(2))). In 2020, Congress repeated this directive, requiring in section 5321(g) that "any ambiguity [in the ISDEAA] shall be resolved in favor of the Indian Tribe."

ARGUMENT

For decades IHS (and its sister agency the Bureau of Indian Affairs (BIA)) have been at war with Tribes when it comes to reimbursing the contract support costs Tribes incur when operating self-determination contracts. As this Circuit

noted 25 years ago, "'[s]elf-determination contractors' rights under the Act have been systematically violated *particularly in the area of funding indirect costs*." *Ramah Navajo Sch. Bd.*, 87 F.3d at 1344 (emphasis in opinion) (quoting S. Rep. No. 100-274, at 37 (1987)). Indeed, Congress put it best: "[p]erhaps the single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs [later, "contract support costs"] associated with self-determination contracts," S. Rep. No. 100-274, at 8, concluding that "[f]ull funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed," *id*. at 13. Yet IHS's resistance continues unabated.

Congress directly addressed the underfunding of contract support costs in successive amendments to the Act, producing the following two provisions pertinent to this appeal:

> (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 subchapter 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.

§ 5325(a)(2)-(3).

"To discern the Congress's intent," this Circuit will "generally examine the statutory text, structure, purpose and its legislative history." *Kiewit Power Constructors Co. v. Sec'y of Labor*, 959 F.3d 381, 395 (D.C. Cir. 2020) (quoting *Lindeen v. S.E.C.*, 825 F.3d 646, 653 (D.C. Cir. 2016)). Further, "to assess '[t]he plainness or ambiguity of statutory language,'" this Circuit "must also consider 'the broader context of the statute as a whole.'" *Id*. (alteration in original) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). When (as here) agency deference is not in play, the rule of statutory interpretation is clear:

> If the statutory language is plain, we must enforce it according to its terms. But oftentimes the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." So when deciding whether the language is plain, we must read the words "in their context and with a view to their place in the overall statutory

> scheme." Our duty, after all, is "to construe statutes, not isolated provisions."

King v. Burwell, 576 U.S. 473, 486 (2015) (citations omitted).

As we show below, under those basic principles the Council's facility costs fit comfortably within the definitional provisions of section 5325(a)(3), and nothing in subsection 5325(a)(2) overrides the application of subsection (a)(3)—indeed, read in light of the statute as a whole, subsection (a)(2) supports the reimbursement of facilities costs as contract support costs.

I. FACILITIES COSTS ARE ELIGIBLE CONTRACT SUPPORT COSTS UNDER SECTION 5325(a)(3), AND SUBSECTION (a)(2) DOES NOT OVERRIDE THIS PLAIN MEANING.

A. Facilities Costs are Eligible Contract Support Costs Under the Plain Text of Subsection 5325(a)(3).

Little argument is necessary to establish that, under the plain meaning of section 5325(a)(3)(A)(i), the cost of a facility used to carry out a contracted federal program is a "direct program expense[] for the operation of the Federal program that is the subject of the contract." Indeed, the government did not assert otherwise in its 2014 declination letter, *see* JA 31, nor does it argue otherwise here, thereby conceding the point. Accordingly, unless something in subsection 5325(a)(2) changes the result, facility costs are eligible contract support costs under subsection (a)(3)'s statutory text.[5]

[5] It is also plain from the statutory text that when facility costs are instead accounted for within a Tribe's indirect cost rate, *see* § 5304(g)—rather than as a

B. Read Together with Subsection (a)(3), Subsection (a)(2) Does Not Alter the Conclusion that Facilities Costs are Eligible Contract Support Costs.

IHS would rewrite subsections (2) and (3) by making subsection (3) a subset of subsection (2), converting subsection (2) into the "gatekeeper" for both provisions. Appellant Br. at 16. When coupled with IHS's extremely narrow view of subsection (2), this reconfiguration of the statutory text would leave subsection (3) with such narrow coverage as to empty it of nearly all meaning. Under IHS's approach, no costs are ever eligible to be reimbursed as "contract support costs" if the cost is a type of cost that IHS might "normally" incur in its own operation of the program. As a matter of statutory construction, IHS's reading has no support in the Act, its legislative history, the context in which these provisions were enacted, or the caselaw interpreting them.

1. Subsection 5325(a)(3) Controls the Eligibility of Contract Support Costs.

"[T]he broader context of the statute as a whole," *Kiewit Power*, 959 F.3d at 395 (citation omitted), illuminates the relationship between (a)(1), (a)(2), and (a)(3). It confirms that contract support costs, whether classified as "direct" or

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"direct cost"—such costs similarly qualify under subsection 5325(a)(3)(A)(ii) as an "administrative or other expense . . . [or] overhead expense incurred by the tribal contractor in connection with the operation of the Federal program." In fact, this is precisely how the Council accounted for its facility support costs in later years. *See* Complaint ¶ 25, *Cook Inlet Tribal Council v. Mandregan*, No. 18-cv-632 (EGS) (D.D.C. Mar. 19, 2018), ECF No. 1.

"indirect" under subsection (a)(3), include costs that have been inadequately funded under subsection (a)(1), and that subsection (a)(2) works in service of that understanding.

The ISDEAA is a far-reaching statutory scheme that Congress refined over decades in response to *repeated* agency intransigence, particularly on the topic of contract support costs. Congress concluded that prior to 1988 "the single most serious problem with implementation of the Indian self-determination policy" had been IHS's (and the BIA's) "failure . . . to provide funding for the indirect costs associated with self-determination contracts." S. Rep. No. 100-274, at 8. As the seminal Senate Report reflects, Congress was well aware both that Tribes were incurring substantial costs to run federally contracted programs, and that the agencies were calculating those support costs, too. *Id.* at 8, 11-13; *see also infra* at 30 (discussing same). Congress's central concern wasn't about overlapping categories of costs (a matter Congress never even mentioned); its concern was that neither IHS nor the BIA were actually reimbursing Tribes in full for these costs. *See, e.g.*, S. Rep. No. 100-274, at 13 ("When the [BIA] and the [IHS] contract with Indian tribes, . . . they routinely fail to reimburse tribes for legitimate administrative costs associated with carrying out federal responsibilities."). The whole purpose of the 1988 amendments was to mandate that *all* such costs had to be added to each contract. *Id.* at 12-13 (noting Presidential council's

recommendation that tribes' administrative costs "be fully funded" and concluding that "*[f]ull funding* of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed" (emphasis added)).[6]

When six more years of agency obstruction continued, Congress returned to the issue in 1994 and this time added a clear definition for the contract support costs that had to be reimbursed each year. Pub. L. No. 103-413, § 102(14), 108 Stat. 4250, 4257-58 (1994); *see* S. Rep. No. 103-374 (1994). The legislative history of the 1994 amendments reveals that subsection (a)(3) was added to subsection (a) precisely 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." *See* S. Rep. No. 103-374, at 8-9 (emphasis added).[7] Congress thus expressly declared that subsection (a)(3) was to serve as the

[6] As the Committee report specifically explained, the 1988 amendments were "designed to require the [BIA] and the [IHS] to comply with the requirement of the Act that indirect costs be added to the amount of funds available for direct program costs." *Id.* at 12.

[7] While the Committee report mentions amendments to both subsections (a)(2) and (a)(3), only a few words were added to subsection (a)(2) that did not substantially alter its meaning. *See* Pub. L. No. 103-413, § 102(14)(B). It was the amendment to subsection (a)(3) that clarified the definition, as discussed in the Committee report.

controlling definition for the contract support costs that are eligible for reimbursement, and it made clear that this definition reflects what Congress *always* understood "contract support costs" to mean.

Subsection (a)(3)(A) is written in particularly broad terms, making clear that eligible costs include "direct program expenses," "any additional administrative or other expense," and "any overhead expense incurred" by a Tribe in connection with the contracted program.[8] The use of such broad language reflects a studied intent to ensure that tribal contractors receive full reimbursement for their administrative costs. *See*, *e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (citation omitted)). IHS's argument that facilities costs are normally a Secretarial expense and for this reason can never be contract support costs, *see*, *e.g.*, Appellant Br. at 17, is utterly incompatible with Congress's choice of words in subsection 5325(a)(3)(A), and finds no mooring in any of the Act's legislative history nor its context at the time of enactment.

[8] This language reflects minor amendments to subsection (a)(3)(A) made by the recent PROGRESS for Indian Tribes Act, Pub. L. No. 116–180, title II, § 204 (2020), which further clarify that eligible administrative costs include those incurred by the governing body of a Tribe or tribal organization running an ISDEAA program and any overhead incurred by a tribal contractor. Prior to 2020, subsection (a)(3)(A) referred to "any additional administrative or other expense related to the overhead incurred by a tribal contractor."

As for subsection 5325(a)(2)(A), that subsection speaks in the negative, describing contract support costs as sums that are *not* transferred within the subsection (a)(1) Secretarial amount because they are *not* normally carried out by the Secretary and are therefore *not* part of what the Secretary has "otherwise provided" (i.e., paid) within that amount. This understanding easily meshes with the natural reading of subsection 5325(a)(3)(A), which plainly addresses the reimbursement of costs beyond the amounts already paid under subsection 5325(a)(1).

But there is more to the "structure" of this unique statute. Subsection 5325(a)(3)(A)'s concluding duplication provision confirms the logic of broadly reading subsections (a)(2) and (3), because it is the one provision that ties all of these subsections together "into an harmonious whole." *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959)); *see also id.* ("A court must . . . interpret [a] statute 'as a symmetrical and coherent regulatory scheme.'" (citation omitted)). With respect to a given program, the amount of the duplication offset for an identified cost is determined by assessing (1) whether the Secretary was spending that cost in his direct operation of the program; and (2) if so, whether he paid the Tribe that cost as part of the Secretarial amount under subsection (a)(1). If both conditions are met, the payment already made is subtracted from the contract

support costs to be added, yielding a net amount due that avoids any duplication. And if for whatever reason the Secretary never transferred a particular cost (either because he retained the money or he never incurred the cost in the first place), then no duplication offset is computed.

The duplication provision only makes sense if subsections (a)(1), (2), and (3) authorize similar categories of costs to be paid to a tribal contractor. That is, it only makes sense if the contract support cost provisions are read broadly. In contrast, if IHS's narrow position were correct, the duplication provision instantly becomes surplusage—because (as IHS sees it) the ISDEAA would never permit the same type of costs to be paid under both subsections (a)(1) and subsections (a)(2)-(3). Such a construction would nullify this critical link between the three subsections. Just as in *King v Burwell*, "[i]t is implausible that Congress meant the Act to operate in this manner." 576 U.S. at 494. Rather, and as the District Court aptly noted, "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 (citing § 5325(a)(3)(A)); *see also id*. ("If there was no overlap between the two funding provisions, as IHS contends, this section of the statute would be superfluous."). The District Court was mindful of the rule against superfluities, noting courts "are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same

law." JA 595 (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011)).

In the District Court, IHS's attempted response to this dilemma—but a point only half-heartedly pressed on appeal—was to argue that if a given category of contract support costs is *potentially* ineligible, it then becomes *actually* ineligible when some portion of that cost is paid to the tribal contractor as part of the Secretarial amount. *See* JA 593. But a partial payment situation is precisely when the duplication provision is triggered. Here, the Council's unreimbursed expenses were far more than the $11,838.50 the Secretary paid for these costs with subsection (a)(1) Secretarial amount dollars. JA 460, ¶ 4; JA 592 (noting that IHS argued only that it was "irrelevant" that it could not show any additional amount of funding provided for facilities). The notion that any amount of agency payment in the Secretarial amount—even as little as $1 dollar—would altogether eliminate a tribal contractor's statutory right to reimbursement of such costs—potentially hundreds of thousands of dollars' worth—is absurd and cannot possibly be what Congress intended. *See, e.g.*, *McNeill v. United States*, 563 U.S. 816, 822 (2011) ("Absurd results are to be avoided." (alteration omitted) (quoting *United States v. Wilson*, 503 U.S. 329, 334 (1992))).

To be sure, when (as here) a complex statute has been frequently amended over time, internal tensions can arise. As IHS sees it, in isolation subsection (a)(2)

could be given a narrow interpretation. But subsection (a)(3) is written in broad strokes, and it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA*, 529 U.S. at 133 (citation omitted). It is for this reason that "[i]f the first rule of statutory construction is 'Read,' the second rule is 'Read On!'" *Make The Rd. N.Y. v. Wolf*, 962 F.3d 612, 625 (D.C. Cir. 2020) (quoting *Loc. Union 1261, Dist. 22, United Mine Workers v. Fed. Mine Safety & Health Rev. Comm'n*, 917 F.2d 42, 45 (D.C. Cir. 1990)). Applying that venerable principle here, subsection 5325(a)(2) cannot be read in isolation and a reviewing court must "read on" to subsection (a)(3).

IHS insists that no category of costs that IHS "normally" carries out can ever be supplemented with contract support cost funding. But putting aside the question of what costs IHS "normally" incurs, *see* JA 582-83, that is just one way to read subsection (a)(2)(A). Another reading is that costs for any activity the Secretary "normally" carries on in his "direct operation of the program" would have already been transferred in the amount the "Secretary would have otherwise provided" under subsection (a)(1) (i.e., the Secretarial amount), so subsection (a)(2)(A) was intended to be a non-duplication provision. But if Congress's intent in the precise words chosen in subsection (a)(2) was uncertain, Congress in subsection (a)(3) made its intent crystal clear, explaining:

> In the event the Secretarial amount under section 106(a)(1) 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. If IHS's interpretation were not already foreclosed by subsection 5325(a)(3)(A)'s text, this statement removes any remaining doubt.[9]

IHS's response is to assert that "the meaning of that statement is not entirely clear." Appellant Br. at 17. But the word "insufficient" could hardly be clearer: it means "not enough" or "less than is needed." *Insufficient*, Cambridge Dictionary (Cambridge Univ. Press), https://dictionary.cambridge.org/us/dictionary/english/insufficient (last visited Mar. 3, 2021). Thus, when the Secretarial amount is "not enough" or is "less than is needed" to cover a Tribe's prudent but necessary costs for a particular function, contract support costs fill the gap.[10]

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[9] Additional legislative history is to the same effect. As sponsor Senator McCain explained, the duplication provision was added to "assure against any inadvertent *double payment* of contract support costs which duplicate the Secretarial amount already included in the contract." 140 Cong. Rec. 28,326 (1994) (emphasis added) (comments regarding proposed amendment of S. 2036); 140 Cong. Rec. 28,629 (1994) (notes to Committee amendment of H.R. 4842).

[10] IHS offers no support for its conjecture that this statement refers only to "management costs that . . . would not have been incurred had the federal government continued to operate the program," except to invoke its own cramped statutory reading already discussed above. *See* Appellant Br. at 17-18. As explained below, *infra* at 43–45, that reading would eliminate many costs that are indisputably and routinely reimbursed as contract support costs.

The foregoing Senate statement explaining the duplication provision directly undermines IHS's alternate theory that a $1 payment within the Secretarial amount forecloses additional reimbursement of reasonable and necessary costs. IHS misses the point when invoking the truism that legislative history "does not alter the meaning of the text that Congress enacted" if it "contradict[s] the statutory language." Appellant Br. at 18. Far from contradicting it, the quoted legislative history *supports* the most natural reading of the statutory text, and it is only IHS's disjointed interpretation that contradicts both. *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011) ("[C]lear evidence of congressional intent may illuminate ambiguous text."). And in circumstances such as these, legislative history matters. *See, e.g.*, *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020) (relying on legislative history where "[t]he statutory history and precedent, as well as the legislative history," all supported the same conclusion).

IHS insists that Congress would have had to change the text of subsection (a)(2) if it intended subsection (a)(3)'s text to actually mean what it says. *See* Appellant Br. at 17. But that, too, is not correct. Subsection (a)(3) clarifies that subsection (a)(2) was *always* intended to be read broadly; as a factual matter, was always read this broadly; and was never read by anyone as restrictively as IHS now asserts. While Congress could also have made further amendments to subsection (a)(2), that is no excuse to ignore or narrow subsection 5325(a)(3)'s plain text.

IHS urges that unless its interpretation is adopted, a portion of subsection (a)(2) will become superfluous. Appellant Br. at 16. But even if that were true (and for the reasons noted earlier, we disagree), the Court's "preference for avoiding surplusage constructions is not absolute" where application of this interpretive rule would upset the entire statutory scheme. *King*, 576 U.S. at 491 (citation omitted). In the end, courts "'must do [their] best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Id*. at 492 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 320 (2014)).

Although these general rules of statutory construction resolve the issue, one more rule drives the point home: Congress has commanded that any tension between these provisions must be construed in favor of the Council, directing that the Act "shall be liberally construed for the benefit of" contracting tribes. § 5329(c) (model agreement § 1(a)(2)); *see* JA 42 (repeating and incorporating the Act's rule of construction); *see also* § 5321(g) ("[E]ach provision of this chapter . . . shall be liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe."). Since IHS's restrictive reading is not "clearly required by the statutory language," *Ramah Navajo Chapter*, 567 U.S. at 194, the government's reading of

subsections 5325(a)(2) and (3) must fail. This is also how the District Court resolved any lingering tension between these provisions. *See* AR 585 (quoting *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001)).

2. Statutory Context Demands a Broad Reading of Subsections 5325(a)(2) and (3).

In interpreting the text of subsections (a)(2) and (a)(3), the Court must also consider the "overall statutory scheme." *FDA*, 529 U.S. at 132–33. And when it comes to the ISDEAA, "Congress has clearly expressed . . . its intent to circumscribe as tightly as possible the discretion of the Secretary." *Ramah Navajo Sch. Bd.*, 87 F.3d at 1344 (citing § 5328(a)). Literally, Congress "left the Secretary with as little discretion as feasible in the allocation of [contract support costs]." *Id.* Congress even denied IHS any discretion to write regulations implementing the Act's contract support cost provisions. *Id*. at 1348; *see* § 5328(a)(1). These facts make the ISDEAA an extraordinarily unique statutory scheme.

If IHS could remove an entire cost from eligibility simply by asserting in a brief that the agency "normally" covers that cost itself, IHS would be vested with precisely the level of discretion Congress denied IHS through its exhaustive and successive amendments. Given that courts "cannot interpret federal statutes to negate their own stated purposes," *King*, 576 U.S. at 492-93 (quoting *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973)), subsections (a)(2)

and (3) cannot be read to negate the entire purpose of the Act's contract support cost provisions.

A careful review of subsection 5325(a)(2)'s development demonstrates that IHS is simply wrong in its interpretation of this 1988 provision, even when read in isolation. That is, Congress never intended subsection (a)(2) to narrow the scope of eligible contract support costs as IHS now suggests. Prior to 1988, the ISDEAA contained no provision concerning contract support costs or indirect costs. Nonetheless, IHS and the BIA had each developed agency practices for recognizing and reimbursing tribal contractors for these costs, primarily through applying the Tribe's indirect cost rate. *See* S. Rep. No. 100-274, at 9 ("Tribal indirect cost rates are negotiated and approved according to OMB guidelines."); *see also id.* at 11-12 (discussing studies of indirect cost reimbursements). Yet as Congress was acutely aware, both agencies routinely failed to reimburse these costs in full. *Id.* at 9, 11-12 ("The most relevant issue is the need to fully fund indirect costs associated with self-determination contracts."). It was the failure to pay these costs, not a failure to recognize them or to recognize too many costs, that resulted in both years of study and crushing hardship for the Tribes. *Id.* at 12-13.

The Senate version of the 1988 Amendments addressed this issue head on, with the purpose of making full payment mandatory. In so doing, the Senate preferred the term "indirect costs" over "contract support costs," in order "to

eliminate the confusion that has surrounded the use of the term 'contract support costs' in the past." S. Rep. No. 100-274, at 17. The Senate report explained: "The Committee intends, by defining this term, to make it absolutely clear that the Secretary of the Interior and the Secretary of Health and Human Services should fully fund tribal indirect costs associated with a self-determination contract." *Id*. But when the House reported its version of the Amendments it referred to "indirect costs and contract support costs" (or "contract support costs and indirect costs") as if the two types of costs were different. *See* H.R. Rep. No. 100-393, at 3, 7, 14 (1987). For its part, the Congressional Budget Office appeared to view the terms synonymously. *Id*. at 9 (referring to "contract support costs, or indirect costs").

In the end, Congress followed the House lead but, like the Congressional Budget Office, merged the two terms into simply "contract support costs," § 5325(a)(2), while directing the Secretaries to report to Congress annually on all "contract support costs" shortfalls, § 5325(c)(1), (2), including data regarding indirect costs, § 5325(c)(3), (4). *See* 134 Cong. Rec. 23,335, 23,340 (Sept. 9, 1988). The core provisions of the Senate amendments remained: mandatory addition of contract support costs (§ 5325(a)(2)) and annual reporting to Congress of any payment shortfalls (§ 5325(c)).

This history shows that Congress's intent in 1988 was to cement—rather than cut back on—existing tribal rights to contract support cost reimbursements,

while prohibiting the agencies from either reducing those costs, § 5325(b), or failing to pay those costs in "full," § 5325(g). As such, the 1988 addition of § 5325(a)(2) should be given the broad interpretation Congress intended and the equally broad interpretation the agencies expected. Put differently, nothing in the text or history of the 1988 Amendments suggests a congressional intent to *cut back* on contract support costs (the result that would follow from IHS's position here).

3. Reading Subsections (a)(2) and (a)(3) To Permit Nonduplicative Funding of Costs Identical to Costs IHS Normally Incurs Is Consistent With IHS's Longstanding Practice.

Eligible contract support costs must be "reasonable . . . to ensure compliance with the terms of the contract and prudent management," § 5325(a)(2), and they must be "reasonable and allowable," § 5325(a)(3)(A).[11] Further, contract support cost reimbursements "shall not duplicate any funding provided under subsection (a)(1)" (the Secretarial amount). *Id.* Within these guardrails, tribal contractors are entitled to full reimbursement for all relevant "direct program expenses,"

[11] The latter phrase echoes the general accounting principles which apply to all federal contractors. *See* 2 C.F.R. § 200.404 (defining "reasonable costs"); *id.* §§ 200.403, 200.408 (discussing "allowable" costs). Because contract support costs are a reimbursement for the costs actually incurred by a tribal contractor, each contractor's costs are annually audited pursuant to the OMB regulations published at 2 C.F.R. Part 200, which include the cost principles applicable to the expenditure of federal funds (including that expenditures be reasonable (.404), allocable (.405), and allowable (.403, .408)).

"administrative or other expense[s]" and "overhead expense[s]," *id.*, subject only to standard accounting requirements and a duplication offset to prevent any overpayment.

This is precisely how IHS has long understood the eligibility of contract support costs. For instance, tribal contractors are routinely reimbursed the indirect cost portion of their contract support costs through a government-issued indirect cost rate. *See* § 5304(g); *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 635 (2005) ("Most contract support costs are indirect costs 'generally calculated by applying an "indirect cost rate" to the amount of funds otherwise payable to the Tribe.'" (citation omitted)).[12] Tribal contractors without such rates are similarly reimbursed through indirect-*type* costs. Manual § 6-3.2E(2), https://www.ihs.gov/ihm/pc/part-6/p6c3/. Either way, these costs encompass all manner of financial management costs, procurement costs, information technology costs, and personnel management costs. *Id*.

[12] An "[i]ndirect cost rate . . . is the ratio (expressed as a percentage) of the indirect costs to a direct cost base." 2 C.F.R. pt. 200, App. VII, ¶ B.7. "Indirect costs" (also called the "indirect cost pool") are pooled overhead costs "that jointly benefit two or more programs," *id*. ¶ B.6, such as centralized accounting costs. The direct cost "base" is the total program spending of all programs served by the indirect cost pool. *Id*. ¶ B.1. Such cost allocation systems are a common feature of government contracts. *E.g.*, *Rumsfeld v. United Techs. Corp.*, 315 F.3d 1361, 1365 (Fed. Cir. 2003). IHS's regulations demonstrate the agency's understanding that the indirect cost rate system applies to indirect costs under the ISDEAA. *See, e.g.*, 25 C.F.R. § 900.8(h)(3).

IHS also incurs these very same financial management, procurement, information technology and personnel management costs. For IHS, these costs are generally funded through the "Direct Operations" portion of the annual IHS appropriation. *See* Dep't of Health & Human Servs., IHS FY 2021 Congressional Justification, at CJ-179 (2020) (Direct Operations includes funding for "administration and oversight of . . . human resources (HR), financial management, acquisitions, internal control and risk management, health care and facilities planning, health information technology" as well as "other administrative support and systems accountability).[13] Under IHS's Manual, this fact has no bearing on the eligibility of these same types of costs for reimbursement as contract support costs. To the contrary, such costs are *expressly* eligible as contract support costs, subject only to an offset for any duplicate amounts that would otherwise lead to overpayments. *See* Manual § 6-3.2E(2) (detailing "overhead" costs eligible for contract support costs funding); § 6-3.2E(3)-(4) (addressing offsets for potential duplication in program funds and in "Tribal shares" of Area and Headquarters funding).

[13] Available at https://www.ihs.gov/sites/budgetformulation/themes/responsive2017/display_objects/documents/FY_2021_Final_CJ-IHS.pdf.

The same is true of "direct" contract support costs—the Manual details costs that Tribes and IHS *both* incur (i.e., health insurance, retirement costs, facility costs, *see* Manual § 6-3.2D(1)) and authorizes their reimbursement in full as contract support costs (again, provided no overpayment occurs). *See* Manual Ex. 6-3-G, § C. IHS's formal regulations show the same, providing examples of costs that are eligible for reimbursement as direct contract support costs, which include personnel, equipment, materials and supplies, travel, subcontracts, and "[o]ther appropriate items of cost." 25 C.F.R. § 900.8(h)(2). All of these same costs are also incurred by IHS in its own "normal" operation of a program, and most are routinely funded in part through the Secretarial amount. *See, e.g.*, IHS FY 2021 Congressional Justification, at CJ-28 to CJ-31 (listing categories of costs incurred by IHS).

IHS's longstanding and expressly codified practice of acknowledging contract support cost categories that are identical to categories of costs normally incurred by the Secretary (including categories that are actually paid under § 5325(a)(1)) establishes two propositions. First, the same types of costs *can* be reimbursed as both contract support costs and program amounts. Second (and as reflected in the Senate and House reports and discussed *supra* at 30–31), IHS's longstanding practice of reimbursing indirect costs without any categorical disqualification for "normal" Secretarial costs was well known to Congress when it

rewrote section 5325 in the 1988 Amendments. Nothing in the legislative history of those amendments even hints at an intent to cut back contract support cost payments just to those types of costs that are never incurred by the Secretary. Surely Congress can be presumed to know the agency's practices under the Act when it adopts legislative measures to reform those practices. *See, e.g.*, *ICC v. Texas*, 479 U.S. 450, 457-58 (1987) (rejecting a statutory reading that was "inconsistent with the agency's historical treatment of" a certain type of railroad service because "[p]resumably, in enacting [the statute], Congress was aware of the Commission's consistent practice of regulating railroads" in that particular way).

II. THE COUNCIL'S ADDITIONAL FACILITY COSTS ARE ELIGIBLE CONTRACT SUPPORT COSTS.

The Council's costs of operating and maintaining the buildings in which it runs its contracted substance abuse programs, including treatment beds, plainly qualify as contract support costs. Facilities costs are, of course, a necessity "to ensure compliance with the terms of the contract and prudent management"—the point of the contract being to provide substance abuse services. § 5325(a)(2). They also comfortably fit into subsection (a)(3)(A) either as a "direct program expense[]" (if they support just a single program), or as an indirect "overhead expense" (if they support this contract and other, non-ISDEAA programs too). Either way, they qualify as contract support under the plain meaning of the statutory text.

A. IHS's Own Guidance Shows That Facilities Costs Are Eligible Contract Support Costs.

IHS's own guidance confirms the Council's—and the District Court's—reading of the ISDEAA. IHS acknowledges that its Indian Health Manual expressly includes "facility support costs" in its list of "[d]irect costs eligible for CSC funding, pursuant to 25 U.S.C. § 5325(a)(2)-(3)." Manual § 6-3.2D(1)(e); *see* Appellant Br. at 19. Under the Manual, such facility costs are to be made available as contract support costs "to the extent not already made available" in the Secretarial amount. Manual § 6-3.2D(1)(e).

This concession should be the end of the matter. It shows that IHS *itself* understands that facility costs may be paid as contract support, and the restrictive interpretation of subsection 5325(a)(2) IHS has adopted solely for purposes of this litigation cannot be correct. IHS tries to dismiss this guidance as applying only in "extremely rare circumstances," Appellant Br. at 19 (citing Manual Ex. 6-3-G, § C), but either facility costs are eligible or they are not. Allowing facilities costs as contract support costs in *any* circumstance is an admission that such costs are not categorically precluded by law.

Moreover, the section of the Manual discussing indirect contract support costs—which IHS altogether ignores—acknowledges that facilities costs are one of three primary categories of costs that may be paid as indirect contract support costs. Manual § 6-3.2E(2). In discussing the categories of "overhead" (or

"indirect-type") costs that are routinely paid as contract support, the Manual lists "Facilities and Facilities Equipment" and provides examples of the specific costs that often fall into this category. *Id.* As the District Court correctly noted, these portions of the Manual "suggest[] that facility support costs may be funded as both Secretarial funding *and* contract support costs funding, so long as there are no duplicate payments." JA 588 (emphasis in original); *see* JA 587-89. Yet, if IHS's assertion on appeal were true, then its own Manual is wrong and facilities costs could never be funded as contract support because IHS always incurs facility costs in its operation of health care programs.

In sum, IHS's own guidance confirms the agency's understanding that facilities costs are eligible contract support costs.

B. IHS's Guidance Shows How the Duplication Offset Works, Further Supporting the District Court's Reading of the Act.

The IHS Manual describes how direct contract support cost requirements are calculated. Manual Ex. 6-3-G, § C. After determining "the total cost . . . of the activities to be supported with CSC," IHS will "deduct any funds that may have been provided to the awardee in the Secretarial amount *for this activity* to avoid duplication of costs." *Id.* (emphasis added). As the District Court noted, if IHS were correct that payment of *any* funds in the Secretarial amount could disqualify that entire category of costs from being paid as contract support costs, then "there would be no need to 'deduct any funds' from the contract support costs funding

that 'may have been provided . . . in the [S]ecretarial amount' because *any* activity included in the Secretarial amount would be categorically disqualified from contract support costs funding." JA 595 (alterations in original) (quoting Manual Ex. 6-3-G, § C). Similarly, the Manual provides that direct contract support costs may include "facility support costs *to the extent not already made available*," using language that again forecloses IHS's assertion here that making a type of funding available within the Secretarial amount categorically forecloses additional funding in the form of contract support costs. *See* Manual § 6-3.2D(1)(e).

As a practical matter, if the agency is annually paying some amount of money for overhead costs as part of the Secretarial amount (here, $11,838.50 for facilities support costs), the duplication provision instructs the agency not to pay that same money again. The simple cure is to deduct the $11,838.50 from the total contract support cost amount that would otherwise be paid to reimburse the Tribe for facility costs. Manual Ex. 6-3-G, § C. That is precisely what the Council suggested here. The fact of the small initial payment (and the resulting deduction) does not relieve the agency of the obligation to pay all *additional* amounts as necessary to reimburse a Tribe in full.

C. The Council Is Entitled to be Reimbursed the Remaining Amount Due for Facilities Support Costs After Applying the Duplication Offset.

The parties were directed to stipulate (if possible) to the amount IHS owed the Council as reasonable and prudent contract support costs required to cover the Council's unreimbursed facility costs in 2014. JA 641. The parties stipulated to the $302,000 reflected in the final judgment. JA 664. That judgment should be affirmed.

The actual facts of this case emphasize the particular absurdity of IHS's position. Usually, when a tribal contractor first contracts, it is taking over an ongoing IHS program. In that setting the parties can generally determine precise amounts to be transferred through the Secretarial amount, looking at prior-year budgets and expenditure records for necessary details (including facility costs). But in this case, IHS never ran this program previously. In such instances, the IHS Manual instructs the parties to clearly identify the amounts that will be transferred within the overall Secretarial amount. Manual Ex. 6-3-G § C.[14]

[14] "The amount provided in support of these [programs] included in the Secretarial amount is determined by the past expenditures of the Agency for the activities included in the [direct contract support costs] that are provided in support of the [program] to be transferred. . . . In cases where the [program] has not been operated by the Agency, the awardee should request the cost 'profile' from the Agency to determine what the Secretarial amount would have been." Manual Ex. 6-3-G § (C). *See also* Manual § 6-3.2B (2014) (the earlier version of the

This is what happened here, and in the 1992 budget for the program IHS designated $11,838.50 toward facilities costs. This amount, commensurate with the scope of the Council's programs in 1992, did not come close to covering the Council's facilities costs after the Council's contract for substance abuse programs grew over 16 times the size of the original program.[15] Yet IHS never added additional facilities funding to the contract. Although IHS has a separate facilities appropriation, over the years IHS never added to the contract amount any funds from that appropriation. *See* Ex. E to Pls.' Mot. to Suppl. Admin. R., ECF No. 20-3, at 1 (No. 1:14-cv-01835-EGS).

If IHS's legal position is correct, the Council is forever stuck with the $11,838.50 it received for facilities costs, and the balance of several hundred thousand dollars incurred each year for its facility must be covered by diverting program salaries and other funds to make up the difference. Funding for its counselors, treatment professionals, supplies, beds, equipment, and so forth must be diverted to cover these fixed costs. This is exactly the result Congress sought to

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Manual referred to a negotiated "budget" that would identify the amounts provided in the Secretarial amount in these instances).

[15] Contrary to IHS's suggestion, the expansion was not a unilateral decision in which IHS somehow played no part, for which IHS is now being asked to foot the bill. Appellant Br. at 14-15. Indeed, the assertion makes little sense: It is the Council's ISDEAA contract *with IHS* that has grown to cover expanded service delivery, funded *by IHS* thanks to increases in Congressional appropriations targeted for substance abuse services.

guard against when it added the contract support cost provisions to the ISDEAA, explaining that "[i]n the absence of [the contract support cost provisions], a tribe would be compelled to divert program funds to prudently manage the contract, *a result Congress has consistently sought to avoid*." S. Rep. No. 103-374, at 9 (emphasis added); *cf. King*, 576 U.S. at 492 (rejecting the proffered interpretation of the Affordable Care Act because it would "create the very 'death spirals' that Congress designed the Act to avoid"). And again, Congress also underscored that contract support costs would be available if program funding "for a particular function"—here, facility costs—"proves to be insufficient in light of a contractor's needs for prudent management of the contract." S. Rep. No. 103-374, at 9. Congress was focused on making sure that tribal contractors would not have to take from program resources to fund administrative costs, the exact result that would flow here if IHS's position is upheld. The Supreme Court lamented this same outcome in *Ramah Navajo Chapter*, 567 U.S. at 188, noting that when Tribes lack adequate contract support cost funding, they have to "reduc[e] ISD[EA]A services to tribal members, divert[] tribal resources from non-ISD[EA]A programs, and forgo[] opportunities to contract in furtherance of Congress' self-determination objective." (citation omitted). Affirming the District Court's judgment honors Congress's statutory "objective . . . to assure that there is no diminution in program

resources when programs, services, functions or activities are transferred to tribal operation." S. Rep. No. 103-374, at 9.

III. IHS'S POSITION WOULD VIRTUALLY ELIMINATE CONTRACT SUPPORT COSTS.

The extraordinary impact of accepting IHS's interpretation of the ISDEAA cannot be overstated. Today, in recognition of the need to pay full contract support costs, Congress annually appropriates an indefinite amount for these reimbursements, separate and apart from its other appropriations to IHS and the BIA. *See, e.g.*, Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182, 1491(Dec. 27, 2020). In turn, IHS budgets nearly $900 million for contract support cost reimbursements across the United States, *see* IHS FY 2021 Congressional Justification, at CJ-226, and the BIA budgets approximately $300 million, *see* U.S. Dep't of the Interior, Budget Justifications and Performance Information Fiscal Year 2021, at IA-CSC-2.[16] The overwhelming majority of these reimbursements is for indirect costs, which form nearly 80% of all contract support cost reimbursements, with the remainder being direct contract support costs (like the facilities costs at issue here). Manual Ex. 6-3-G, § C.

As noted *supra* at 33–34, the overwhelming majority of these IHS and BIA indirect cost payments are for functions (such as financial management,

[16] Available at https://www.bia.gov/sites/bia.gov/files/assets/as-ia/obpm/BIA_FY2021_Greenbook-508.pdf.

procurement, information technology, and personnel management costs) that these agencies normally incur themselves. Acceptance of the government's extreme theory would nearly zero out all of those indirect cost reimbursements, leaving just a few narrow categories of contract support costs such as legal costs, insurance costs, outside annual audit costs, and other isolated costs IHS does not incur or that are funded from other sources.

So too with direct contract support costs, much of which cover the difference between the fringe benefit package offered by the government, and the higher fringe benefit package many tribes must pay to retain staff, such as for health insurance, retirement, and the like.[17] Perhaps the only direct cost that would survive under the government's theory is worker's compensation insurance and certain state employment taxes.

[17] The government acknowledges that fringe benefits are frequently paid in both the Secretarial amount and as contract support costs, but it argues that this is permissible because some of these costs are either unique to tribal contractors or were not transferred in the Secretarial amount. *See* Appellant Br. at 22. This qualifier is factually wrong, as direct contract support costs often make up the difference between the higher Tribal costs for the exact same health insurance, retirement and federal personnel taxes that are incurred by the government and transferred in the Secretarial amount. *See* Manual Ex. 6-3-G § C (example of fringe benefits calculation). Moreover, the government's argument only underscores the Council's point: A single category of costs can be partially paid in the Secretarial amount and (for the portions not covered by the Secretarial amount) reimbursed as contract support costs.

This is why the Council cautions in the opening section of this brief that IHS's position here is "extreme." *See supra* at 1. It is. If IHS is right, everything Congress did to strengthen tribal contract support cost reimbursements in the 1980s and 1990s was for naught, the tribal Supreme Court victories in *Cherokee* and *Ramah* were hollow, and overnight tribes will again be forced to divert massive amounts of program dollars in order to cover fixed tribal overhead costs, all this with stunning human consequences across tribal hospitals, clinics, and (as here) local alcohol and substance abuse programs. Fortunately, the District Court below correctly concluded that Congress intended nothing of the kind, and that its reforms in 1988 and 1994 were not in vain.

CONCLUSION

The District Court properly concluded that IHS had failed to meet its statutory burden to "clearly demonstrate" the validity of IHS's declination of the Council's proposal to add facility support costs to its 2014 contract. The agency's position—which has only grown more extreme in the course of this litigation (and goes well beyond the two-page declination issued in 2014)—is contrary to the text of the statute, the legislative history, the overall statutory scheme, the agency's

own guidance, and decades of agency practice. For this reason, the District Court's decision should be affirmed.[18]

DATED this 5th day of March, 2021.

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[18] The government raises no objection in its brief to the remedy ordered by the District Court in its 2019 Opinion. Accordingly, the government has forfeited any argument that the remedy was improper. *See United States ex rel. Kasowitz Benson Torres LLP v. BASF Corp.*, 929 F.3d 721, 728 (D.C. Cir. 2019) ("A party forfeits an argument by failing to raise it in his opening brief." (quoting *Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019))). In any event, and for the reasons well stated in the District Court's 2019 Opinion, mandamus was the proper remedy.

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because, excluding the items permitted by Fed. R. Civ. P. 32(f) and Circuit Rule 32(e), this brief contains 10,758 words, including footnotes.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface in Microsoft Word using Times New Roman, 14-point font.

Respectfully submitted this 5th day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2021, I electronically filed the foregoing motion with the Clerk of the Court using the CM/ECF system.

I certify that the participants of this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted this 5th day of March, 2021.

/s/ Rebecca A. Patterson
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STATUTORY ADDENDUM

Except for the following, all applicable statutes and regulations are contained in the Brief for Appellants.

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25 U.S.C. § 5302(a), (b)

§ 5302. Congressional declaration of policy

(a) Recognition of obligation of United States

The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) Declaration of commitment

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

25 U.S.C. § 5304(g), (l)

§ 5304. Definitions

(g) "indirect cost rate" means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency;

…

(l) "tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; and

25 U.S.C. § 5321(a), (e), (g)

§ 5321. Self-determination contracts

(a) Request by tribe; authorized programs.

(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs--

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended;

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended;

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4), the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that--

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 5325(a) of this title; or

(E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

…

(e) Burden of proof at hearing or appeal declining contract; final agency action.

(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3) of this section or any civil action conducted pursuant to section 5331(a) of this title, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

(2) Notwithstanding any other provision of law, a decision by an official of the Department of the Interior or the Department of Health and Human Services, as appropriate (referred to in this paragraph as the "Department")

that constitutes final agency action and that relates to an appeal within the Department that is conducted under subsection (b)(3) of this section shall be amade either--

(A) by an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency (such as the Indian Health Service or the Bureau of Indian Affairs) in which the decision that is the subject of the appeal was made; or

(B) by an administrative judge.

…

(g) Rule of construction.

Subject to section 101(a) of the PROGRESS for Indian Tribes Act, each provision of this chapter and each provision of a contract or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe.

25 U.S.C. § 5325(b), (c), (g)

§ 5325. Contract funding and indirect costs

…

(b) Reductions and increases in amount of funds provided

The amount of funds required by subsection (a) of this section--

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to--

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this subchapter or as provided in section 450j(c) of this title.

Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

(c) Annual reports

Not later than May 15 of each year, the Secretary shall prepare and submit to Congress an annual report on the implementation of this subchapter. Such report shall include--

(1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;

(2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted;

(3) the indirect cost rate and type of rate for each tribal organization that has been negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect cost pool; and

(6) an accounting of any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes affected by contracting activities under this subchapter, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle, as authorized by section 450j(d) of this title.

…

(g) Addition to contract of full amount contractor entitled; adjustment

Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

25 U.S.C. § 5328(a)(1)

§ 5328. Rules and regulations

(a) Authority of Secretaries of the Interior and of Health and Human Services to promulgate; time restriction

> (1) Except as may be specifically authorized in this subsection, or in any other provision of this subchapter, the Secretary of the Interior and the Secretary of Health and Human Services may not promulgate any regulation, nor impose any nonregulatory requirement, relating to self-determination contracts or the approval, award, or declination of such contracts, except that the Secretary of the Interior and the Secretary of Health and Human Services may promulgate regulations under this subchapter relating to chapter 171 of Title 28, commonly known as the "Federal Tort Claims Act", chapter 71 of Title 41, declination and waiver procedures, appeal procedures, reassumption procedures, discretionary grant procedures for grants awarded under section 450h of this title, property donation procedures arising under section 450j(f) of this title, internal agency procedures relating to the implementation of this subchapter, retrocession and tribal organization relinquishment procedures, contract proposal contents, conflicts of interest, construction, programmatic reports and data requirements, procurement standards, property management standards, and financial management standards.

25 U.S.C. § 5329(a), (c)

§ 5329. Contract or grant specifications.

(a) Terms.

Each self-determination contract entered into under this chapter shall--

(1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) of this section (with modifications where indicated and the blanks appropriately filled in), and

(2) subject to subsections (a) and (b) of section 5321 of this title, contain such other provisions as are agreed to by the parties.

…

(c) Model agreement.

The model agreement referred to in subsection (a)(1) of this section reads as follows:

"Section 1. Agreement between the Secretary and the _____

Tribal Government.

"(a) Authority and Purpose.--

"(1) Authority.--This agreement, denoted a Self-Determination Contract (referred to in this agreement as the 'Contract'), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the 'Secretary'), for and on behalf of the United States pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and by the authority of the _____ tribal government or tribal organization (referred to in this agreement as the 'Contractor'). The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) are incorporated in this agreement.

"(2) Purpose.--Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) 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: (List functions, services, activities, and programs).

25 U.S.C. § 5331(a), (d)

§ 5331. Contract disputes and claims

(a) Civil actions; concurrent jurisdiction; relief

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

…

(d) Application of chapter 71 of Title 41

Chapter 71 of Title 41 shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).

Indian Health Manual (Excerpts)
§ 6-3.2E(2), (3), (4)

§ 6-3.2E. Indirect CSC.

…

(2) Negotiating Indirect-Type Costs. A lump sum amount for "indirect-type costs" may be negotiated with awardees that do not have negotiated IDC agreements with their cognizant agency or that request such a negotiation, even if they have a negotiated rate. This annual lump-sum amount may be calculated by negotiating a fixed amount for "indirect-type costs." Categories of costs often considered "overhead" or "indirect-type" are generally in the categories of:

Management and Administration; Facilities and Facilities Equipment; and General Services and Expenses. More specific examples of indirect and indirect-type costs include but are not necessarily limited to the following:

Management and Administration	Facilities and Facilities Equipment	General Services and Expenses
Governing Body	Building Rent/Lease/Cost Recovery	Insurance and Bonding
Management and Planning	Utilities	Legal Services
Financial Management	Housekeeping/Janitorial	Audit
Personnel Management	Building and Grounds	General Support Services
Property Management	Repairs and Maintenance	Interest
Records Management	Equipment	Depreciation/Use Fees
Data Processing	----	----
Office Services	----	----

As with all IDC, however, the negotiation of indirect-type CSC funding must ensure the amounts are consistent with the definition of CSC in 25 U.S.C. § 5325(a)(2)-(3).

Indirect-type costs must be renegotiated not less than once every three years, but they can be renegotiated more frequently at the awardee's option.

(3) Alternative Methods for Calculating IDC Associated With Recurring Service Unit Shares. The provisions of this section E(3) shall apply to the negotiation of indirect CSC funding for ISDEAA agreements entered into in or after FY 2017 and to the calculation of duplication under 25 U.S.C. § 5325(a)(3), when: i) an awardee assumes a new or expanded PFSA or added staff associated with a joint venture (in which case the review is limited to those new or expanded PFSA or those additional staff); ii) an awardee includes new types of costs not previously included in the IDC pool that is associated with IHS programs, resulting in a change of more than 5% in the value of the IDC pool (in which case the review will be conducted under Alternative A and will be limited to those new types of costs); or iii) an awardee proposes and renegotiates the amount.

Pursuant to the above circumstances, the awardee and the Area Director or his or her designee shall jointly determine, on a case-by-case basis, the appropriate method for determining the amount of IDC associated with the Service Unit shares and the remaining IDC that may be eligible for CSC funding, to identify duplication, if any, pursuant to 25 U.S.C. § 5325(a)(3), using one of two options listed below, or any other mutually acceptable approach.

a. Alternative A. The awardee and the Area Director or his or her designee shall conduct a case-by-case detailed analysis (Manual Exhibit 6-3-D) of Agency Service Unit share expenditures to identify any IDC transferred in the Secretarial amount. The IDC funded in the Service Unit shares will be deducted from the awardee's direct costs and total IDC, not to exceed the amount included for that same cost in the awardee's IDC pool that would be allocable to IHS under the IDC rate, to avoid duplication under 25 U.S.C. § 5325(a)(3) when determining the indirect CSC funding amount as described above in 6-3.2E(1).

b. Alternative B. The awardee and the Area Director or his or her designee will apply the following "split" of total Service Unit shares, the 97/3 method (Manual Exhibit 6-3-E):

    1. 97% of the Service Unit shares amounts will be considered as part of the awardee's direct cost base.
    2. 3% of the Service Unit shares amounts will be considered as IDC funding.
    3. If the amount considered IDC funding (3 percent) exceeds the awardee's negotiated CSC requirements, the awardee shall retain the excess funds for direct costs.

Once these 97/3 amounts are computed, they will be used in accordance with the terms of the IDC rate agreement (or alternative method provided herein) for calculating the CSC requirement. The remaining IDC need associated with the IHS PFSA will be eligible for payment as indirect CSC, as provided in this chapter and 25 U.S.C. § 5325(a)(2)-(3). Manual Exhibit 6-3-D illustrates how Alternative A (a detailed analysis) is calculated and Manual Exhibit 6-3-E illustrates how Alternative B (the 97/3 method) is calculated.

(4) Alternative Methods for Calculating IDC Associated With Tribal Shares. Pursuant to the above circumstances, if an awardee's contract includes Tribal shares, the awardee shall elect the method for determining the amount of IDC associated with Tribal shares and the remaining IDC that may be eligible for CSC funding, to identify duplication, if any, pursuant to 25 U.S.C. § 5325(a)(3), in one of two options listed below.

a. Alternative A. The awardee and the Area Director or his or her designee shall conduct a case-by-case detailed analysis (Manual Exhibit 6-3-B) of Agency Tribal share expenditures to identify any IDC transferred in the Secretarial amount. The IDC funded in the Tribal shares will be deducted from the awardee's direct costs and total IDC, not to exceed the amount included for that same cost in the awardee's IDC pool that would be allocable to IHS under the IDC rate, to avoid duplication under 25 U.S.C. § 5325(a)(3) when determining the indirect CSC funding amount as described above in 6-3.2E(1).

b. Alternative B. The awardee and the Area Director or his or her designee will apply the following "split" of total Tribal shares, the 80/20 method (Manual Exhibit 6-3-C):

   i. 80% of the Tribal shares amounts will be considered as part of the awardee's direct cost base.

   ii. 20% of the Tribal shares amounts will be considered as IDC funding.

   iii. If the amount considered IDC funding (20 percent) exceeds the awardee's negotiated CSC requirements, the awardee shall retain the excess funds for direct costs.

Once these 80/20 amounts are computed, they will be used in accordance with the terms of the rate agreement (or alternative method provided herein) for calculating the CSC requirement. The remaining IDC need associated with the IHS PFSA will

be eligible for payment as indirect CSC, as provided in this chapter and 25 U.S.C. § 5325(a)(2)-(3). Manual Exhibit 6-3-B illustrates how Alternative A (a detailed analysis) is calculated and Manual Exhibit 6-3-C illustrates how Alternative B (the 80/20 method) is calculated.

Exhibit 6-3-G

Section C.

…

To compute the DCSC requirement, the awardee and the IHS must negotiate the total cost to the awardee of the activities to be supported with CSC. After this requirement is determined, the Agency will deduct any funds that may have been provided to the awardee in the Secretarial amount for this activity to avoid duplication of costs. The amount provided in support of these PFSA included in the Secretarial amount is determined by the past expenditures of the Agency for the activities included in the DCSC that are provided in support of the PFSA to be transferred. In cases where the expenditures of the prior year do not represent the amount the Secretary would have expended due to one-time distortions in expenditures, a multi-year average of past expenditures may be used. In circumstances where the Agency has never operated the PFSA, such as new programs or new appropriations for expanded programs, the Agency will compute the amount the Secretary would have provided for the DCSC activities from a "profile" developed from other, similar Agency PFSA. To prepare the DCSC proposal, the awardee should request the amounts the Agency has provided in support of the PFSA to be transferred. In cases where the PFSA has not been operated by the Agency, the awardee should request the cost "profile" from the Agency to determine what the Secretarial amount would have been.

…

Example of the Fringe Benefits calculation:

FRINGE ITEM	TRIBAL AMOUNT	TOTAL IHS AMOUNT	DIFFERENCE (DCSC AMOUNT)
FICA and Medicare Tax	$1,000	$900	---
Retirement	$2,000	$1,250	---
Insurance (Life, Health, Disability)	$750	$1,000	---
Sub-Totals	$3,750	$3,150	$600
Workers Comp.	$200	---	$200
Unemployment	$400	---	$400
TOTALS	$4,350	$3,150	$1,200

Indian Health Manual (version in effect in 2014) (Excerpt)

§ 6-3.2B

6-3.2B. Determining CSC Requirements.

…

To ensure there is no duplication of costs in the CSC amounts, the IHS will review the CSC request to identify any costs that duplicate costs incurred by the IHS in the operation of the program and included in the Section 106(a) (1) program funding to be transferred, or that may have been duplicated within the CSC amount. When the PFSA to be contracted have not previously been operated by the IHS, the identification of the duplicative costs will be negotiated based on the program budget submitted by the awardee and a budget from the IHS reflecting the expenditure patterns of how the Secretary would have otherwise operated the PFSA. On rare occasions, the IRS has provided general health services to Indian beneficiaries by purchasing care as opposed to providing services directly in an IHS facility. When Tribes contract to assume control of these types of programs, the IHS must develop a profile to show indirect types of costs that are funded within the program amount. This profile is used as a basis to show the historical costs and amounts transferred with the program, and for the purposes of determining whether duplication exists between amounts requested as CSC and amounts provided as a part of the program.

…