UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, Plaintiff, v. XAVIER BECERRA, *et al*., Defendants.	No. 1:18-cv-2360 (DLF)

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants respectfully move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Defendants' motion is supported by the attached combined brief in support of their motion and in opposition to Plaintiff's motion for summary judgment, *see* Pl.'s Mot. for Summ. J., ECF No. 71, and a statement of facts.

Dated: April 11, 2024

Respectfully submitted,

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DEFENDANTS' COMBINED BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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GLOSSARY OF ABBREVIATIONS

IHCIA	Indian Health Care Improvement Act
IHS	Indian Health Service
IHM	Indian Health Manual
ISDEAA	Indian Self Determination and Education Assistance Act
PIMC	Phoenix Indian Medical Center
PSU	Phoenix Service Unit

INTRODUCTION

This case concerns whether the Indian Health Service ("IHS") must pay additional funds to the Salt River Pima Maricopa Indian Community ("Community") to operate a number of IHS health care programs at the Salt River Health Clinic that the Community elected to take over in 2017 pursuant to a compact under the Indian Self Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 5301 *et seq*. Due to a calculation error discovered during the course of this litigation, IHS has offered to pay the Community an additional $664,057. But beyond that additional amount, the short answer is that IHS is not required to pay additional amounts.

The ISDEAA authorizes a federally-recognized tribe the option to take over and operate certain programs provided by the government for the benefit of the tribe or its members. When a tribe elects to do so, the government and the tribe enter into an agreement under the ISDEAA. The ISDEAA defines the amount of funds that the government is required to pay, including the amount of funds that the government would have otherwise provided were it to continue operating the programs (known as the "Secretarial amount"), and additional funds to fill specific gaps in that funding so that the tribes are not put at a disadvantage when running the transferred program in the government's stead ("contract support costs"). But the ISDEAA does not require IHS to add to the Secretarial amount additional funds reflecting revenues from third-party payors, such as Medicare, Medicaid, and private insurance, that it previously collected when it operated the programs, as the tribe itself can now collect those revenues in the course of operating the program. Moreover, when a tribe elects to take over a portion of a program operated for the benefit of multiple tribes, the ISDEAA does not require the government to reduce the amount of funding it provides for the benefit of the non-contracting tribes in order to make additional funds available to the contracting tribe. Additionally, the ISDEAA does not

require the government to pay contract support costs unless the tribe actually incurred certain reasonable and allowable costs.

Yet, this is precisely what the Community seeks to do here. First, the Community seeks an order requiring IHS to include additional funds in the Secretarial amount reflecting third-party revenues that the tribe hypothesizes were collected at other IHS facilities and reallocated to the Salt River Health Clinic. But the D.C. Circuit has rejected the notion that funds may be added to the Secretarial amount to reflect third party revenues. IHS, moreover, is prohibited as a matter of law from reallocating third party funds away from the facility at which they were generated and did not so here. And the Community fails to provide admissible evidence that IHS did in fact reallocate third party revenues to the Salt River Health Clinic.

Second, the Community seeks an order requiring IHS to include additional funds in the Secretarial amount reflecting additional tribal shares of programs operated for the benefit of more than one tribe that the Community claims it is entitled to without regard for the effect it would have on those other tribes and based on a methodology and underlying data that the Community has declined to disclose to IHS or to this Court. Moreover, the Community's methodology—to the limited extent it can be divined—is plainly flawed because it includes third-party revenues and funding for programs that it elected to leave with IHS, which, as explained below, are in excess of the amount the Community is entitled to under the ISDEAA. Taking those errors into account reduces the amount in controversy to less than the $664,057 in additional tribal shares that IHS has offered to pay.

Finally, the Community is not entitled to additional contract support costs because it has offered no evidence that the Community actually incurred reasonable and allowable costs associated with its operation of the IHS health care programs.

This Court should thus deny the Community's motion for summary judgment and grant Defendants' cross motion.

BACKGROUND

I. STATUTORY BACKGROUND

A. Tribal Contracting of IHS Health Care Programs

Congress enacted the ISDEAA to promote "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of federal programs and services for Indians. 25 U.S.C. § 5302(b). The Act allows eligible Indian tribes to assume responsibility for operating federal programs that would otherwise be administered by the Secretary of the Interior or the Secretary of Health and Human Services ("HHS"), through the Indian Health Service ("IHS"), for the benefit of tribal members. 25 U.S.C. § 5321; *see Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 252 (2016). Tribes may assume such responsibility by entering into a "self-determination contract" with the respective agency, in which the tribe agrees to undertake the federal program or programs previously administered by the agency on the tribe's behalf. 25 U.S.C. §§ 5321–31 (governing "Title I" contracts); *see* 25 U.S.C. § 5304(j). Tribes that meet certain financial management standards may also elect to enter into "self-governance compacts," which function like self-determination contracts but generally offer those tribes greater operational flexibility. *See* 25 U.S.C. §§ 5381–99 (governing "Title V" compacts).

IHS has traditionally operated health care programs serving eligible American Indians and Alaska Natives, primarily under the authority of the Snyder Act, 25 U.S.C. § 13, and the Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et seq*. *See* 1 Cohen's Handbook of Federal Indian Law § 22.04. IHS has entered into ISDEAA contracts or compacts with the majority of federally recognized tribes for those tribes to assume all or a portion of IHS's programs; for the remaining programs, IHS continues to provide services directly. Dep't of

Health & Human Servs., Fiscal Year 2024, Indian Health Service: Justification of Estimates for Appropriations Committees CJ-300 (2023) (FY2024 IHS Budget Justification), https://perma.cc/2YYB-ZXF8.

Upon entering into an ISDEAA contract, a tribe receives funding from IHS to operate the transferred program or programs. That contract funding has two main components, which are set forth in 25 U.S.C. § 5325(a). Section 5325(a)(1) provides that the tribe shall receive the amount of appropriated funds that the "Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract." 25 U.S.C. § 5325(a)(1). This is commonly known as the "Secretarial amount." *See, e.g.*, *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 186 (2012). In certain circumstances, this funding may also sometimes be referred to as "tribal shares," particularly where a particular program or facility serves multiple tribes. Once awarded, the Secretarial amount generally cannot be reduced in subsequent contract years outside of a narrow set of circumstances. 25 U.S.C. § 5325(b)(2). Thus, the Secretarial amount funding is also colloquially referred to as "recurring" funding.

When a tribe seeks to contract for a portion of an IHS program that serves multiple tribes, the ISDEAA requires IHS to ensure that services continue to be provided to tribes not served by the self-determination contract. *See* 25 U.S.C. §§ 5324(i), 5325(b). Additionally, the ISDEAA does not "require[] the [agency] to reduce funding for programs … serving a [non-contracting] tribe to make funds available to another [contracting] tribe." *Id*. § 5325(b). And, to the extent a tribal contractor's proposed division of an existing program requires IHS to redesign the remaining program, the agency must engage in tribal consultation with all affected tribes. 25 U.S.C. § 5324(i).

At the discretion of a contracting tribe, tribal shares may be left, in whole or in part, with

IHS for certain health care programs. These shares are referred to as "retained shares" or "retained tribal shares," 42 C.F.R. § 137.43, and the services that will continue to be operated by IHS are considered "retained services," *id*. When a tribe elects to have IHS retain these services, it is not entitled to funding for those services because they are not part of the tribe's contract and because the tribe is not performing them. *Id*.

B. Contract Support Costs

In addition to the Secretarial amount, the ISDEAA requires IHS to provide an additional amount in contract funding. Section 5325(a)(2) states:

> 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.

25 U.S.C. § 5325(a)(2). As the text of Section 5325(a)(2) indicates, Congress determined that the relevant concern arises—and therefore that support costs should be available—in two circumstances. First, they are available when the agency would not "normally" have "carried on" the relevant compliance activity under the program—like making contributions to state workers compensation programs for program employees, which the federal government is not obligated to do. Second, they are available when the agency would have covered a necessary cost using "resources other than" its appropriated funding for the program—such as the cost of contract oversight or auditing. *Id*. § 5325(a)(2)(A) & (B).

Additionally, Section 5325(a)(3) provides that:

> (A) The contract support costs that are eligible costs for the purposes of receiving funding under this chapter shall include the costs of reimbursing each tribal

> contractor for reasonable and allowable costs of—
>
> (i) direct program expenses for the operation of the Federal program that is the subject of the contract; and
>
> (ii) any additional administrative or other expense incurred by the governing body of the Indian Tribe or Tribal organization and any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,
>
> except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

Id. § 5325(a)(3)(A). Section 5325(a)(3)(A)(i) describes what are typically called "direct contract support costs," which might include expenses like the workers compensation payments described above. *See Cherokee Nation v. Leavitt*, 543 U.S. 631, 635 (2005). Section 5325(a)(3)(A)(ii) describes what are typically called "indirect contract support costs," which might include the ISDEAA-funded program's share of the tribe's pooled overhead or administrative costs (again, so long as the underlying activities are not already funded by the Secretarial amount). *See Cherokee Nation*, 543 U.S. at 635. Section 5325(a) applies to tribes contracting under Title I or compacting under Title V of the ISDEAA 25 U.S.C. § 5396(a); *see also* 25 U.S.C. § 5388(c) (mandating that IHS provide funds under a Title V compact "in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts").

The ISDEAA, however, does not specify a formula for calculating direct and indirect contract support costs. *See* 25 U.S.C. § 5325(a)(3)(C) (indicating that such amounts should be determined pursuant to negotiation). But IHS has published a chapter in its Indian Health Manual that specifies various methodologies, one of which is often incorporated by reference into ISDEAA contracts. IHS, U.S. Dep't of Health & Human Servs., Indian Health Manual, Pt. 6, Ch. 3—Contract Support Costs (Aug. 6, 2019) ("IHM"), https://perma.cc/V4Y4-7J5J. The Manual provides for the negotiation of direct contract support costs based on the tribe's identification of

eligible costs. *See* Manual § 6-3.2B & D. Although indirect contract support costs may also be negotiated on a cost-by-cost basis, IHS and contracting tribes most often agree to calculate that amount by applying a separately negotiated rate to the IHS "direct cost base." IHM § 6-3.2E(1)-(2); *see Cherokee Nation*, 543 U.S. at 635. After applying the indirect cost rate to the IHS direct cost base, IHS must then assess which indirect costs qualify for indirect contract support costs under the unique requirements of the ISDEAA. *See* 25 U.S.C. § 5325(a)(2)-(3); IHM § 6-3.2E(1)a-b; *see also* IHM Ex. 6-3-F (template for calculating and negotiating indirect contract support costs).

C. Third Party Revenues

In addition to the funds a tribe receives under ISDEAA contracts, a tribal contractor may receive income pursuant to the Indian Health Care Improvement Act ("IHCIA"), Pub. L. No. 94-437, 90 Stat. 1400 (1976) (codified at 25 U.S.C. § 1601 *et seq*.). As amended, the IHCIA authorizes both IHS and tribal contractors to collect payment for services provided from private insurers, tortfeasors, and workers compensation programs. *See* 25 U.S.C. § 1621e. The IHCIA also authorizes IHS and tribal contractors to participate in and collect payment from the Medicare and Medicaid programs, so long they meet those programs' terms and conditions. *See* 25 U.S.C. § 1641; 42 U.S.C. §§ 1395qq, 1396j. Additionally, the IHCIA regulates IHS's and tribal contractors' subsequent use of the income that they receive from those payors. *See* 25 U.S.C. §§ 1621f(a), 1641(c)(1)(B) & (d)(2)(A).

Although the authority for collecting third-party revenues arises under the IHCIA, Congress has expressly addressed third-party revenue in the ISDEAA by making it clear that the default rules for recipients of federal financial assistance regarding such income do not apply to ISDEAA contractors. Section 5325(m) of the ISDEAA provides that "[t]he program income earned by a tribal organization in the course of carrying out a self-determination contract" "shall

be used by the tribal organization to further the general purposes of the contract," and "shall not be a basis for reducing the amount of funds otherwise obligated to the contract." 25 U.S.C. § 5325(m)(1)-(2). This is the inverse of the default rule for recipients of federal financial assistance, which requires that income earned reduces the Federal award. *See* 2 C.F.R. § 200.307(e)(1). Title V of the ISDEAA contains a similar provision, 25 U.S.C. § 5388(j), which further emphasizes the "supplemental" nature of third party revenue and instructs that "program income earned by an Indian tribe shall be treated as supplemental funding to that negotiated in the funding agreement," and "[s]uch funds shall not result in any offset or reduction in the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the program income is received or for any subsequent fiscal year." *Id*.

D. Final Offers and Judicial Review

When a tribe and the government are unable to reach agreement on the terms of compact, the ISDEAA authorizes the tribe to present the government with a "final offer." 25 U.S.C. § 5387(b). The government is allowed to reject in whole or part a tribe's final offer on four enumerated bases, including that "the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under [the ISDEAA]." *Id*. § 5387(c)(1)(A)(i). In such a situation, the tribe has option of entering into the severable portions of a final proposed compact or funding agreement (including a lesser funding amount) that the government did not reject, but retains the right to appeal the rejected portion of its final offer. *Id*. § 5387(c)(1)(D), (c)(2). It may pursue its appeal in federal court. *Id*. § 5331(a).

II. FACTUAL BACKGROUND

A. IHS Phoenix Area Health Care Programs

IHS's Phoenix Area Indian Health Service oversees the delivery of health care in Arizona, Nevada, and Utah. IHS, Phoenix Area, https://perma.cc/9M5N-H4SY. The Phoenix

Area includes IHS and tribally-operated health care facilities that serve tribal areas and urban health care programs for approximately 180,000 tribal members and other eligible persons. *Id*. IHS's Phoenix Area is divided into twelve Service Units, including the Phoenix Service Unit ("PSU"). IHS, Phoenix Area, Healthcare Facilities, https://perma.cc/7YPB-ZMBT.

Located in downtown Phoenix, Arizona, the Phoenix Indian Medical Center ("PIMC") serves two functions. First it serves a primary care facility for tribal members in the Phoenix Service Unit. IHS, Phoenix Indian Medical Center, https://perma.cc/8Q4Q-VDNV. The Phoenix Service Unit primarily serves members of the Fort McDowell Yavapai Nation, the San Lucy District of the Tohono O'odham Nation, the Tonto Apache Tribe, the Yavapai-Apache Indian Tribe, the Yavapai-Prescott Indian Tribe, and the Community. *Id*. Second, the Phoenix Indian Medical Center serves as an area-wide and regional referral unit providing secondary specialty inpatient and outpatient services to nine Service Units throughout the Phoenix Area. *Id*.; *see also* Administrative Record ("AR") at 315, ECF No. 18. Additionally, Phoenix Indian Medical Center staff occasionally travel throughout the states in the Phoenix Area region, providing specialty services and consultation and guidance to other IHS hospitals and health centers, including IHS facilities operated by the tribes. IHS, Phoenix Indian Medical Center, *supra*.

B. The Salt River Health Clinic

The Community is a federally recognized Indian tribe located in Maricopa County, Arizona. Prior to this dispute, the Community had operated the Salt River Health Clinic to provide certain IHS health care programs for the benefit of the tribe's members under a Title I ISDEAA contract. On October 14, 2014, the Community sent a letter of intent to enter into a Title V ISDEAA compact to operate and take over operation of additional health care programs provided at the Salt River Health Clinic, as well as to over certain tribal shares of the Phoenix Service Unit. AR 67–68.

During the compact negotiations, the Community asked IHS to provide, and IHS provided to the Community, "cost center reports" for the Salt River Clinic for FY 2012 through 2016. AR 402–06. The cost center reports were generated from IHS's Unified Financial Management System and included information regarding revenues, including third-party revenues. Decl. of Sheila Todecheenie ¶ 5, attached as Ex. 1. IHS uses cost center reports for budgeting and estimating costs of operating the health care facilities. *Id*. ¶ 6. If generated for current or recent years, however, cost center reports seldom reflect the actual amount of third-party revenues generated or expended at a health facility because those revenues and expenditures continue well after the end of a fiscal year. *Id*. As a result, IHS continues to adjust the data that goes into a cost center report for several years to reflect additional revenues (which may be higher or lower than originally anticipated) and expenditures (which also may be higher or lower than originally anticipated) that are collected or expended after the end of the fiscal year, until such time as IHS can perform a final reconciliation and adjustment. *Id*. And indeed, here, IHS continued to adjust the data reflected in the FY 2012 through 2016 cost center reports that it had provided to the Community up through 2022 to reflect those additional revenues and expenditures. *Id*.

1. Third-Party Revenues

In making its request for cost center reports, the Community asked for, and IHS provided, available data for FY 2012 through 2016 reflecting the amount of third-party revenue generated for services provided at the Salt River Clinic by IHS providers who *were* stationed at the Salt River Clinic. AR 398–407; *see also* Decl. of Barry Brown Dec., ¶ 10 & Ex. C, ECF No. 71-1. As noted above, however, IHS has continued to adjust the data reflecting third party revenues generated and expended at the Salt River Clinic up through 2022. Todecheenie Decl. ¶ 6. Ultimately, IHS's final reconciliation reflected significantly lower third-party revenues generated

than originally indicated in the cost center reports provided to the Community during the negotiations. *Id*.

Unfortunately, the Community did not ask for, and IHS did not provide, available data for FY 2012 through 2016 reflecting third-party revenue that was generated at the Salt River Clinic for services that were provided at the Salt River Clinic by IHS providers who were *not* stationed there but were instead visiting from the Phoenix Indian Medical Center or elsewhere, or available data for FY 2012 through 2016 reflecting third-party revenue collected at the Salt River Clinic pharmacy. Todacheenie Decl. ¶ 10 & Ex. B. As a result, in comparing the initial data in the cost center reports with the third-party revenue data the Community asked for, the Community may have thus been under the mistaken impression that IHS was using third-party revenues generated at other locations to fund the Salt River Health Clinic.

2. Tribal Shares

The Community also asked for its "tribal shares" of the Phoenix Service Unit. Decl. of Charles Reidhead ¶ 5, attached as Ex. 2. Due to the Phoenix Indian Medical Center's unique status as both a Service Unit and a regional referral center, the Phoenix Area IHS first had to determine the amount of the facility's budget that constituted the Phoenix Service Unit, and then calculated tribal shares of the Phoenix Service Unit using a methodology by which 30 percent of the allocated appropriation was divided equally among the six tribes in the Service Unit, and 70 percent of the appropriation was divided based on the active user population of each tribe in the Service Unit, which was consistent with the methodology used to calculate tribal shares for the Phoenix Area Office tribal shares. *Id*. ¶¶ 7, 9. The Phoenix Area IHS determined that at least a portion of Service Unit funding should be divided equally among the tribe because, generally, smaller tribes cannot achieve the efficiencies of scale that larger tribes can. *Id*. ¶ 8.

Before employing this methodology here, IHS conducted tribal consultations with the six

tribes served by the Phoenix Service Unit concerning the appropriate methodology for determining the Community's tribal shares. AR 379–84. After the consultations, IHS initially offered to include an additional $430,306 in the Secretarial amount, reflecting the Community's tribal shares of the Phoenix Service Unit. AR 150.[1]

In response, the Community urged IHS to calculate tribal shares based on a "level of effort" methodology that it created. AR 110; *see also id*. at 145 (characterizing the parties' negotiations). Although the Community provided a summary table of its analysis, AR 277, it did not disclose its methodology or the underlying data that it used in its level-of-effort analysis to IHS. *See generally* AR; Reidhead Decl. ¶ 15.

3. Final Offer

The parties were unable to reach agreement on the terms of a Title V compact, and on August 4, 2017, the Community sent a final offer to IHS identifying a number of unresolved issues, including dollar figures for the Secretarial amount and contract support costs for FY 2018. *See* Ltr. from Martin Harvier, Vice Pres., Salt River Pima-Maricopa Indian Cmty, to Acting Director Michael Weahkee, IHS (Aug. 4, 2017) ("Final Offer"), AR 71–137. Among other things, the Community requested that IHS add for FY 2018: (i) $3,697,957 in third party revenues to the Secretarial amount; (ii) an additional $1,348,696 in Secretarial amount funding "associated with PSU/PIMC 'level of effort'" and "other PSU/PIMC support"; and (iii) contract support costs based on these amounts. *See* Final Offer, Funding Agreement App'x B, Funding Tables, AR 113–25 of 411. However, the Community proposed to have IHS retain certain services, including: (i) the Chief Executive Officer; (ii) the Chief Financial Officer;

[1] After this litigation commenced, IHS discovered a calculation error and has since offered to increase the Community's tribal shares to $664,057. Reidhead Decl. ¶ 16.

(iii) Purchased Referred Care, (iv) Professional Services–Lab, and (v) Professional Services–Radiology. *E.g.*, AR 114, line 18 & n.10.[2]

IHS responded to the Community's Final Offer on September 18, 2017. *See* Ltr. from Michael Weahkee to Martin Harvier (Sept. 18, 2017) ("IHS Response"), AR 138–61. IHS declined or declined in part the Community's requests to add: (i) third party revenues to the Secretarial amount, *id*. at 7, 148 of 411; (ii) additional tribal shares in excess of $430,306 for the Secretarial amount funding the for the Phoenix Service Unit; and (iii) additional contract support costs on these amounts, *id*. at 9–11, 150–52 of 411. With respect to the Community's request for additional tribal shares, IHS explained that the Community's proposed "level of effort" and "other PSU/PIMC support" calculations improperly included costs associated with referral functions and third-party revenue, rather than solely IHS appropriations allocated to the Phoenix Service Unit. AR 145. IHS also explained that the Community's proposed across-the-board 25 percent surcharge for "administrative support costs" was seemingly arbitrary and not supported by any actual information about federal spending or any other explanation for its inclusion. *Id*. IHS also noted that, in contrast, the agency had developed an "accurate and equitable methodology," which was consistent with how the Phoenix Area IHS calculates Service Unit shares and Area Level shares. *Id*.

IHS advised the Community of its appeal rights, *id*. at 12, 153 of 411, and offered to enter into a compact for the portion of the Final Offer that the agency did not decline, *id*. The Community and IHS then entered into the portion of the Title V compact on which they could agree on September 24, 2017. *See* Compact between the Community and the United States, AR

[2] Defendants note that there were other amounts that the Community sought in its Final Offer which have either been resolved through settlement or are otherwise not at issue in the Community's summary judgment motion.

1–65; *see also id*. at 44 (identifying administration, informatics, telecommunications, laboratory, and IT support as services retained by IHS in the amount of $137,042).

III. PROCEDURAL BACKGROUND

The Community initiated this action on October 11, 2018, and subsequently filed an Amended Complaint. Compl., ECF No. 1; Am. Compl. ECF No. 13. Defendants answered the Amended Complaint and filed the Administrative Record in April 2019. Answer, ECF No. 17; Admin. Record, *supra*. The Community filed it first motion for summary judgment in June 2019. Pl.'s Mot. for Summ. J., ECF No. 19. Defendants then moved with the consent of the Community to stay the case to determine whether settlement was possible. Defs.' Consent Mot. to Stay, ECF No. 20; Minute Order (July 10, 2019). In October 2021, the parties reached a partial settlement resolving a portion of the Community's claims, and the Community filed an Amended Complaint concerning its remaining claims. Notice of Settlement Partially Resolving Litig., ECF No. 40; Second Am. Compl., ECF No. 42.

Count I of the Community's Second Amended Complaint seeks to include in the Secretarial amount an additional $3,697,957, representing third party revenues that the Community alleges IHS collected from Medicare, Medicaid, and private insurers for services IHS provided to the Community's members (as well as other eligible persons). Am. Compl., Count I, ¶¶ 37–38. The Community alleges that IHS used these third-party revenues to fund operations and the Salt River Clinic, *id*. ¶ 38, and thus that it is entitled to them as part of the Secretarial amount under the ISDEAA, *id*. ¶ 41.

Count II of the Community's Second Amended Complaint seeks to include in the Secretarial amount an additional $918,390, representing the Community's claimed "tribal shares" of the funds that IHS used to operate the Phoenix Service Unit and the Phoenix Indian Medical Center. *Id*., Count II, ¶¶ 44–47.

Count III of the Community's Second Amended Complaint seeks $159,800 in additional contract support costs based on the additional tribal shares sought in Count II, *id*., Count III, ¶ 53, and $251,460 in pre-award costs, *id*. ¶ 54.[3]

After the Community filed its Amended Complaint, the parties filed a meet and confer statement indicating their desire to explore whether a settlement of the Community's remaining claims might be possible. Jt. Meet & Confer Statement, ECF No. 44. This time the parties were unable to reach an agreement, and the Community filed a motion for summary judgment in July 2022. Pl.'s Mot. for Summ. J., ECF No. 53.

Defendants again moved with the consent of the Community to stay the case to determine whether settlement was possible, Defs.' Consent Mot. to Stay, ECF No. 55, and the Community moved with the consent of Defendants to withdraw its summary judgment motion, Pl.'s Consent Mot. to Withdraw Mot. for Summ. J., ECF No. 57. The parties still did not reach agreement, and the Community filed the present motion for summary judgment. Pl.'s Mot. for Summ. J, ECF No. 71.

The Community's current summary judgment motion seeks an order requiring IHS to: (i) include in the Secretarial amount an additional $3,697,957, reflecting third-party revenues that the Community asserts IHS received in the course of providing health care services for the Community's members; (ii) include in the Secretarial amount an additional $1,348,696 in tribal shares that it claims are associated with health care services that IHS provided for the tribe's members at the Phoenix Service Unit and the Phoenix Indian Medical Center; and (iii) pay contract support costs associated with these additional Secretarial amounts. *See* Pl.'s Mem. in Support of Mot. for Summ J. ("Pl.'s Mem."), ECF No. 71.

[3] Pre-award costs are not at issue in the Community's summary judgment motion.

STANDARD OF REVIEW

I. SUMMARY JUDGMENT

Defendants move for summary judgment on the Community's remaining claims. Summary judgment is appropriate when the movant establishes "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. To obtain summary judgment, Defendants need only point to the absence of evidence of an essential element of the Community's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once Defendants do so, the Community must go beyond its pleadings and designate specific facts showing there is a genuine issue for trial. *See id*. at 324. An issue is genuine if the evidence is such that a reasonable factfinder could return a verdict in the Community's favor. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986); *see also* Fed. R. Civ. P. 56(c) ("A party asserting that a fact … is genuinely disputed must support the assertion by citing to particular parts of materials in the record…."). The Community's failure to produce proof as to any essential element of a claim renders all other facts immaterial. *See Husain v. Power*, 630 F. Supp. 3d 188, 195 (D.D.C. 2022). Summary judgment is mandatory if the Community fails to meet this burden. *See Grimes v. Dist. of Columbia*, 794 F.3d 83, 93 (D.C. Cir. 2015) ("the burden on a defendant moving for summary judgment may be discharged without factual disproof of the plaintiff's case; the defendant need only identify the ways in which the plaintiff has failed to come forward with sufficient evidence to support a reasonable jury to find in [his] favor on one or more essential elements of [his] claim").

II. STANDARD OF REVIEW AND BURDEN OF PROOF UNDER THE ISDEAA

The ISDEAA does not identify a standard of review. 25 U.S.C. § 2531. However, other courts in this District have reviewed claims brought solely under the ISDEAA under a de novo standard. *See, e.g.*, *Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 108 (D.D.C. 2019);

Maniilaq Ass'n. v. Burwell, 72 F. Supp. 3d 227, 234 (D.D.C. 2014) ("*Maniilaq I*").

The Community urges this Court to review IHS's partial rejection of the Community's Final Offer under a de novo standard, yet simultaneously seeks to confine this Court's review of that partial rejection to the Administrative Record, including the parties' negotiations, the Community's Final Offer, and the agency's partial rejection of that offer. Pl.'s Mem. at 15–16, 25–26. Nevertheless, the Community attaches declarations to its summary judgment motion, *see* Brown Decl., *supra*; Decl. of Brian Deveau, ECF No. 71-2, that were not before the agency at the time of its decision and are thus not part of the record. *See generally* AR. In such a situation, the Rules of Civil Procedure allow IHS the opportunity to present evidence refuting those facts. Fed. R. Civ. 56(c)-(e).

The ISDEAA requires the agency to provide clear and convincing evidence of the basis for the agency's grounds for rejection or partial rejection of the Community's offer. 25 U.S.C. § 5387(c)(1)(A)(ii). Under this evidentiary standard, Defendants are not required to prove their case to an absolute certainty. *See Samra v. Shaheen Bus. & Inv. Grp., Inc.*, 355 F. Supp. 2d 483, 494 (D.D.C. 2005) (*quoting United States v. Montague*, 40 F.3d 1251, 1255 (D.C. Cir. 1994)). Rather, Defendants are required only to offer proof enabling the trier of fact to reach a "firm conviction" or a "reasonable certainty" of the truth on the evidence about which it is certain. *Id.*

ARGUMENT

I. THE SECRETARIAL AMOUNT OWED TO THE COMMUNITY CANNOT INCLUDE AN ADDITIONAL AMOUNT REPRESENTING THIRD-PARTY REVENUES PREVIOUSLY EARNED BY IHS

In seeking summary judgment, the Community asserts that the cost center reports that IHS provided to the tribe in 2017 show that IHS expended $18,035,829 in third-party revenue for Clinic operations yet collected only $6,898,379 in third-party revenues attributable to IHS *providers stationed in the Salt River Clinic*. Pl.'s Mem. at 23. But the Community must resort to

speculation that IHS funded the clinic with additional third-party revenue (the difference between the $18,035,829 reflected in the Cost Center Reports and $6,898,379 in third party revenues attributable to IHS providers stationed in the Salt River Clinic) that "came not from Clinic operations but from other sources." *Id*. at 21. The Community thus now seeks to include that third-party revenue in the Secretarial amount. However, the Community's claims do not withstand scrutiny.

A. The IHS Could Not and Did Not Use Third-Party Revenues from Non-Clinic Sources to Augment Funding at the Salt River Health Clinic

Contrary to the Community's contention, IHS could not and did not use third-party revenues from non-Clinic sources to augment funding at the Salt River Health Clinic.

First, the IHCIA prohibits IHS from using Medicare and Medicaid reimbursements generated at another IHS facility to fund operations at the Salt River Clinic. 25 U.S.C. § 1641(c)(1)(B). Section 1624(c)(1)(B) provides that:

> [a]mounts received by a facility of the Service under subparagraph (A) by reason of a provision of title XVIII or XIX of the Social Security Act *shall first be used* (to such extent or in such amounts as are provided in appropriation Acts) *for the purpose of making any improvements in the programs of the Service operated by or through such facility* which may be necessary to achieve or maintain compliance with the applicable conditions and requirements of such respective title. Any amounts so received that are in excess of the amount necessary to achieve or maintain such conditions and requirements shall, subject to consultation with the Indian tribes being served by the Service unit, be used for reducing the health resource deficiencies (as determined in section 1621(c) of this title) of such Indian tribes, including the provision of services pursuant to section 1621d of this title.

Id. (emphasis added). As a result of this statutory mandate, it is not the IHS's policy or practice to use third-party revenue generated at another service unit, or any other non-clinic source, including the Phoenix Indian Medical Center, to support the operations or expenditures at any Phoenix Area IHS clinic, and IHS did not do so for the Salt River Clinic. Todecheenie Decl. ¶¶ 13-14.

B. The Community is Relying on Out-of-Date and Incomplete Data

The basis of the Community's claim that IHS was using third-party revenues generated from other locations appears to stem from its failure to consider current and complete data. First, the Community's summary judgment motion relies on cost center reports for FY 2012 through 2016 that were generated at the end of each fiscal year. AR 406–10. When generated for current or recent years, however, cost center reports seldom reflect the actual amount of third-party revenues generated or expended at a health facility. Todecheenie Decl. ¶ 6. Instead, IHS continues to adjust its accounting for several years after the end of a fiscal year to reflect additional revenues (which may be higher or lower than originally anticipated) and expenditures (which also may be higher or lower than originally anticipated) that may be collected or expended well after the end of the fiscal year, until there is a final reconciliation and adjustment. *Id*.

Indeed, in this case, IHS continued to adjust the accounting for FY 2012 through 2016 up through 2022 to account for additional revenues and expenditures at the Salt River Health Clinic. *Id*. As a result, the actual expenditures of third-party revenue for Salt River Health Clinic operations, as currently reflected in IHS's financial system, is, for FY 2012 through 2016, approximately $13.8 million, not the $18,270,947 amount reflected in the now out-of-date cost center reports on which the Community relies. *Id*. ¶ 8

Second, in making its request for cost center reports, the Community asked for, and IHS provided, available data for FY 2012 through 2016 reflecting the amount of third-party revenue generated for services provided at the Salt River Health Clinic by IHS providers who *were* stationed at the Salt River Clinic. Brown Decl. ¶ 10 & Ex. C. But unfortunately, during the negotiations the Community did not ask for, and IHS did not provide, available data for FY 2012 through 2016 reflecting third-party revenue that was generated at the Salt River Clinic for

services that were provided at the Salt River Health Clinic by IHS providers who were *not* stationed there but were instead visiting from the PIMC or elsewhere, or available data for FY 2012 through 2016 reflecting third-party revenue collected at the Salt River Health Clinic pharmacy. Todecheenie Decl. ¶ 10.

As a result, Defendants do not dispute that IHS collected more third-party revenue than the amount of third-party revenue attributable to IHS *providers stationed in the Salt River Heath Clinic*, which is the data the Community asked for. Specifically, for FY 2012 through 2016, IHS also collected third-party revenue for the following services provided at the Salt River Health Clinic:

- Approximately $2,690,593 in third-party revenues by providers from the Phoenix Indian Medical Center (primarily specialists) and other IHS staff who were *not* stationed at the Salt River Health Clinic but provided services at the Clinic;
- Approximately $962,173 in third-party revenue at the onsite pharmacy at the Salt River Health Clinic;
- Approximately $240,654 in third-party revenue for prescriptions filled at the Salt River Health Clinic but written by outside (neither IHS or tribal) providers;
- Approximately $20,360 in third-party revenue by other IHS dental providers who provided dental services at the Salt River Health Clinic but were not stationed at the Clinic.

Todecheenie Decl. ¶ 10 & Ex. B.[4]. Together with updated data reflecting actual third-party revenues collected and expended at Salt River Clinic for FY 2012 through 2016, accounting for these additional third-party revenues disposes of the Community's contention that IHS was

[4] All of these third-party revenues were generated at the Salt River Clinic for FY 2012 through 2016, except for a short period of time in late 2015 and 2016 when the Salt River Clinic was flooded and services for the Community's members were temporarily provided at PIMC. *Id.* ¶ 14.

using—and the Community is therefore entitled to—an additional $3,697,957 in Secretarial amount funding, reflecting third-party revenues allegedly generated at the Phoenix Indian Medical Center or elsewhere in the Phoenix Area to fund operations at the Salt River Health Clinic.

Additionally, staff from the Phoenix Indian Medical Center continued to visit the Salt River Health Clinic in FY 2018 to provide medical and dental services, Todecheenie Decl. ¶ 15, and presumably, the Salt River Health Clinic pharmacy continued to fill prescriptions in FY 2018, including those written by outside providers. Thus, the Community was eligible to bill for and collect revenues from third parties for those services and prescriptions, 25 U.S.C. §§ 1621e, 1641; 42 U.S.C. §§ 1395qq, 1396j, and did so here. Todecheenie Decl. ¶ 15. As a result, as is further explained below, the Community should not be allowed to now "double dip" by including additional funding in the Secretarial amount to reflect those revenues.

C. The ISDEAA, the IHCIA, and Controlling D.C. Circuit Precedent Foreclose the Community's Attempt to Include Third Party Revenue in the Secretarial Amount

The Community's attempts to include third-party revenue in the Secretarial amount also fail as a matter of law. ISDEAA provisions governing the funding that IHS must provide under a self-determination contract or self-governance compact work together as a comprehensive and coherent scheme to (i) transfer IHS's appropriated funding to the contracting tribe, and (ii) fill specific gaps in that funding so that the tribes are not put at a disadvantage when running the transferred program in IHS's stead. But the ISDEAA does not require IHS to supplement these amounts with third-party revenue it previously collected—regardless of where that third-party revenue was generated.

The ISDEAA defines the Secretarial amount. Section 5325(a)(1) provides that the Secretary of HHS, through IHS, must award to a contracting tribe "[t]he amount of funds" that

he "would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract." 25 U.S.C. § 5325(a)(1). In other words, IHS must take the appropriated funding it would have allocated to the transferred program for the year, in the absence of the ISDEAA contract, and instead transfer that funding to the tribal contractor.

The ISDEAA, moreover, expressly excludes third-party revenue from the Secretarial amount. Section 5388(j) provides that "all Medicare [or] Medicaid … income earned by an Indian tribe shall be treated as supplemental funding to that negotiated in the funding agreement." 25 U.S.C. § 5388(j). As a practical matter, this makes sense, because once IHS transfers operation of a health care program to a tribal contractor, the agency no longer generates and receives third-party revenues.

Based on these statutory provisions, the D.C. Circuit has expressly held that the Secretarial amount expressly excludes third-party revenue from the Secretarial amount. *Ft. McDermitt Paiute & Shoshone Tribe v. Becerra*, 6 F.4th 6, 14 (D.C. Cir. 2021). In *Fort McDermitt*, the tribe sought to include third-party revenue that IHS had collected when it operated the program as part of the Secretarial amount. 6 F. 4th at 9. Rejecting the tribe's claim, the court of appeals held that "[t]he secretarial amount must be not less than what IHS would have 'provided for the operation of the programs or portions thereof' covered by the self-governance compact or self-determination contract at issue." *Id*. at 9 (citation omitted). However, the court went on to hold that the ISDEAA "expressly excludes third-party income from the Secretarial amount." *Id.* at 14. The court explained that although "the secretarial amount reflects what IHS would otherwise have 'provided' for clinic operations, … IHS does not 'provide' Medicare and Medicaid reimbursements within the ordinary meaning of that term." *Id*. at 13. The court thus explained that "[b]ecause income from third parties is 'supplemental' to the funds

negotiated in a funding agreement, it must be separate from those funds. And because the negotiated funds include the [S]ecretarial amount, section 5388(j) requires IHS to calculate that amount separately from third-party income." *Ft. McDermitt*, 6 F.4th at 14. Accordingly, the court held that the tribal contractor was not entitled to include third-party revenue in the Secretarial amount.

This Court reached the same conclusion about the meaning of Section 5388(j) in *Swinomish Indian Tribal Cmty. v. Azar*, 406 F. Supp. 3d 18 (D.D.C. 2019), *aff'd sub nom. Swinomish Indian Tribal Cmty. v. Becerra*, 993 F.3d 917 (D.C. Cir. 2021).[5] In *Swinomish*, this Court held that "[Section] 5388(j)'s text and structure distinguish third-party revenue from the Secretarial amount." *Id*. at 26. Similar to the *Fort McDermitt* court, this Court held in *Swinomish* that "Section 5388(j)'s text explicitly separates third-party revenue from the funding agreement. It clarifies that third-party revenue 'shall be treated as *supplemental* funding to that negotiated in the funding agreement." *Id*. (citation omitted).

The structure of the IHCIA reinforces the *Fort McDermitt* court's and this Court's conclusions. The IHCIA allows contracting tribes to receive third-party income in two ways. IHS can collect that income on tribes' behalf, hold it in a "special fund," and then disburse it under specific statutory criteria. 25 U.S.C. § 1641(c)(1)(A), (B). Or, tribes participating in self-governance may elect to bill for and receive the income directly. *Id*. §§ 1603(25), 1641(d)(1). The *Fort McDermitt* court noted that the IHCIA makes these two methods mutually exclusive; when a tribe elects to collect the income directly, the provisions allowing IHS to collect and

[5] The issue in *Swinomish* was whether the IHS is obligated to pay CSC on tribes' expenditures of third-party revenues. That issue is now pending before the Supreme Court in *San Carlos Apache Tribe v. Becerra*, 53 F. 4th 1236 (9th Cir. 2022), *cert. granted*, 144 S. Ct. 418 (2023), and *N. Arapaho Tribe v. Becerra*, 61 F.4th 810 (10th Cir. Mar. 6, 2023), *cert. granted*, 144 S. Ct. 419 (2023). Oral argument was heard in both cases on March 25, 2024.

disburse the funds on the tribe's behalf "shall not apply," and the tribe ceases to be eligible for payments from its IHS "special fund" for services provided "during the period of such election." 6 F.4th at 14 (citing 25 U.S.C. § 1641(c)(2)). The court thus held that just as the IHCIA "plainly bars tribes from recovering twice for services provided to Medicare and Medicaid beneficiaries," it would "decline to adopt a strained interpretation of ISDA that would allow precisely that double-dipping." *Id*.

Ignoring this controlling precedent, the Community instead rests its claim on *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534 (D.D.C. 2014), a district court case that predates *Fort McDermitt* and *Swinomish* and has been overruled by *Fort McDermitt*. *See* Pl.'s Mem. at 19, 24–26. In *Pyramid Lake*, the district court held that IHS could not decline a tribe's proposal to take over operation of an IHS emergency medical service program on the basis that IHS decided to discontinue the program after the tribe proposed to take it over or that it had previously operated it with other appropriated funds. *Pyramid Lake*, 70 F. Supp. 3d at 544. Contrary to the Community's contention, *see* Pl.'s Mem. at 25–26, *Pyramid Lake* cannot be fairly read as holding that the Secretarial amount should include third-party funding. To the contrary, third-party revenues were not at issue in the case. *See generally Pyramid Lake*, *supra*. This Court reached that exact conclusion about *Pyramid Lake* in *Swinomish*. 406 F. Supp. 3d at 30-31. Additionally, the *Pyramid Lake* court did not address other controlling statutory provisions, including 25 U.S.C. § 5388(j) or 25 U.S.C. § 5325(m). *See generally Pyramid Lake*, *supra*. More significantly, *Pyramid Lake* is irreconcilable with, and overruled by, the binding precedent in *Fort McDermitt* that the ISDEAA expressly excludes third-party revenue from the Secretarial amount—no matter the source of that revenue. *Fort McDermitt* expressly held that Section 5388(j) provides that "*all* Medicare or Medicaid … income earned by an Indian tribe

shall be treated as supplemental funding to that negotiated in the funding agreement." 6 F.4th at 14 (emphasis added) (citation omitted). It additionally held that, "[b]ecause income from third parties is 'supplemental' to the funds negotiated in a funding agreement, it must be separate from those funds." *Id*. It thus concluded that, "because the negotiated funds include the [S]ecretarial amount, section 5388(j) requires IHS to calculate that amount separately from third-party income." *Id*.

Thus, the third-party revenue that the Community now seeks to add to the Secretarial amount is barred as a matter of law and controlling precedent. It still is "provided" by third parties, not IHS. 25 U.S.C. § 5325(a)(1). It is also "supplemental" to the Secretarial amount negotiated in the agreement. *Id*. § 5388(j). IHS thus properly declined the portion of the Community's final offer seeking to add third-party revenue to the Secretarial amount.

D. The Community Fails to Offer Admissible Evidence that IHS Diverted Third-Party Revenues from Non-Clinic Sources to Fund the Salt River Clinic

The Community is not entitled to summary judgment on Count I because it fails to offer admissible evidence to support its claim that IHS diverted third-party revenues from non-clinic sources to fund the Salt River Clinic. The Community's reliance on the Deveau declaration does not constitute admissible evidence because it fails to satisfy the personal knowledge requirement of Rule 56(c)(4) of the Federal Rules of Civil Procedure. *Londrigan v. FBI*, 670 F.2d 1164, 1174 (D.C. Cir. 1981). Rule 56(c)(4) provides that an affidavit used to support a motion must be made on personal knowledge, set out facts that would be admissible evidence, and show that the declarant is competent to testify on the matters stated. Fed. R. Civ. P. 56(c)(4). The Rule's "requirement of personal knowledge by the affiant is unequivocal, and cannot be circumvented. An affidavit based merely on information and belief is unacceptable." *Londrigan*, 670 F.2d at 1174.

Mr. Deveau's declaration does not meet the requirements of Rule 56(c)(4) because is not based on personal knowledge. *See* Deveau Decl. ¶ 8(c) ("I was told by Barry Brown that Mr. Lincoln …"). Additionally, it is impermissibly based on Mr. Deveau's personal beliefs. *See id*. ¶¶ 9(b)(i) ("I consider it highly unlikely …"), 10 ("I believe IHS did collect …"), *id*. ("I consider it highly unlikely …"). Quite simply, "[a]n affidavit based merely on information and belief is unacceptable." *Londrigan*, 670 F.2d at 1174.

Additionally, the Deveau declaration is not sufficient to support their summary judgment motion because it relies on a chain of inferences and speculation, not facts conclusively established in the record. *Cf*. *id*. at 1171 ("It is only where the facts supportive of a summary judgment can be held to have so unambiguously established the actualities of a situation as to leave no basis of substance for dispute as to their reality or as to the conclusion required from them is a summary judgment entitled to be entered.") (citation omitted). The drawing of inferences from facts are jury functions, not the function of a judge when ruling on a motion for summary judgment. *Anderson*, 477 U.S. at 254–55.

The Deveau declaration does not offer unambiguously established facts. It instead consists of Mr. Deveau's speculation: (i) about how IHS made use of certain cost center reports in the 2012 through 2016 time period, *see* Deveau Decl. ¶ 3; (ii) about data in those cost center reports that do not support his conclusion, *see id*. ("I consider this difference very minor and not material …"); (iii) that certain third-party revenues were used to fund the Salt River Clinic but were collected for medical services provided at other locations, including the PSU and the PIMC, *see id*. ¶ 10 (speculating that it was "highly unlikely" that all third-party revenues were generated at the clinic and that it was "likely" that those revenue were generated elsewhere). Thus, the Community's request that this Court rely on Mr. Deveau's mere inferences about evidence is

improper. *See Anderson*, 477 U.S. at 254–55.

In short, this Court should deny the Community's request to include third-party revenues in the Secretarial amount.

II. THE COMMUNITY IS NOT ENTITLED TO ADDITIONAL TRIBAL SHARES BASED ON ITS "LEVEL OF EFFORT" METHODOLOGY

This Court should reject the Community's request for an additional $918,390 in tribal shares funding for its claimed portion of the Phoenix Service Unit based on its proposed "level of effort" methodology, Pl.'s Mem. at 28, 32, because it is not based on or related to the amount the "Secretary otherwise would have provided" to operate the Salt River Clinic. 25 U.S.C. § 5321(a)(1). IHS, moreover, has offered to pay the Community an additional $664,057 for the Community's tribal shares of the Phoenix Service Unit.[6] As a result, this Court can resolve the Community's request for additional tribal shares without deciding whether its proposed level of effort methodology is an appropriate measure of the tribal shares to which the Community is entitled.

First, although IHS initially made a calculation error (which it has now corrected), IHS's methodology for determining the Community's tribal shares accords with the ISDEAA and is reasonable. The ISDEAA provides that where, as here, a proposal seeks to divide an existing program provided to multiple tribes, IHS must "ensure that services [continue to be] provided to the tribes not served" by that proposal. 25 U.S.C. § 5324(i)(1). Further, the ISDEAA does not "require[] [the agency] to reduce funding for programs … serving a [non-contracting] tribe to make funds available to another [contracting] tribe." *Id.* § 5325(b). To the contrary, Section

[6] As noted above, *see supra*, at 12 n.1, IHS is offering this additional amount because, after the litigation commenced, it discovered an error in its original tribal shares calculation. Reidhead Decl. ¶ 16.

5325(b) requires the government to "maintain …. services to the non-contracting tribes." *N. Arapaho Tribe v. LaCounte*, No. 1:16-cv-11, 2017 WL 2728408, at *7 (D. Mont. June 23, 2017) (quoting 25 U.S.C. § 5325(b)); *Shoshone-Bannock Tribes of Fort Hall Rsrv. v. Shalala*, 988 F. Supp. 1306, 1325 (D. Or. 1997). Additionally, to the extent a tribal contractor's proposed division of an existing program requires IHS to redesign the remaining program, the agency must engage in tribal consultation with all affect tribes. 25 U.S.C. § 5324(i).

In this case, in light of the unique nature of the Phoenix Indian Medical Center's role as both the Phoenix Service Unit and a regional referral center, IHS developed a reasonable methodology that accords with the ISDEAA. The Phoenix Area IHS first determined the amount of funding allocated to the Phoenix Service Unit, and calculated the Phoenix Service Unit tribal shares using a methodology by which 30 percent of the allocated appropriation is divided equally among each tribe in the Service Unit, and 70 percent of the appropriation divided based on the active user population of each of the six tribes in the Service Unit, which is consistent with how the Phoenix Area IHS calculates Phoenix Area Office tribal shares. Reidhead Decl. ¶¶ 7, 9. The Phoenix Area IHS determined that at least a portion of Service Unit funding should be divided equally among the tribes because, generally, smaller tribes cannot achieve the efficiencies of scale that larger tribes can. *Id*. ¶ 8. Before employing this methodology here, IHS conducted tribal consultations with the six tribes served by the Phoenix Service Unit. AR 379–84. After the consultations, IHS initially offered to include an additional $430,306 in the Secretarial amount, reflecting the Community's tribal shares of the Phoenix Service Unit. AR 150. After correcting its calculation error, IHS has since offered to increase the Community's tribal shares by $664,057. Reidhead Decl. ¶ 16.

Second, the Community is not entitled to summary judgment on its tribal shares claims

because its "level of effort" analysis does not constitute admissible evidence. *See* Fed. R. Civ. P. 56(c)(4); *Londrigan*, 670 F.2d at 1174. To support its claim, the Community proffers a summary of its level-of-effort analysis, *see* Salt River Maricopa Indian Community, Level of Effort, FY 2016, AR 277, but it does not identify the methodology that it used for its analysis or the underlying data that it used to produce that summary. *See id*. Instead, the Community proffers the Declaration of Barry Brown, who offers only hearsay and speculation about the source of the underlying data. Brown Decl. ¶¶ 11–12. Nor do the documents attached to his declaration support his assertions that the data was provided by IHS or is even accurate or complete data. Brown Decl. Exs. A-B. And nowhere does the Brown declaration meaningfully describe the Community's methodology. *See generally* Brown Decl. The Deveau Declaration similarly fails to explain the Community's "level of effort" methodology. *See generally* Deveau Decl. As a result, the Community proffers nothing more than a table of numbers of its own making that neither IHS nor this Court has any ability to assess the accuracy of. In short, it is inadmissible evidence. What's more, the Community has offered no indication that it consulted with the other tribes in the Phoenix Service Unit that would be affected by its claimed amount for tribal shares.

Fortunately, this Court can resolve this part of the Community's summary judgment motion without deciding whether the validity of the Community's level of effort methodology because IHS is offering the Community more than its own analysis shows it is entitled to. In other words, even if this Court were to accept the Community's level-of-effort methodology, its calculations are still incorrect. First, the Community's request for funding based on its level-of-effort methodology exceeds the funding level it is entitled to under the ISDEAA because it includes third-party revenues in the amount of $644,609. AR 114, 277; Pl.'s Mem. at 28–29. The Community is not entitled to include these amounts in the Secretarial amount for the reasons set

forth above. *See supra* §I(C) at 22–25 (citing *Fort McDermitt, supra*). The Community admits as much. Pl.'s Mem. at 18. Therefore, even under the Community's proposed level of effort methodology, its remaining request for tribal shares should be reduced to $434,348. AR 277. Reducing the Community's claimed tribal shares by this amount already puts the amount in contention below the additional amounts IHS is offering to pay.

Second, unlike the Community's Final Offer, *see* AR 114, line 8, the Community's summary judgment motion inexplicably seeks $139,938 in funding for health care services that IHS has, at the Community's request (and as reflected in the Tribe's Compact, AR 44, 167), retained pursuant 42 C.F.R. § 137.43. This amount also exceeds the applicable funding level under the ISDEAA to which the Community is entitled. Specifically, in negotiating its Title V compact, the Community requested that IHS retain, and IHS has retained: (i) the position of Chief Executive Officer; (ii) the position of Chief Financial Officer, (iii) Purchased Referred Care; (iv) Professional Services–Lab; and (v) Professional Services–Radiology. AR 114, line 18 & n.10, *see also* AR 44 (Compact and Annual Funding Agreement identifying administration, informatics, telecommunications, laboratory, and IT support as retained services in the amount of $137,042).[7] Quite simply, the Community is not entitled to funding for health care services that it has not contracted to operate. So again, even under the Community's proposed level of effort methodology, its remaining request should include only $296,948 for tribal shares of the Phoenix Service Unit. And again, reducing the Community's claimed tribal shares by this additional amount puts the amount in contention well below the additional amounts IHS is offering to pay.

In sum, this Court should deny Plaintiff's motion for summary judgment on its tribal

[7] The amounts for retained tribal shares in this paragraph are different because the $139,938 is based on the Community's level of effort analysis and the $137,042 is the amount the parties agreed to in the Title V compact.

shares claim.

III. THE COMMUNITY IS NOT ENTITLED TO ADDITIONAL CONTRACT SUPPORT COSTS

This Court should reject the Community's request for payment of additional contract support costs. The Community seeks payment of additional indirect contract support costs based solely on its request to add funding to its Secretarial amount based on Count II of its Second Amended Complaint ("PSU/PIMC Shares"). *See* Second Am. Compl., Count III, ¶¶ 50–55; Pl.'s Mem. at 30–31.

As a preliminary matter, the Community admits that if its request to increase the Secretarial amount fails (which it must), its request for additional contract support costs necessarily fails as well. *See* Pl.'s Mem. at 30–31.

Even if this Court rules in favor of the Community on Count II of its Second Amended Complaint, however, the Community has failed to proffer any evidence that it is actually eligible for contract support costs for FY 2018. The ISDEAA only authorizes contract support costs to reimburse qualifying expenses that are actually incurred by a contractor. *See Ramah Navajo Chapter*, 567 U.S. at 185 (observing that the ISDEAA requires payment of "the full amount of 'contract support costs' *incurred* by tribes in performing their contracts") (emphasis added). Indeed, the ISDEAA defines contract support costs as "reasonable costs for activities that *must be carried on*" by a contractor to ensure contract compliance and prudent management that are not already funded through the Secretarial amount. 25 U.S.C. § 5325(a)(2) (emphasis added). The ISDEAA also defines indirect costs as "costs incurred" and refers to contract support costs as the "costs of reimbursing each tribal [organization]" and as "overhead expenses incurred." *Id.* §§ 5304(f), 5325(a)(3); *see also* IHM § 6-3.1(G)(14); 2 C.F.R. part 200, Appendix VII, § A(1); 25 U.S.C. § 5386(c)(2) (applying applicable OMB cost principles to Title V compacts). Absent

evidence that the Community actually incurred reasonable and allowable costs in the course of administering its Title V ISDEAA compact, the Community is not entitled to additional contract support costs.

Ignoring the ISDEAA requirements, the Community simply asserts that this Court can award it indirect contract support costs merely "by multiplying a negotiated indirect cost rate by the amount of the direct cost base." Pl.'s Mem. at 11. But this is not how contract support costs are calculated or awarded. First, a tribal contractor's "direct cost base" is not equivalent to the Secretarial amount. Rather, a direct cost based is the "accumulated direct costs (normally either total direct salaries and wages or total direct costs exclusive of any extraordinary or distorting expenditures) used to distribute indirect costs to individual Federal awards." 2 C.F.R. part 200, Appendix VII, § B(1); 25 U.S.C. § 5386(c)(2) (applying applicable OMB cost principles to Title V compacts). Second, a tribal contractor's direct cost base constitutes the amount it expends, not the amount it is awarded. *See* 2 C.F.R. part 200, Appendix VII, § D(2)(c) (requiring indirect cost rate proposals to be based on "[t]he approximate amount of direct base costs *incurred*") (emphasis added); *Flandreau Santee Sioux Tribe v. United States*, 565 F. Supp. 3d 1154, 1159 (D.S.D. 2021) (explaining that the direct cost base "is comprised of the funds *spent* under the IHS contract") (emphasis added), *reconsideration denied*, 610 F. Supp. 3d 1225 (D.S.D. 2022). Even though it may be appropriate to use budgeted or funding amounts to estimate contract support costs needed at the outset of a performance period to provide up-front funding, it is not the proper measure once the performance period has been completed, as is the case here for FY 2018. The Community has proffered no evidence that it actually expended the amounts it claims under Count II.

Second, even if the Community had shown that it expended the amounts claimed in

Count II, that would still not establish the direct cost base to which the indirect cost rate is applied, as the Community itself acknowledges. It references, but then disregards, the crucial step required of its own negotiated indirect cost rate agreements: it must deduct capital expenditures and passthrough funds from the total incurred direct costs. Pl.'s Mem. at 11 (citing AR 246, 287). For entities that use a total direct costs base, excluding "capital expenditures and other distorting items" is a required step. *See* 2 C.F.R. part 200, Appendix VII, § B(1) (defining this type of base as "total direct costs *exclusive* of any extraordinary or distorting expenditures") (emphasis added). The Community has not proffered any evidence of these expenditures, which would be required to identify the appropriate direct cost base.

Third, the Community ignores that application of an indirect cost rate to a direct cost base is only one step in the indirect contract support costs calculation under the ISDEAA. While indirect contract support costs are a type of indirect cost, the ISDEAA also imposes additional requirements for contract support costs eligibility, not found in the cost principles nor considered in the negotiation of an indirect cost rate. *See* 25 U.S.C. § 5386(c)(2) (providing that § 5325 may "modif[y]" the OMB cost principles); IHM § 6-3.2(E) (requiring that indirect costs "be analyzed to ensure they meet the definition of [contract support costs] in 25 U.S.C. § 5325(a)(2)-(3)" and requiring the parties to "review" not only the indirect cost rate and associated proposal, but also "the requirements of 25 U.S.C. § 5325(a)(2)-(3)"); *id*. § 6-3.2(E)(1) (requiring that, after application of the indirect cost rate, the amount "shall be adjusted consistent with 25 U.S.C. § 5325(a)(2)-(3) … to determine the indirect [contract support costs] need"); *Flandreau Santee Sioux Tribe*, 565 F. Supp. 3d at 1172 ("[T]here are many variables that influence the contract support costs owed to a tribe under an ISDEAA agreement."). The ISDEAA requires that a contracting tribe's costs be reasonable, and that they be necessary to ensure compliance with the

terms of the ISDEAA contract and prudent management. *Id*. § 5325(a)(2). It also excludes indirect costs for activities "normally" "carried on" by IHS unless the agency would have covered a necessary cost using "resources other than" its appropriated funding for the program. *Id*. § 5325(a)(2)(A)-(B); *Cook Inlet Tribal Council, Inc. v. Dotomain*, 10 F.4th 892, 894 (2021) ("[T]he government must pay contract support costs for the 'activities' required by the contracted-for program—but only if those activities 'normally are not carried on by' the government agency that would otherwise operate the program."), *reh'g en banc denied sub nom Cook Inlet Tribal Council, Inc. v. Mandregan*, 2022 WL 128774 (D.C. Cir. Jan. 12, 2022). Clearly, the Community has not engaged in any of these required statutory considerations in this case. This Court should thus grant summary judgment in favor of the government on the Community's request for additional contract support costs.

IV. IF THIS COURT DENIES THE GOVERNMENT'S SUMMARY JUDGMENT MOTION, REMAND IS THE PROPER REMEDY

This Court should reject any claim that an inadequately justified agency decision requires the automatic approval of an award of additional funds, because such a result conflicts with the Supreme Court's repeated holdings that "[i]f the record before the agency does not support the agency action, … or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it," remand to the agency is the appropriate remedy. *E.g., Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Rather than mandating a specific remedy, the ISDEAA only provides a right of action to challenge a rejection. 25 U.S.C. § 5387(c)(1)(C); *see also Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 65-66 (1992) ("[T]he question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place.") (quoting *Davis v. Passman*, 442 U.S. 228, 239 (1979)). Section 5387(c)(1)(C) of the ISDEAA

provides a tribe with the right to "directly proceed … in a Federal district court pursuant to section 5331(a) of this title," which the Community chose to do in this case. *Id*. When an agency explanation is inadequate, and even when the Government bears the burden of proof under a higher standard, courts regularly remand decisions for further explanation. *See, e.g., Chambers v. Dep't of Interior*, 602 F.3d 1370, 1381-82 (Fed. Cir. 2010); *Pierce v. Colvin*, 565 F. App'x 621, 621–22 (9th Cir. 2014). Indeed, remand is the path other courts reviewing ISDEAA challenges have followed. *See, e.g., Yukon-Kuskokwim Health Corp. v. N.L.R.B*., 234 F.3d 714, 718 (D.C. Cir. 2000) (remanding ISDEAA claim to agency for further consideration); *Seminole Tribe of Fla*., 376 F. Supp. 3d at 115 (remanding ISDEAA case to agency for further factual development); *N. Arapaho Tribe*, 2017 WL 2728408, at *5 (remanding denial of ISDEAA proposals back to BIA for further consideration); *Aleutian Pribilof Islands Ass'n v. Kempthorne*, 537 F. Supp. 2d 1, 13 (D.D.C. 2008) (remanding declination back to agency after concluding that "Defendants failed to meet their burden with respect to demonstrating APIA was not entitled to the Section 14(h)(1) funds for fiscal year 2006"); *Ramah Navajo Sch. Bd., Inc. v. Sebelius*, No. 07-cv-289, 2014 WL 12798378, at *3 (D.N.M. Jan. 29, 2014) ("While determining that IHS's asserted reason for declining the contract … was illegitimate, … the very reasoning of *Seneca Nation* would foreclose [the plaintiff] from receiving the full contract amount.").

If this Court were to grant any portion of the Community's summary judgment motion, remand would be warranted here because, as discussed above, the application of the Community's proposed methodology for determining its tribal shares of the Phoenix Service Unit would not yield the amount the Community is requesting in this litigation (and is not the amount it requested in its final offer). AR 114. The Community's request to increase the Secretarial amount to reflect third-party revenues is similarly unreliable and unverifiable for the

reasons discussed in Argument Section I, *supra*. Thus, in the event that this Court were to find that the reasons for the IHS's partial declinations was inadequate, it should remand those decisions back to the agency.

CONCLUSION

This Court should deny Plaintiff's motion for summary judgment and grant Defendants' cross motion.

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Respectfully submitted,

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