**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW MEXICO**

Fort Defiance Indian Hospital Board, Inc.,

Plaintiff,

v.

Xavier Becerra, Secretary, U.S. Department of Health and Human Services, *et al.*,

Defendants.

No. 1:22-cv-00098-JB-CG

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR IMMEDIATE INJUNCTIVE RELIEF OR IN THE ALTERNATIVE A PRELIMINARY INJUNCTION**

## I. Introduction

Plaintiff seeks a mandatory injunction based only on Counts I and II of its First Amended Complaint. Doc. 29. But Plaintiff's failure to demonstrate irreparable harm if an injunction does not issue, standing alone, is sufficient basis to deny a preliminary injunction. And because Plaintiff is unlikely to succeed on the merits, an injunction pursuant to 25 U.S.C. § 5331(a) is also unwarranted. Defendants respectfully request that the Court deny Plaintiff's motion.

## II. Applicable Law

"A preliminary injunction is an extraordinary remedy, the exception rather than the rule." *United States ex rel. Citizen Band Potawatomi Indian Tribe of Okla. v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 888 (10th Cir. 1989); *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right."). To justify this extraordinary remedy, "the movant must establish that four equitable factors weigh in its favor: (1) it is substantially likely to succeed on the merits; (2) it will suffer irreparable injury if the injunction is denied; (3) its threatened injury outweighs the injury the

opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest." *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009); *see also Winter*, 555 U.S. at 20. These prerequisites do not establish a balancing test; rather, as the Tenth Circuit has held, each must be satisfied independently, and the strength of one cannot compensate for the weakness of another. *Diné Citizens Against Ruining Our Env't*, 839 F.3d 1276, 1282 (10th Cir. 2016) ("Under *Winter*'s rationale, any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible.").

The limited purpose of a preliminary injunction "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). The Tenth Circuit has identified three types of preliminary injunctions that do not serve this purpose: "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc) (per curiam), *aff'd and remanded on other grounds sub nom. Gonzalez v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 544 U.S. 973 (2005). A preliminary injunction that falls into any of these three categories is "specifically disfavored" and "a party seeking such an injunction must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms, and may not rely on [the Tenth Circuit's] modified likelihood-of-success-on-the-merits standard." *Id*. at 975-76. "The burden on the party seeking a preliminary injunction is especially heavy when the relief sought would in effect grant plaintiff a substantial part of the

relief it would obtain after a trial on the merits." *GTE Corp. v. Williams*, 731 F.2d 676, 679 (10th Cir. 1984).

## III. Argument

### 1. Plaintiff Will Not Suffer Irreparable Injury Absent a Preliminary Injunction

"[A] showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction," and therefore "the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004) (quoting *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990)). To show irreparable harm, a plaintiff must "demonstrat[e] 'a significant risk that [it] will experience harm that cannot be compensated after the fact by monetary damages.'" *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (quoting *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003)). "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). "[T]he party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (quoting *Wisc. Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985)). It is well settled that a "temporary loss of income which may be recovered later does not usually constitute irreparable injury." 11A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1 n.2 (3d ed. 2015) (citing *DeNovellis v. Shalala*, 135 F.3d 58, 64 (1st Cir. 1998)); *see also, e.g.*, *Sampson v. Murray*, 415 U.S. 61, 90 (1974).

Although Plaintiff claims that it will likely need to eliminate patient services and reduce staff, Plaintiff has submitted no evidence of its current financial position to support its motion. In

fact, the most recent audited financial statements that Plaintiff has provided to IHS reflect that, on September 30, 2020, Plaintiff had $227,781,909 in assets and a net position of $199,665,784. Yazzie Decl. ¶ 3; Ex. B.[1] This is over ten times the amount Plaintiff has proposed in annual indirect contract support costs ("CSC") funding. And setting aside CSC, IHS has awarded Plaintiff $47,786,305 to operate health care programs in fiscal year ("FY") 2022. Doc. 29, Ex. 25 at 40.[2] Plaintiff faces no irreparable injury when it possesses substantial assets and can recover damages, if warranted, at the conclusion of this action.[3]

Nor has Plaintiff explained its delay in seeking preliminary relief, which "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *GTE Corp.*, 731 F.2d at 678. IHS issued its partial declination decision on December 1, 2021; Plaintiff did not file the present motion until four months later.

Plaintiff's failure to demonstrate irreparable injury is an independently sufficient ground for denying its motion; the Court need not consider the remaining preliminary injunction factors. *Dominion*, 356 F.3d at 1260.

**2. Plaintiff Is Unlikely to Succeed on the Merits of Its Claims**

[1] To the extent Plaintiff's assets include funds transferred by IHS to Plaintiff under an ISDEAA contract, then Plaintiff must use the funds to carry out contracted programs. If Plaintiff's assets include third-party insurance reimbursements, those funds likewise must be used to further the general purposes of Plaintiff's ISDEAA contract. 25 U.S.C. § 5325(m).

[2] Upon information and belief, this is one of the exhibits that is the subject of Plaintiffs' Unopposed Motion for Leave to File Overlength Exhibits, Doc.33.

[3] Plaintiff alleges that it "faces a dire financial situation if the Court does not award a preliminary injunction," citing *Navajo Health Found.-Sage Mem'l Hosp., Inc. v. Burwell*, 100 F. Supp. 3d 1122, 1171 (D.N.M. 2015). However, in that case, Sage Memorial Hospital had lost all of its IHS funding and provided declarations alleging that it would be on "brink of insolvency" by the end of the year. There are no such allegations in this case.

**A. 25 U.S.C. § 5325(b) Only Applies to Funding Required by § 5325(a)**

Pursuant to the Indian Self-Determination and Education Assistance Act ("ISDEAA"), once a tribe or tribal organization enters into a contract with IHS, IHS transfers to the tribal contractor the amount of appropriated funds the agency had or would have allocated for its operation of the program for the period covered by the contract, for the tribal contractor to operate the program. 25 U.S.C. § 5325(a)(1). This is known as the "Secretarial amount" because this is the amount the Secretary, through IHS, would have otherwise provided for its continued operation of the program. The Secretarial amount is the primary source of funding under an ISDEAA agreement.

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

> an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—
>
> (A) normally are not carried on by the respective Secretary in his direct operation of the program; or
>
> (B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

*Id.* § 5325(a)(2). In other words, CSC are only authorized to cover costs for unique activities for which funding is not already transferred in the Secretarial amount.

25 U.S.C. § 5325(b) limits the circumstances in which IHS can reduce the "amount of funds *required* by subsection (a)." (Emphasis added). The funding in dispute here was not

required by subsection (a), nor was it authorized CSC under subsection (a)(2)-(3). Subsection (a)(3), which Congress added later to clarify that CSC can be for both direct and indirect types of costs, emphasizes that requirement. 25 U.S.C. § 5325(a)(3) (CSC "shall not duplicate any funding provided under subsection (a)(1)"); *see also Cook Inlet Tribal Council, Inc. v. Dotomain*, 10 F.4th 892, 894-96 (D.C. Cir. 2021).

In this case, IHS declined funding that did not satisfy the ISDEAA's CSC provisions. Stated differently, IHS declined to fund as CSC costs for activities that IHS also carried out when it directly operated the now-contracted health care programs, and transferred to Plaintiff in the Secretarial amount, as required by § 5325(a)(1), such as laundry and linen service, patient registration services, and facility maintenance. Doc 30, Ex. 11 at 7. Therefore, not only were these CSC not "required" by 25 U.S.C. § 5325(a)—thus rendering § 5325(b) wholly inapplicable—but the costs were not authorized by § 5325(a)(2)-(3) in the first instance.

Reading § 5325(b) as requiring IHS to fund unauthorized CSC, merely because of an inadvertent overpayment or oversight in prior years, would create internal inconsistencies in the statute. By prohibiting any fluctuations in CSC, such an interpretation would nullify Congress's specific instructions about the types of costs that are authorized as CSC (*see* § 5325(a)(2), (3)). *See, e.g.*, *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488 (1947) (finding that the court's "task is to give all of [a statute] the most harmonious, comprehensive meaning possible"). This is particularly illogical when the nature of indirect CSC is to fluctuate year-to-year, because indirect cost rates fluctuate—a fact long recognized by tribes and by IHS. *See* 2 C.F.R. Part 200, Appendix VII. Moreover, there are other categories of CSC, for pre-award and start-up costs, that are *only* paid in the first year of contracting. 25 U.S.C. § 5325(a)(5)-(6).

Therefore, § 5325(b) cannot be read as requiring the same amount of CSC year-to-year without invalidating the CSC provisions of § 5325(a).

The District Court for the District of Columbia recently recognized that the Department of the Interior could decline in a renewal contract proposal funding not required by § 5325(a), but which the agency had paid in previous years. *Navajo Nation v. U.S. Dep't of the Interior*, No. 16-CV-0011-TSC, 2022 WL 834143 (D.D.C. Mar. 21, 2022); *see also Ninilchik Traditional Council*, DAB No. 1711, 1999 WL 1292898, at *8 (1999) (amounts not "required by subsection (a)," may be reduced notwithstanding § 5325(b)). Similarly here, even if IHS inadvertently overfunded Plaintiff for CSC in previous years, § 5325(b) did not prevent IHS from declining an amount for FY 2022 that exceeded what § 5325(a)(2)-(3) requires.

**B. 25 C.F.R. § 900.33 Did Not Prohibit IHS's Partial Declination**

25 C.F.R. § 900.33 provides that IHS "will not review the renewal of a term contract for declination issues where no material and substantial change to the scope or funding of a program, functions, services, or activities has been proposed by the Indian tribe or tribal organization." In this case, Plaintiff did propose a material and substantial change to its funding amount. Specifically, in its August 3, 2021 proposal, Plaintiff proposed to increase indirect CSC from $15,250,622 (a 10-month proration from an annual amount of $18,279,615) in FY 2021 to $19,486,709 in FY 2022, equivalent to a 6.6% annual increase. Doc. 29, Ex. 5 at 11.[4] Plaintiff also proposed more than a simple "renewal" of its term contract—it requested to multiply the term of the contract by a factor of five, from three to 15 years. Doc. 29, Ex. 5 at 1.[5] This too

[4] *See* note 2, *supra*.
[5] *See id.*

justified review. As a result, 25 C.F.R. § 900.33 did not prohibit IHS from partially declining amounts proposed by Plaintiff that exceeded what 25 U.S.C. § 5325(a) authorizes.

Even if Plaintiff had not proposed an increase to its funding amount or contract term, the IHS must follow the ISDEAA's requirements, and the regulation cannot conflict with those requirements. As the Tenth Circuit explained in *Emery Mining Co. v. Secretary of Labor, Mine Safety and Health Administration*, 744 F.2d 1411, 1414 (10th Cir. 1984), "a regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements." Accordingly, 25 C.F.R. § 900.33 cannot be read to override Congress's restrictions defining the types of costs authorized to be paid by 25 U.S.C. § 5325(a)(2)-(3).

**3. The Equities and the Public Interest Tilt Against Preliminary Injunctive Relief**

A party seeking a preliminary injunction must also "establish . . . that the balance of equities tips in [its] favor, and that [the] injunction is in the public interest." *Winter*, 555 U.S. at 20. These factors merge when a plaintiff seeks an injunction against the federal government. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Plaintiff suggests there is no harm in an injunction mandating that IHS pay Plaintiff's proposed costs before the merits of this case have been decided because IHS could later recover them by pursuing a claim under the Contract Disputes Act. Doc. 29 at 16. But it would contravene the public interest to require IHS to award funding that Congress specifically prohibited in 25 U.S.C. § 5325(a)(2)-(3).

## IV. Conclusion

Plaintiff has not shown it is entitled to a preliminary injunction or immediate injunctive relief under 25 U.S.C. § 5331(a). Defendants respectfully request that the Court deny Plaintiff's motion.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 15, 2022, I filed the foregoing pleading electronically through the CM/ECF system which caused all parties or counsel of record to be served by electronic means as more fully reflected on the Notice of Electronic Filing.

*/s/ Kimberly Bell 4/15/22*
KIMBERLY BELL
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