No. 21-15641

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN CARLOS APACHE TRIBE,
Plaintiff-Appellant,

v.

XAVIER BECERRA, Secretary, U.S. Department of Health and Human Services, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona (Phoenix)
No. 2:19-cv-5624-NVW
Hon. Neil V. Wake, District Judge

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The Indian Self-Determination Act ("ISDA") mandates that the government reimburse the Tribe's contract support costs in connection with the "Federal program" that the Tribe is contracting to carry out. IHS cannot dispute this central principle; instead it attempts to limit contract support costs by artificially defining the Federal program under contract to include *only* those portions of the Federal program funded by the Secretarial amount. Neither the contract support cost provisions nor anything else in the Act supports this cramped reading.

Moreover, IHS's interpretation undermines a central purpose of contract support costs, which is to reimburse tribes for *additional* administrative or overhead costs they must incur over and above the costs incurred by the government in its own operation of a given program. By failing to reimburse administrative costs associated with the Tribe's contracted services funded through program income, IHS forces the Tribe to reduce the amount of services it can provide and thus deprives it of the parity that is central to the ISDA framework. In short, IHS cannot meet the high bar of demonstrating that its restrictive interpretation is clearly required by the statutory language, and the district court's decision should accordingly be reversed.

STATUTES AND REGULATIONS

Pertinent statutory and regulatory provisions not already reproduced in the addendum to the Tribe's Opening Brief or IHS's Answering Brief are reproduced in the addendum to this brief.

STANDARD OF REVIEW

The parties agree that review is de novo, Tribe Br. 14; IHS Br. 17, and that the text of the statute controls the disposition of this case. But stunningly, the government then altogether *ignores* the central statutory text commanding how the ISDA must be read: "Each provision of the [ISDA] and each provision of [an ISDA] Contract *shall be liberally construed for the benefit of the Contractor*." 25 U.S.C. § 5329(c) (model agreement, § 1(a)(2)). The government also ignores that this statutory command is repeated verbatim in the parties' contract. ER-57. Neither controlling provision is cited anywhere in the government's brief.[1]

These provisions make the standard of review crystal clear: IHS "must demonstrate that its reading [of the ISDA] is *clearly required* by the statutory language." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 194 (2012) (emphasis added) (citing 25 U.S.C. § 5329(c) (then codified at § 450*l*(c)). If IHS

[1] IHS cites a related later-enacted provision, § 5321(g), but ignores § 5329(c) and the Supreme Court's specific interpretation of it. *See* IHS Br. 18.

fails to meet that high burden, its position cannot be saved by reference to more malleable common law rules of construction or the general Indian law canon.

ARGUMENT

I. IHS'S INTERPRETATION OF 25 U.S.C. § 5325(a)(3) IS NOT "CLEARLY REQUIRED" BY THE STATUTORY LANGUAGE.

A. IHS Cannot Rely on its Internal Guidance to Resolve the Asserted Statutory Ambiguity.

IHS's central proposition is that the ISDA's contract support cost provisions are incomplete because (as IHS would have it) they "do[] not specify a mechanism for calculating the appropriate amount of these [contract support] costs," IHS Br. 22, and that the resulting ambiguity created by this gap should be resolved by reference to IHS's internal Manual, *id*. at 22–24. But that approach to the ISDA is impermissible for two reasons.

First, Congress has commanded that the Tribe's reading of the ISDA controls unless the government "demonstrate[s] that its reading is clearly required by the statutory language." *Salazar*, 567 U.S. at 194; *see supra* at 2. The government cannot do so here.

And second, in the ISDA Congress expressly denied the agency its routine discretion to broadly interpret the statutes it is charged with implementing—instead confining IHS's discretion under the ISDA to 16 narrow topics that do not

include contract support costs. *See* 25 U.S.C. § 5328(a)(1); *see also* S. Rep. No. 103–374, at 14 (1994) ("Beyond the areas specified in [the Act] (such as the Federal Tort Claims Act, declination appeal procedures, the Contract Disputes Act, etc.), no further delegated authority is conferred."); *Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996) (with respect to contract support costs, explaining: "Congress has clearly expressed in the ISDA . . . its intent to circumscribe as tightly as possible the discretion of the Secretary, *see* ISDA § [5328](a) (prohibiting the Secretary from promulgating any regulation or imposing any nonregulatory requirement, except for regulations pertaining to sixteen carefully delineated topics not relevant here)."). The statutory model contract—and the contract at issue here—underscore the point by noting that tribes are not bound by "program guidelines, *manuals*, or policy directives of the Secretary." 25 U.S.C. 5329(c) (model agreement § 1(a)(11) (emphasis added)); *see also* ER-61. This explains why IHS's implementing regulations expressly concede that its "manuals" are *not* binding on tribes, 25 C.F.R. § 900.5, a caution repeated in the very Manual IHS repeatedly invokes, IHS Manual 6-3.1A.[2] IHS

[2] Section 6-3.1A of the IHS Manual specifically acknowledges: "These instructions are not regulations establishing program requirements and are issued consistent with 25 [C.F.R.] § 900.5, which states:

(*Continued on next page.*)

therefore cannot rely on its self-serving internal guidance document to rebut the Tribe's reasonable interpretation of the Act.

Moreover, IHS is simply wrong when it asserts that the ISDA does not explain how indirect contract support costs are calculated. The Act repeatedly refers to the indirect cost rate system and its constituent elements. *See* 25 U.S.C. §§ 5304(f), (g), 5322(e)(1), 5325(c)(3), (c)(4), (c)(5), (d)(1), (d)(2), (e), (h), 5326, 5327. The Tribe's position that the "indirect cost pool," § 5325(c)(5), from which the "overhead expense" is to be calculated includes "any additional administrative or other expense . . . incurred by the tribal contractor in connection with the operation of the Federal program," § 5325(a)(3)(A)(ii), is drawn directly from the statute. And while IHS resists the Tribe's plain reading of the central term "Federal program," IHS Br. 27, IHS *never* explains why the "Federal program" that IHS carries out (and which IHS concedes includes program income, *see* IHS Br. 3) means something different when the Tribe carries it out.

> *Except as specifically provided in the [ISDEAA], or as specified in subpart J, an Indian Tribe or Tribal organization is not required to abide by any unpublished requirements such as program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Indian Tribe or Tribal organization and the Secretary, or otherwise required by law*."

In sum, IHS's interpretation of § 5325(a)(3)(A) is not "clearly required by the statutory language" and therefore fails.

B. The Tribe's Reading Faithfully Implements both the Act and the Tribe's ISDA contract.

IHS focuses heavily on the suggestion that the Tribe's ISDA contract, and the Annual Funding Agreements ("AFAs") entered into under the contract, dictate the "final amount" of contract support costs that IHS owes to the Tribe. *See* IHS Br. 19–24. But this is simply not true, nor has it ever been: the contract incorporates the terms of the ISDA (which requires payment of full contract support costs); the contract makes crystal clear that the amounts specified are estimates that will be adjusted and reconciled later; and IHS's contrary view ignores that contract support costs are ultimately *reimbursements* which, by definition, cannot be calculated until after the close of each contract year.

First, the Tribe's ISDA contract expressly states that "[t]he provisions of title I of the [ISDA] are incorporated in this agreement." ER-57; *see* Tribe Br. 14 n.5. The contract thus incorporates the Act's provisions mandating full payment of contract support costs on the entire "Federal program," including the portion funded with program income. 25 U.S.C. § 5325(a)(2)–(3); *see* Tribe Br. 17–26. So too, each Annual Funding Agreement (AFA) states that contract support costs "will be calculated and paid in accordance with Section [5325(a)] of the Act."

E.g., ER-72. And while the AFA also refers to the IHS Manual, the express statutory incorporation trumps any provision of the Manual that is contrary to law. *See* Manual § 6-3.1A (explaining that the Manual is nonbinding); 25 C.F.R. § 900.5 (same). Contrary to IHS's suggestion, nothing in the parties' contract overrides or waives the ISDA's statutory commands. Nor could it. *See MAPCO Alaska Petroleum, Inc. v. United States*, 27 Fed. Cl. 405, 416 (1992) ("The contractor cannot, by waiver, permit the Government to enter an illegal contract."), *abrogated on other grounds by Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005).

Second, each AFA makes plain that the stated contract amounts are *estimates* because they are all subject to adjustment "as a result of changes in program bases, *Tribal CSC need*, and available CSC appropriations." *E.g.*, ER-72 (emphasis added). IHS acknowledges this language, yet contradictorily insists the amount "awarded by the agreements" is the final amount due. IHS Br. 22–23. As explained, that cannot be correct.

Third, IHS's presentation elides the very nature of contract support costs, which are "reimburs[ements]," § 5325(a)(3)(A), (B), for costs that have been "incurred," §§ 5304(f), 5325(a)(3)(A)(ii), (a)(3)(B), (a)(5), (a)(6), (e). Such sums cannot possibly be known until the contract year is over, payments have been

reconciled, expenditures have been audited, and final reimbursement amounts have been calculated. IHS omits all this, to make it appear that final amounts due are known and agreed to when each contract is signed ahead of the start of a fiscal year. Nothing could be further from the facts.

Here, the expenses incurred to provide the services listed in the Tribe's contract, as audited after the end of the contract year, include health care expenses paid with program income earned under the contract. ER-33, ¶ 55. Thus, these costs are properly included in the Tribe's direct cost base, and the final contract support cost calculations must take them into account.[3] The statute dictates reimbursement of all "reasonable and allowable costs" of both direct and indirect expenses incurred in the operation of the Federal program, § 5325(a)(2)–(3); *see* Tribe Br. 17–26, and these terms are paramount. As discussed above, IHS may not rely on its own Indian Health Manual to supersede that statutory command. *See supra* at 3–5.

[3] The indirect cost *rate* is subject to negotiation, as IHS describes in its brief. *See* IHS Br. 23. But once the rate is set, the indirect cost rate *must* be applied to the full direct cost base—which is adjusted to account for a tribe's actual direct cost expenditures over the contract year—in order to ensure full payment of contract support costs in compliance with § 5325(a)(2)–(3), (c).

C. The Statutory Text and Structure Demonstrate that Program Income is Part of the Federal Program Under Contract.

IHS presents a series of arguments that attempt to set program income outside the scope of the contracted Federal program. These arguments fail for multiple reasons.

Relying on the flawed *Swinomish* decision, IHS argues that contract support costs are "limited to those under *one* 'contract,'" between IHS and the Tribe. IHS Br. 26 (quoting *Swinomish Indian Tribal Cmty. v. Becerra*, 993 F.3d 917, 920 (D.C. Cir. 2021)). IHS then suggests that the collection and expenditure of program income is "distinct from" the performance of the Tribe's contractual obligations. *Id.* at 27. But this argument cannot be squared with the fact that the collection and subsequent expenditure of program income are required by the Tribe's contract and the statutory scheme, thereby putting the expenditure of program income squarely within the scope of the Tribe's (one) contract with IHS. *See* Tribe Br. 8–9, 12, 27–28, 34, 53; ER-86.

As an initial matter, the scope of work incorporated into the Tribe's AFA expressly requires the Tribe to "[m]aintain an efficient billing system, *to maximize third party revenues*," ER-86, and the statute requires those third-party revenues to be spent on the IHS services under contract, 25 U.S.C. §§ 1621f, 1641(d). This, alone, demonstrates the flaw in IHS's argument that the collection and expenditure

of program income somehow falls outside the scope of the Tribe's contractual obligations.

IHS repeatedly tries to recharacterize the Tribe's billing and expenditure of program income as a discretionary choice, ignoring these contractual and statutory provisions. For instance, IHS argues that 25 U.S.C. § 1623(b) does not require the Tribe to bill third-party payors. IHS Br. 31–32. But § 1623(b) could hardly be clearer. It provides:

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

The plain meaning of this provision is that if another funding source is available—as is the case with an Indian patient who is covered by Medicare, Medicaid, or private insurance—that other funding source *must* be billed first. Only if no other funding source is available may IHS appropriated funds be used.[4]

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[4] The applicability of this provision does not hinge on the existence of some imagined "dispute among potential payers," as the government argues without support, IHS Br. 32, and its plain terms suggest nothing of the sort. One way of understanding the payer-of-last-resort scheme is to keep in mind that there is always a potential payer: Medicare, Medicaid, private insurance, or IHS appropriated funds. If a patient is covered by any of the first three options, § 1623(b) commands that those sources of funds must pay for the services rendered. This rule is what generates program income, which Congress then

IHS does not dispute that once program income is earned, the ISDA mandates that the funds be spent "to further the general purposes of the contract," 25 U.S.C. § 5325(m), and the Indian Health Care Improvement Act similarly directs that program income be spent on additional services or related facility improvements, *id.* § 1641(c)(1)(B). Accordingly, because the collection and expenditure of program income are contemplated *and required* by both the Tribe's contract and the statutory scheme, IHS misses the mark in trying to push program income outside the scope of the Tribe's contract.

The D.C. Circuit's *Swinomish* decision failed to understand this core element of the contractual and statutory scheme, purporting to focus on "*the* contract" between the tribe and IHS without appreciating the actual scope of that contract. *See* IHS Br. 26 (quoting *Swinomish*, 993 F.3d at 920).[5] This Court should therefore reject IHS's invitation to adopt the D.C. Circuit's flawed

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mandates must go back into the program to increase services and improve facilities.

[5] The D.C. Circuit seemed to believe there were two separate programs—an IHS program and some separate program funded by third-party revenues. But that is not correct: both IHS-operated *and* tribal programs use third-party revenues, plus appropriated dollars when third-party revenues are unavailable, in combination to support the health services provided as part of the IHS program, *i.e.*, the Federal program under contract.

reasoning. Contrary to IHS's contention, the Tribe's reading of the statute does not result in contract support cost payments of an "unlimited" amount, *see* IHS Br. 30 (quoting *Swinomish*, 993 F.3d at 921), but only reimbursement of the Tribe's actual administrative costs associated with services the Tribe provided *pursuant to its ISDA contract*—indeed, services the Tribe could not have provided *without* that contract. The ISDA entitles the Tribe to that full reimbursement and nothing more.

IHS gains no ground with its argument that the statutory structure separates program income from the payment of contract support costs. *See* IHS Br. 28. Pointing to 25 U.S.C. §§ 5325(m) and 5388(j),[6] IHS acknowledges that these special provisions prohibit program income from being used to *reduce* the amount of appropriated funding provided to a tribal contractor, in contrast with normal accounting rules that would require a government contractor's base funding to be reduced commensurate with its earnings. IHS Br. 28–29 (citing 2 C.F.R. pt. 200). But IHS draws the wrong conclusion from these special provisions, arguing that Congress's decision to protect the tribes' base funding suggests that Congress considered program income to be "separate from" a tribe's contract funding. *Id.* at 29. The history of the third-party billing provisions directly contradicts this

[6] IHS acknowledges, as it must, that § 5388(j) relates only to Title V—not to Title I, which is the applicable Title here. IHS Br. 28 & n.6.

conclusion.

It is well-established that Congress enacted the various third-party billing provisions so that program income could "be used to expand and improve current IHS health care services and not to substitute for present expenditures." H.R. Rep. No. 94-1026, at 108 (1976); *see Ariz. Health Care Cost Containment Sys. v. McClellan*, 508 F.3d 1243, 1246 (9th Cir. 2007) (describing same); Tribe Br. 42–43; Amici Curiae Br. 9–25. Section 5325(m)(2) carries out this intent by prohibiting the reduction of appropriated funds on the basis of program income earned by a tribe. This provision therefore only *supports* the Tribe's argument that program income is an integral part of the Federal program. Far from intending a separation, Congress intended for program income to "expand and improve" the services provided under that program. *See* H.R. Rep. No. 94-1026, at 108.

IHS also entirely fails to grapple with the historical context in which the contract support cost provisions were enacted. *See* Tribe Br. at 31–32. In 1988 and 1999, *IHS* provided program income to participating tribes *under their IHS contracts*. (Even today, IHS continues to pay some tribes their program income under their ISDA contracts, operating as the "intermediary." *See* IHS Br. 9.) It is difficult to deny—and IHS does not—that in *that* scenario, program income is paid by IHS to the tribe under the contract and is therefore an integral part of the unified

Federal program to which contract support costs must be added. *See* Tribe Br. 31–32. Nothing in the ISDA suggests Congress intended a different result for tribes that opt to bill third parties directly and avail themselves of the same congressionally sanctioned short-cut that IHS uses to access and spend program income.

D. IHS's Approach Destroys the Intended Parity between Tribes and IHS.

IHS argues that the Tribe's position would provide a windfall. That hyperbole is simply untrue. The Tribe here is simply seeking to be treated like any other IHS-operated health center.

For instance, IHS posits that program income can be used for broad purposes, including administrative costs, and therefore IHS should not have to pay these costs. IHS Br. 33. But the same could be said of dollars transferred in the Secretarial amount, over which tribes have broad re-budgeting authority (and which, therefore, could theoretically be spent on administrative costs). IHS's novel argument would entirely undermine the contract support cost system, the very purpose of which is to ensure that Tribes *not* "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.

Moreover, that's not what IHS does when it operates health programs: IHS's

program income goes to services and facilities—specifically, the additional staff, services or updates needed to maintain compliance. 25 U.S.C. § 1641(c)(1)(B); IHS Br. 33. IHS contends that even the agency must spend *part* of its program income on some administrative costs. IHS Br. 37. But that misses the point—whether the agency spends some small portion of its program income on administrative costs is irrelevant to whether IHS is creating an impermissible disparity by forcing tribes to spend significantly *more* of their program income on administrative costs than IHS does, leaving significantly *less* available for services. Because tribal administrative costs are higher than the federal government's, the very purpose of contract support costs is to cover the *additional* expenditures that tribes must incur, so that tribes can provide "at least the same amount of services" that IHS would have provided if it continued to run the program. S. Rep. No. 100-274, at 16 (1987); *see* S. Rep. No. 103-374, at 9; Tribe Br. 9–10, 37–38. By refusing to pay contract support costs on the portion of services funded by program income, IHS forces tribal programs to make up the difference by diverting additional program funds toward administrative costs. Since this leaves fewer funds available for the provision of services, it *necessarily* disadvantages tribal programs as compared to IHS-run programs.

IHS also contends the Tribe's position must fail because the Tribe has not

presented evidence showing that it received less than what *IHS* would have received if IHS had continued operating the subject program. IHS Br. 35. This, too, misses the mark. For one thing, the Tribe did provide evidence of the resources available to IHS, citing the agency's admissions made directly to Congress. Tribe Br. 38–41 (citing, *inter alia*, Dep't of Health & Human Servs., Indian Health Serv., Fiscal Year 2013 Justification of Estimates for Appropriations Committees, at CJ-13–14, *available at* https://www.ihs.gov/sites/budgetformulation/themes/responsive2017/documents/FY2013BudgetJustification.pdf). As for evidence of the resources provided to the Tribe, the Complaint squarely alleged that the Tribe was not reimbursed for any administrative expenses it incurred to carry out the portion of its contracted services funded with program income. ER-33, ¶¶ 53–55. That allegation is sufficient for purposes of a motion to dismiss. *Northstar Fin. Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1042 (9th Cir. 2015) ("On a motion to dismiss, [courts] accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the non-moving party." (quotation omitted)).[7]

[7] To the extent additional evidence is needed regarding specific costs, that is a factual matter to be resolved at a later stage, not a reason to categorically deny all contract support costs related to these services as a matter of law.

IHS also argues that the Tribe already achieved parity because contracting tribes receive a share of the Direct Operations line item in IHS's budget. IHS Br. 36. But even if IHS could establish that this occurred here (and IHS hasn't), this would not impact whether *un*reimbursed administrative costs arising from spending program income are *categorically* excluded by law from contract support cost reimbursement. A tribe's "share" of the Direct Operations line item is not tied to what IHS would have used to run the contracted program; it is based on a formula. Accordingly, there is no particular relationship between what a tribe is paid out of the IHS Direct Operations budget and what it actually incurs in administrative costs to operate a given set of programs. IHS is correct in one partial respect: to the extent IHS paid the Tribe "Direct Operations" funding for reimbursement of tribal administrative costs, IHS would be entitled to a credit against its contract support cost obligation (called a duplication offset), as noted at the end of 25 U.S.C. § 5325(a)(3)(A). Nothing about that credit amount negates IHS's duty to reimburse unpaid contract support costs under the Act.

II. SECTION 5326 HAS NO APPLICATION HERE.

IHS's halfhearted argument regarding § 5326 is unpersuasive. IHS argues that administrative costs arising from the Tribe's expenditure of program income to provide services under the contract are somehow not "directly attributable" to the contract, partly relying again on the mistaken assertion that the provision of such

services is a "discretionary activit[y]." IHS Br. 38–39. This assertion is plainly incorrect, *see supra* at 10–11, and the administrative costs arising from the provision of program income-funded services are indeed "directly attributable to" the Tribe's ISDA contract, *see* Tribe Br. 53–57. Not only are they directly attributable to the contract; they would not exist *but for* the contract. This sharply distinguishes the Tribes' costs from those at issue in the litigation that gave rise to § 5326 and the follow-on *Tunica* litigation that IHS attempts to rely on. IHS Br. 38–39; *see* Tribe Br. 49–52.

IHS does not dispute that Congress enacted § 5326 in response to circumstances wholly different from the ones presented here: in that instance, a tribal contractor sought to recover costs associated with entirely separate and unrelated grant programs. *See* IHS Br. 39; *see also* Tribe Br. 48–53 (discussing *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997)).[8] To be sure, § 5326 would apply here *if* the Tribe were seeking reimbursement for costs incurred to run a different program—for instance, if the Tribe were trying to claim

[8] The *Tunica-Biloxi* case similarly applied § 5326 in a situation involving administrative costs arising under *other agencies'* grants, and IHS's reliance on it is therefore misplaced. *See* IHS Br. 38 (citing *Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 422, 424 (D.D.C. 2008)); *see also* Tribe Br. 51–52 (discussing same).

IHS should pay for administrative expenditures tied to funds received from a Department of Education grant funding school health programs. But that is a far cry from funds generated by the IHS-contracted program and used directly to supplement that contracted program, all precisely as Congress intended for tribally-contracted programs. *See Ariz. Health Care Cost Containment Sys.*, 508 F.3d at 1246. Indeed, IHS does not even attempt to argue that these situations are analogous.

Instead, IHS insists that § 5326 stands for the broader proposition that contract support costs do not "serve as a backstop to make sure the Tribe has adequate funding." IHS Br. 39. But that is not what § 5326 addresses. Nor is it relevant to what the Tribe seeks here, which is not a broad "backstop" but simply reimbursement for costs *directly* attributable to the performance of the IHS contract.

For the same reason, IHS gains no traction when criticizing the *Sage* decision on this basis. *See* IHS Br. 39–40. The *Sage* court did not address § 5326 because IHS never raised it, a fact which only underscores the weakness of the argument here. Because § 5326 has no bearing on costs associated with the expenditure of program income under an ISDA contract, the *Sage* court had no reason to address it.

CONCLUSION

For the foregoing reasons and those set forth in the Tribe's Opening Brief, the district court's decision should be reversed.

Respectfully submitted this 22nd day of December 2021 at Anchorage, Alaska.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Cir. R. 32-1 because this brief contains 4,348 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office 365 Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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STATUTORY ADDENDUM

Except for the following, all applicable statutes, etc., are contained in the addenda submitted with the Tribe's Opening Brief and IHS's Answering Brief.

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25 U.S.C. § 5304(f), (g)

§ 5304. Definitions

For purposes of this chapter, the term—

. . .

(f) "indirect costs" means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;

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

. . .

25 U.S.C. § 5322(e)(1), (e)(2)

§ 5322. Grants to tribal organizations or tribes

(e) Grants for technical assistance and for planning, etc., Federal programs for tribe

The Secretary is authorized, upon the request of an Indian tribe, to make a grant to any tribal organization for—

> (1) obtaining technical assistance from providers designated by the tribal organization, including tribal organizations that operate mature contracts, for the purposes of program planning and evaluation, including the development of any management systems necessary for contract management, and the development of cost allocation plans for indirect cost rates; and
>
> (2) the planning, designing, monitoring, and evaluating of Federal programs serving the tribe, including Federal administrative functions.

25 U.S.C. § 5325 (various excerpts)

§ 5325. Contract funding and indirect costs

(a) Amount of funds provided

. . .

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

. . .

(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 chapter. Such report shall include—

. . .

(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; . . . .

(d) Treatment of shortfalls in indirect cost recoveries

(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

(e) Liability for indebtedness incurred before fiscal year 1992

Indian tribes and tribal organizations shall not be held liable for amounts of indebtedness attributable to theoretical or actual under-recoveries or theoretical over-recoveries of indirect costs, as defined in Office of Management and Budget Circular A–87, incurred for fiscal years prior to fiscal year 1992.

. . .

(h) Indirect costs for contracts for construction programs

In calculating the indirect costs associated with a self-determination contract for a construction program, the Secretary shall take into consideration only those costs associated with the administration of the contract and shall not take into consideration those moneys actually passed on by the tribal organization to construction contractors and subcontractors.

. . .

25 U.S.C. § 5328(a)

§ 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 chapter, 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 chapter 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 5322 of this title, property donation procedures arising under section 5324(f) of this title, internal agency procedures relating to the implementation of this chapter, 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(c) (model agreement, § 1(a)(11))

§ 5329. Contract or grant specifications

(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.

. . .

"(11) Federal program guidelines, manuals, or policy directives.—

Except as specifically provided in the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) 1 the Contractor is not required to abide by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law.

. . . .

25 C.F.R. § 900.5

§ 900.5 Effect of these regulations on Federal program guidelines, manual, or policy directives.

Except as specifically provided in the Act, or as specified in subpart J, an Indian tribe or tribal organization is not required to abide by any unpublished requirements such as program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Indian tribe or tribal organization and the Secretary, or otherwise required by law.

Indian Health Manual § 6-3.1A

§ 6-3.1. INTRODUCTION

A. Purpose. This chapter of the *Indian Health Manual* provides guidance to both Tribal and Agency personnel in the preparation, negotiation, determination, payment, and reconciliation of contract support costs (CSC) funding in support of new, expanded, and/or ongoing Indian Self-Determination and Education Assistance Act (ISDEAA), as amended, codified at 25 United States Code (U.S.C.) Section (§) 5301 et seq., contracts and compacts. The chapter provides instructional guidance on the following:

(1) determination of amounts of pre-award, startup, direct, and indirect CSC funding;

(2) payment of CSC funding to awardees;

(3) reconciliation of CSC payments to awardees; and

(4) reporting by IHS to all Tribes and to Congress.

These instructions are not regulations establishing program requirements and are issued consistent with 25 Code of Federal Regulations (CFR) § 900.5, which states:

> *Except as specifically provided in the [ISDEAA], or as specified in subpart J, an Indian Tribe or Tribal organization is not required to abide by any unpublished requirements such as program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Indian Tribe or Tribal organization and the Secretary, or otherwise required by law.*

The development of this chapter has involved the active participation of representatives from American Indian and Alaska Native Tribes. The procedures discussed here will be applied to contracts and compacts awarded pursuant to Title I and Title V, respectively, of the ISDEAA.