UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, PLAINTIFF, v. **XAVIER BECERRA**, et al., DEFENDANTS.	Case No. 1:18-cv-02360-DLF ORAL HEARING REQUESTED

PLAINTIFF'S COMBINED MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY

Plaintiff Salt River Pima-Maricopa Indian Community ("Community") has moved for summary judgment on its three remaining claims to recover funding owed under the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. §§ 5301–5399, for operation of the Salt River Clinic under the Community's compact. Pl.'s Mem. in Support of Mot. for Summ. J. (hereinafter "Pl.'s Mem."), ECF No. 71. On Claim II, for the unpaid portion of the Community's tribal shares of the Phoenix Service Unit ("PSU")/Phoenix Indian Medical Center ("PIMC"), the Indian Health Service ("IHS") admits in its response and cross-motion that it miscalculated the Community's tribal shares. Defs.' Combined Br. in Supp. of Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. (hereinafter "Defs.' Br."), ECF No 74, 1. On that claim, then, the Court can and should enter judgment in favor of the Community, consistent with the IHS's admission and representation of its tribal shares methodology.

The Community further seeks, in Claim III, contract support costs (CSC) that the ISDEAA and the IHS's own policy require be paid in connection with the amount awarded under Count II. As stated in the Community's Motion and accompanying Memorandum, the Community requests that the Court declare the Community entitled to contract support costs on the amount awarded under Count II and order the parties to negotiate the amount of such costs consistent with the law, IHS policy, and this Court's decision.

That leaves Count I, by which the Community seeks transfer of that portion of clinic funding historically provided from third-party revenues collected elsewhere within the Phoenix Service Unit. So long as a facility operated by the IHS maintains compliance with the conditions and requirements of Medicare and Medicaid participation, the Indian Health Care Improvement Act ("IHCIA") authorizes the IHS to use excess third-party funds for other health care purposes

within the same service unit. 25 U.S.C. § 1641(c)(1)(B). Here, the IHS's records contemporaneous with the Community's final offer show the IHS chose to use third-party funds from elsewhere in the PSU to support its own operation of the Salt River Clinic program. In its rejection of the Community's final offer, the IHS refused to transfer those funds as part of the Secretarial amount, and the Community cannot bill for or collect those amounts itself. As a result, the Community has less funding to operate the Salt River Clinic program under its compact than the IHS provided for itself, in violation of the ISDEAA. 25 U.S.C. § 5325(a)(1).

The ISDEAA is designed to guard against the agencies' natural reluctance to transfer federal resources to tribal contractors, and has been amended multiple times to address that very problem. It requires, among other things, that the IHS justify a rejection of a Title V final offer with specific written findings within 45 days. 25 U.S.C. § 5387(b), (c). In any subsequent challenge, the IHS bears the burden of proof to demonstrate the validity of its rejection decision made in compliance with those requirements. 25 U.S.C. § 5387(d).

In its opposition and cross-motion, the IHS attempts to justify its 2017 rejection decision with new evidence not before the parties during compact negotiations or included in the Administrative Record. The IHS produces for the first time in this litigation records from 2023 reflecting additional third-party collections from visiting providers and other sources attributed to the clinic, which it asserts *partially* explain the difference in third-party expenditures and third-party revenues reflected in the Administrative Record. In order to fully explain away the Community's claim, the IHS also asks this Court to accept new expenditure data that, according to the IHS, reflects "adjustments" to third-party expenditures attributed to the clinic, made as late as 2022, reducing those recorded expenditures by millions of dollars. The IHS provides no description or justification whatsoever for these adjustments.

As a matter of law and common sense, the IHS cannot prove the validity of a 2017 final offer rejection decision based on unexplained accounting actions taken by the agency years after that decision—indeed, years into litigation challenging that decision. And while the IHS relies on these post hoc justifications for its decision, it does not dispute any of the facts material to the Community's motion. The Community is therefore entitled to judgment as a matter of law.

STANDARD OF REVIEW AND BURDEN OF PROOF

Defendants appear to agree that a *de novo* standard of review applies to this Court's review of the IHS's partial rejection of the Community's final offer. Defs.' Br., ECF No 74, 26–27. Contrary to the Defendants' contention, the Community has not sought "to confine this Court's review of that partial rejection to the Administrative Record[.]" Defs.' Br., ECF No. 74, 27; Pl.'s Mem., ECF No. 71, 26 ("The standard of review under the ISDEAA is far less deferential than the standard of review under the APA, and the court is not necessarily limited to the administrative record in ISDEAA cases. *Fort McDermitt Paiute & Shoshone Tribe*, 2018 WL 4637009, at *2 (D.D.C. Sept. 27, 2018) (citing *Shoshone-Bannock Tribes of the Fort Hall Reservation*, 988 F. Supp. at 1317)"). Nor does the Community contest that the Federal Rules of Civil Procedure permit IHS to present admissible evidence in support of its motion.

At the same time, the agency may not use post hoc justifications to meet its burden under the ISDEAA. *Fort McDermitt Paiute & Shoshone Tribe v. Price*, No. CV 17-837 (TJK), 2018 WL 4637009, at *4 n.3 (D.D.C. Sept. 27, 2018) (quoting *Pierce v. SEC*, 786 F.3d 1027, 1034 (D.C. Cir. 2015)); *Susanville Indian Rancheria v. Leavitt*, No. 2:07-CV-259-GEB-DAD, 2008 WL 58951, at *6 (E.D. Cal. Jan. 3, 2008) (citing 25 U.S.C. § 5387(c)(1), then codified at 25 U.S.C. § 458aaa-6(c)(1), and quoting *N.W. Envt'al Def. Ctr. v. Bonneville Power Admin.,* 477 F.3d 668, 688 (9th Cir. 2007)) (cleaned up); *see also,* Pl.'s Mem., ECF No. 71, 24–27. This is a

result of the IHS's burden of proof under the ISDEAA, 25 U.S.C. § 5387(d), to demonstrate by clear and convincing evidence the validity of the grounds for rejecting a final offer, and the requirement in 25 U.S.C. § 5387(c)(1)(A) that the final offer rejection contain a "specific finding that clearly demonstrates, or that is supported by a controlling legal authority," that one of the enumerated rejection criteria apply. *Cook Inlet Tribal Council v. Mandregan*, No. 14-CV-1835 (EGS), 2019 WL 3816573, at *10 (D.D.C. Aug. 14, 2019) (it is the agency's burden to "develop the record" within the statutory time period for rejecting an ISDEAA proposal).

These and other provisions in the ISDEAA are designed specifically to guard against the agency's natural resistance to ceding control of programs and associated funding under the ISDEAA—a recurring problem that has led Congress to repeatedly amend the Act. *See, e.g.*, S. REP. NO. 100–274, at 37 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2656 ("The strong remedies provided in [the 1988] amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law."); H.R. REP. NO. 106–477, 34–35 (1999), *reprinted in* 2000 U.S.C.C.A.N. 573, 592 ("Because the Act requires the agencies to divest themselves of programs, staff, and funding at tribal request, the courts should not give Administrative Procedure Act-type deference to agency decisionmaking."). This resistance even led Congress to write into the Act special interpretive rules, which likewise apply in this case. *See* 25 U.S.C. § 5392(a) ("the Secretary shall interpret all Federal laws, Executive orders, and regulations in a manner that will facilitate . . . the inclusion of programs, services, functions, and activities (or portions thereof) and funds associated therewith," in funding agreements); *id*. § 5392(f) (requiring the ISDEAA as well as compacts and funding agreements to be construed liberally in favor of Tribes); Pl.'s Mem., ECF No. 71, 27-28.

The Court's task here is therefore to determine, without special deference to the agency, whether the IHS has met its burden to prove the validity of the grounds for rejecting the Community's final offer in compliance with the final offer provisions at 25 U.S.C. § 5387(b)-(c). *See* 25 U.S.C. § 5387(d). In so doing, the Court must construe the ISDEAA liberally, and resolve any statutory ambiguities in favor of the Community. 25 U.S.C. § 5392(f); *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001).

ARGUMENT

I. Count I: Third-party revenue component of the Secretarial Amount

The IHS fails to establish that it properly rejected the Community's final offer for that portion of the Secretarial amount, owed under 25 U.S.C. §5325(a)(1), that IHS's contemporaneous records show were composed of third-party revenues from non-clinic sources. In arguing that it could not and did not utilize third-party revenues from PIMC or elsewhere within the Phoenix Service Unit to support its operation of the Salt River Clinic, IHS misstates the law and relies primarily on unexplained accounting "adjustments" it admits were made years after the Community's final offer and its own rejection of the same.

A. IHS is not prohibited from transferring third-party revenues within a Service Unit, and any such transfers are part of the amount the Secretary would have otherwise provided for operation of the program under Section 5325(a)(1).

As a threshold matter, the IHCIA provision cited by the IHS did not prohibit the agency from using third-party revenues generated at PIMC to support its operation of the Salt River Clinic. *See* Defs.' Br., ECF No. 74, 28, citing 25 U.S.C. § 1641(c)(1)(B).[2] It is true that the IHCIA requires the IHS to first use Medicare and Medicaid reimbursements to make any

[2] Defendants' additional citation to 25 U.S.C. § 1624(c)(1)(B) appears to be a typographical error, as no such provision exists.

improvements to the facility receiving those reimbursements, "which may be necessary to achieve or maintain compliance with the applicable conditions and requirements" of the Medicare and Medicaid programs. 25 U.S.C. § 1641(c)(1)(B). But that same provision further states:

> 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. Both PIMC and the Salt River Clinic are part of the Phoenix Service Unit, which is the service unit serving the Salt River Pima-Maricopa Indian Community. Administrative Record (hereinafter "Record"), Apr. 26, 2019, ECF No. 18-1, 314 (2017 Profile of the Phoenix Indian Medical Center)[3]; Defs.' Statement of Facts in Supp. Of Mot. for Summ. J. (hereinafter "Defs.' SOF"), ECF No. 77-1, ¶ 2; Defs.' Br., ECF No. 74, 19. To the extent IHS collected third-party revenue *in excess* of the amount necessary to maintain compliance standards within the PIMC facility, then, it was permitted under § 1641(c)(1)(B) to transfer those funds to the Salt River Clinic or other facilities within the Phoenix Service Unit. The IHS's blanket assertion that "the IHCIA prohibits IHS from using Medicare and Medicaid reimbursements generated at another IHS facility to fund operations at the Salt River Clinic[,]" Defs.' Br., ECF No. 74, 28, is therefore wrong.

To the extent the IHS did in fact rely on third-party revenues from non-clinic sources, those amounts must be transferred to the Community as part of the "Secretarial amount," or "106(a)(1) amount" under Section 106(a)(1) of the ISDEAA, 25 U.S.C. § 5325(a)(1). That

[3] To remain consistent with the Community's opening brief, references to page numbers in the Administrative Record refer to the ECF page numbers at the top of the filed document.

provision mandates that the amount of funds provided to the Community "shall not be less than the appropriate 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).[4] The IHS liberally rephrases this provision in its brief, stating: "[i]n 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." Defs.' Br., ECF No. 74, 32. But that is not what the statute says. Congress *could* have said that the Secretary shall provide to the tribal contractor at least the same amount of ***appropriated*** funds as IHS would have allocated for itself. Congress instead required the IHS to transfer at least the amount of funds the Secretary "would have otherwise provided for the operation of the program" without limit as to the source of those funds. 25 U.S.C. § 5325(a)(1). If the Secretary, through the IHS, would have "provided" third-party revenues from non-clinic sources to support the agency's own operation of the clinic, then Section 5325(a)(1) on its face requires the IHS to provide those same amounts to the Community for its operation of the clinic program.

IHS argues that the D.C. Circuit has already held that third-party revenues are excluded from the Secretarial amount, citing *Fort McDermitt Paiute & Shoshone Tribe v. Becerra*. Defs.' Br., ECF No. 74, 22. But *Fort McDermitt* only considered third-party revenues generated from the same program being transferred to the tribal contractor:

> We now address whether the secretarial amount must include the value of Medicare and Medicaid reimbursements that IHS previously had collected on behalf of the Fort McDermitt, ***even though the tribe now collects the reimbursements directly***. The Fort McDermitt argue that the secretarial amount includes these reimbursements because, had they not entered into a self-governance compact, IHS would have provided them with the reimbursements.

[4] *See also* 25 U.S.C. § 5388(c) (providing that the Secretary shall provide the same amount of funds under Title V of the ISDEAA as it would under Title I).

Fort McDermitt Paiute & Shoshone Tribe v. Becerra, 6 F.4th 6, 13 (D.C. Cir. 2021) (emphasis added); *see also id.* at 7 ("The agency also withheld an amount equal to the Medicare and Medicaid reimbursements received ***from operating the clinic***.") (Emphasis added). That scenario presents very different considerations, and although IHS selectively quotes seemingly broad language from the *Fort McDermitt* decision, each step of the D.C. Circuit's reasoning applies to third-party revenue generated from the contracted program and *not* to third-party revenues generated from another source.

First, the D.C. Circuit in *Fort McDermitt* reasoned that the IHS does not "provide" third-party revenues like Medicare and Medicaid reimbursements because "Tribes are 'entitled' to those payments under the Social Security Act, 25 U.S.C. § 1641(c)(1)(A), and can collect them directly from the Centers for Medicare and Medicaid Services, *id.* § 1641(d)(1)." *Fort McDermitt*, 6 F.4th at 13. Alternatively, where a tribe has not elected to conduct its own "direct billing" for its ISDEAA programs under Section 1641(d), the D.C. Circuit reasoned that IHS collects those revenues on the tribe's behalf and "functions only as a trustee, holding the payments in a 'special fund' and spending them under specific statutory criteria. 25 U.S.C. § 1641(c)(1)(A), (B). Either way, CMS supplies and contributes the payments." *Fort McDermitt*, 6 F.4th at 13–14.

This statement is clear in its assumption that it is the activities of the tribe itself in the course of the contracted program that give rise to the reimbursement obligation by a third party, such as CMS. In those cases, the tribe is "entitled" to payment from CMS and can either collect those payments directly from CMS or request IHS to collect them on the tribe's behalf—thus, the D.C. Circuit reasoned that CMS is fairly considered the party "providing" those revenues *in support of the contracted program*. But where the IHS has historically used third-party revenues

from some other source to support a contracted program, CMS does not and cannot "supply," "contribute," or "provide" those funds to the contracting tribe—either directly or through the IHS—because the contracting tribe did not perform the services for which reimbursement is paid. Rather, in those cases, it was the IHS that historically made the decision to "provide" those revenues "for the operation of" a different program or facility from the one that generated the reimbursement obligation, and only the IHS can "provide" the funds to the tribe after the contract or compact goes into effect. 25 U.S.C. § 5325(a)(1). The D.C. Circuit had no occasion in *Fort McDermitt* to consider the meaning of the word "provide" in that context.

Second, the D.C. Circuit cited 25 U.S.C. § 5388(j), which states (in part) that "All Medicare, Medicaid, or other program income earned by an Indian tribe shall be treated as supplemental funding to that negotiated in the funding agreement." Again, this provision applies on its face to third-party revenues *earned by an Indian tribe*. It goes on to provide that the "Indian tribe may retain all such income" and that "[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[.]" 25 U.S.C. § 5388(j). Third-party revenues earned by the IHS in the course of programs or services not under contract are not program income earned by an Indian tribe and the remainder of Section 5388(j) is plainly inapplicable to such funds. Whatever relevance Section 5388(j) had in *Fort McDermitt*, where the Tribe itself earned the same third-party revenues as the IHS had previously in the operation of the clinic program, it is facially inapplicable here.

Nothing in this Court's decision in *Swinomish Indian Tribal Community* is to the contrary. *See* Defs.' Br., ECF No. 74, 23, citing *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). Again, that case concerned only third-party revenues earned by the Indian tribe in the course of carrying out its ISDEAA agreement. *Swinomish Indian Tribal Cmty.*, 406 F. Supp. 3d at 22 ("The question in this case is whether, when a tribe ***collects its own third-party revenue*** pursuant to 25 U.S.C. § 1641(d)(1), its expenditures of those funds on health care services are eligible for CSC funding from the IHS under the ISDEAA[.]") (emphasis added); *id.* at 25–26 (referring to "third-party revenue the Tribe collects and expends"); *id.* at 28–29 (referring to "third-party revenue that the Tribe itself earns" and "third-party revenue that the Tribe collects on its own").[5] Further, although this Court had no occasion in *Swinomish* to consider the application of Section 5388(j) to third-party revenues still collected by the IHS outside of the contracted program but historically used in support of the contracted program, the Court's interpretation of Section 5388(j) gave primary weight to that provision's plain text. *Id.* at 26. An interpretation of Section 5388(j) that writes out the words "earned by an Indian tribe" would be inconsistent with that approach.

Third, the D.C. Circuit in *Fort McDermitt* reasoned that the structure of the IHCIA "reinforces" its conclusion, because the IHCIA allows tribes to receive third-party income earned in the course of carrying out their ISDEAA agreement in one of 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). Or, tribes participating in self-governance may elect to bill for and receive the income directly. *Id.* §§ 1603(25), 1641(d)(1)." *Fort McDermitt*, 6 F.4th at 14.

[5] As acknowledged by the IHS, *Swinomish* also addressed the very different question of whether contract support costs are owed on third-party revenues collected and expended by tribes in the course of carrying out their ISDEAA agreements. Defs.' Br., ECF No 74, 33 n.5. That question is not at issue here, but is pending decision by the U.S. 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).

These two options for collection of third-party income are mutually exclusive, and so the D.C. Circuit reasoned: "IHCIA thus plainly bars tribes from recovering twice for services provided to Medicare and Medicaid beneficiaries. And we decline to adopt a strained interpretation of [ISDEAA] that would allow precisely that double-dipping." *Id.*

This is a perfectly sensible conclusion. It also underscores that the *Fort McDermitt* decision is premised on a scenario where the contracting tribe can itself directly bill for the third-party revenue amounts at issue as a result of assuming the program under contract, and so recovery from IHS for the same amounts would lead to "double-dipping." Further, as the IHS states in its brief, "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." Defs.' Br., ECF No. 74, 22. Again, however, that logic simply does not apply to third-party revenues derived from programs or services *not* under contract and that the IHS still operates itself. The IHS will continue to generate those revenues even after the contract or compact becomes effective, but the tribal contractor cannot access them unless they are transferred as part of the Secretarial amount. And if they are not transferred, the tribal contractor is forced to operate the contracted or compacted services with *less* program funding than the IHS would have to operate the same program, in violation of 25 U.S.C. § 5325(a)(1) and the very opposite of "double dipping."[6]

[6] The D.C. Circuit in *Fort McDermitt* itself ruled for the tribe on a separate claim relating to the IHS's determination of its "tribal share funding," noting in the course of its analysis that "there is a good reason why ISDA matches program funding to program operations: by granting each self-governing tribe what IHS 'would have otherwise provided' for programs run by the tribe, section 5325(a)(1) guarantees the programs a proxy for adequate funding. The same is not true under IHS's reading of ISDA, which, in cases like this one, would permit the agency to give clinics fewer resources than what it had previously deemed necessary to run them itself." *Fort McDermitt*, 6 F.4th at 11, 13.

This latter scenario was the one considered in *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534 (D.D.C. 2014). The IHS asserts, without citation to the *Fort McDermitt* decision, that the D.C. Circuit in that decision overruled *Pyramid Lake*. Defs.' Br., ECF No 74, 24. In fact, *Pyramid Lake* is not mentioned anywhere in the D.C. Circuit's *Fort McDermitt* decision, and they are not in conflict, let alone "irreconcilable." The court in *Pyramid Lake* held that the IHS could not withhold funds it had historically collected as third-party revenues from the Fort McDermitt clinic and transferred to an EMS program "to make up the shortfall in operating revenues" of the EMS program, when the tribe submitted a contract proposal to operate only the EMS program. 70 F. Supp. 3d 534, 543–44. The court held that the Secretarial amount "is determined based on what the Secretary otherwise would have spent, not on the source of the funds the Secretary uses. If the Secretary chooses to augment its spending on a program with other funds available to her, nothing in the Act permits her to deduct those amounts from the tribe's funding under an otherwise acceptable ISDEAA contract." *Id.* at 544.

To the extent any language in the *Pyramid Lake* decision could have been read to extend to claims by a tribe for amounts representing third-party revenues that the IHS historically collected in its operation of the contracted program itself, *Fort McDermitt* obviously precludes that result and can fairly be read as narrowing the scope of *Pyramid Lake*. But the fact that the *Fort McDermitt* court reached different results from *Pyramid Lake* under clearly distinguishable facts does not support the IHS's claim that *Pyramid Lake* has been overruled. *See, e.g., Nippon Shinyaku Co., Ltd. v. Iancu*, 369 F. Supp. 3d 226, 237 (D.D.C. 2019), *aff'd,* 796 F. App'x 1032 (Fed. Cir. 2020). And the Community's claim here is premised on the factual pattern presented in *Pyramid Lake*, not *Fort McDermitt*.

Moreover, the IHS's claim that third-party revenues were not at issue in *Pyramid Lake*—and that this Court so held in *Swinomish*—is simply untrue.[7] To begin with, the relevant subsection of the *Pyramid Lake* opinion is captioned "ii. Third-Party Funding." 70 F. Supp. 3d at 543. At the outset of the opinion, the court cites the IHS's own statement of facts establishing "that the FY 2012 total operating costs for the EMS program were $502,611, while its revenues were only $102,711. … The agency explained that it had been making up the difference ***with revenues from the clinic*** and IHS discretionary funds." *Id.* at 538–39 (citation omitted) (emphasis added). The IHS declined the contract proposal on multiple grounds, including: "to the extent that the Tribe funding request include[d] the third-party revenues generated by the Fort McDermitt Clinic used ... to fund the EMS program[,]' … IHS asserted that these third-party revenues were not generated by the EMS program, were speculative, and were 'not in themselves a program, function, service or activity'" that could be included in the tribe's funding agreement. *Id.* at 539; *see also id.* at 542 ("As an alternative justification, IHS declined the proposal "'to the extent that the Tribe funding request includes the third-party revenues generated by the Fort McDermitt Clinic[.]'"). After dispensing with the IHS's other arguments, the court held this was an improper basis for the IHS to decline the tribe's contract proposal because the revenues IHS had historically transferred from the clinic to the EMS program were funds the Secretary "otherwise would have spent" to operate the EMS program and were therefore owed to the tribe under Section 5325(a)(1).[8] *Id.* at 544.

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[7] It also does not make sense. IHS does not explain how *Fort McDermitt* overruled *Pyramid Lake* if *Pyramid Lake* had nothing to do with third-party revenues.

[8] This Court in *Swinomish* found that *Pyramid Lake*'s holding was not relevant to one of the questions under consideration in that case, which was whether the "Secretarial amount" includes third-party funds collected and expended by a tribe in the operation of its ISDEAA program, such that contract support costs are owed on those amounts. In that context, this Court found that *Pyramid Lake* "cannot be fairly read as holding that the Secretarial amount includes third-

B. The Community's claim for the third-party revenue component of the Secretarial Amount is based on the undisputed facts and supported by admissible evidence.

The Community has a very similar claim here for an amount representing third-party revenues the IHS generated outside of the Salt River Clinic but "provided" for the operation of the clinic program when the IHS operated that program directly. A comparison of the cost center reports in the Administrative Record with the clinic collections data provided by IHS during compact negotiations shows that the IHS budgeted and spent more third-party revenues in support of the clinic than were taken in from clinic operations. *See* Pl.'s Mem., ECF No. 71, 22-23; Defs.' Combined Resp. to Pl.'s Statement of Material Facts and Statement of Material Facts (hereinafter "Defs.' Resp. to SOF"), ECF No. 74-1, ¶ 23. When the IHS operated the clinic program, those funds were provided to support clinic operations. But the Secretary has refused to transfer those funds to the Community for operation of the same clinic program, and the Community cannot bill for, collect, or otherwise access those funds for itself.

The IHS's arguments attacking the Community's evidence are a distraction. Although the Parties interpret the significance of the facts quite differently based on their differing interpretations of the ISDEAA, the IHS's responses to the Community's Statement of Material Facts (ECF No. 74-1), combined with its own Statement of Facts in Support of Defendants' Motion for Summary Judgment (ECF No. 77-1) and the Declaration of Sheila Todecheenie (ECF No. 75-2),[9] establish that the Parties do not dispute the material facts relevant to the pending Motions for Summary Judgment.

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party funding." *Swinomish*, 406 F. Supp. 3d at 31–32 (cleaned up). But the IHS's argument that this Court categorically held that third-party revenues were "not at issue" in *Pyramid Lake* is a blatant mischaracterization of both decisions.

[9] The Community assumes that by electronically filing the unsigned declaration of Sheila Todecheenie, the Defendants certify that they have a signed copy of the declaration in their possession. *See* LCvR 5.4(b)(5) ("Electronically filing a document that contains a declaration,

The Community bases its claim in the first instance on cost center reports produced by the IHS during the Parties' compact negotiations and included in the Administrative Record. Record, ECF No. 18-1, 402–11. The IHS does not dispute the Community's statement that:

> The Cost Center Reports are the reports the IHS generates to display revenues, expenditures and balances associated with the IHS operation of a given program for a given period of time, usually a single fiscal year. The IHS "Budget Activity Program" or BAP on the Cost Center Reports identifies the source of funding, including appropriated funds (for example, "Hospitals and Clinics" and "Dental"), and third-party revenues (e.g., Medicare, Medicaid, Private Insurance, and, in some years, VA IHS Reimbursement).

Pl.'s Statement of Material Facts (hereinafter "Pl.'s SOF"), ECF No. 71, ¶ 13; Defs.' Resp. to SOF, ECF No. 74-1, ¶ 13 ("Plaintiff's Statement of Material Fact No. 13 are characterizations of record documents and they speak for themselves."); *see also* Decl. of Sheila Todecheenie (hereinafter "Todecheenie Decl."), ECF No. 74-2, ¶ 5 ("The cost center reports were generated from UFMS at the end of each fiscal year and included information regarding revenues, including third-party revenues."). The IHS *does* dispute that the cost center reports "show the balance of available revenues both at the beginning and at the end of each year[,]" Pl.'s SOF, ECF No. 71, ¶ 14, asserting in response;

> Cost center reports seldom reflect the actual amount of third-party revenues generated or expended at a health facility if generated for current or recent years. … 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 of [sic] lower than originally anticipated) that occur after the end of the fiscal year, until IHS can perform a final reconciliation and adjustment.

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verification, certificate, sworn statement, oath or affidavit certifies that the original signed document is in the possession of the attorney . . . and that it is available for review upon request by a party or by the Court"); *see also McGovern v. George Washington Univ.*, 245 F. Supp. 3d 167, 178 (D.D.C. 2017), *aff'd sub nom. McGovern v. Brown*, 891 F.3d 402 (D.C. Cir. 2018) (stating that Local Rule 5.4(b)(5) "contemplates that when an unsigned declaration is electronically filed, the filing party is certifying that the original signed declaration exists in the possession of counsel or the *pro se* party").

Defs.' Resp. to SOF, ECF No. 74-1, ¶ 14 (citing Todecheenie Decl., ECF No. 74-2, ¶ 6). However, the declaration of Sheila Todecheenie also states as follows: "In the past, IHS used cost center reports for budgeting and estimating costs of operating the Salt River Health Clinic." Todecheenie Decl., ECF No. 74-2, ¶ 6; *see also,* Defs.' SOF, ECF No. 77-1, ¶ 7 ("IHS uses cost center reports for budgeting and estimating costs of operating the health care facilities.").

For purposes of the Community's claim, the principal material facts regarding the cost center reports are that they were generated by IHS from its financial systems (Defs.' SOF, ECF No. 77-1, ¶ 7; Todecheenie Decl., ECF No. 74-2, ¶ 5); that they display information regarding revenues, expenditures and balances associated with the IHS operation of a given program, including expenditures of third-party revenues, at a given point in time (Pl.'s SOF, ECF No. 71, ¶ 13; Defs.' Resp. to SOF, ECF No. 74-1, ¶ 13; Todecheenie Decl. ECF No. 74-2, ¶ 5); that the Community requested them from IHS during compact negotiations, and thus they were before both the agency and the Community during compact negotiations (Defs.' SOF, ECF No. 77-1, ¶ 6; Todecheenie Decl., ECF No. 74-2, ¶ 5); and that IHS used cost center reports for budgeting and estimating costs of operating the Salt River Health Clinic (Todecheenie Decl., ECF No. 74-2, ¶ 6, Defs.' SOF, ECF No. 77-1, ¶ 7). These facts are supported by the record and are not in dispute.[10]

Certainly, the IHS disagrees that the cost center reports in the Administrative Record reflect final reconciled and "adjusted" data (which is not necessarily something the Community has asserted). Defs.' SOF, ECF No. 77-1, ¶¶ 8–9. More specifically, the IHS disputes the

[10] Of course, the Community also relies on what the cost center reports themselves show. The cost center reports are in the Administrative Record, ECF No. 18-1, 402-11. Paragraphs 15 through 17 of the Community's Statement of Material Facts also describe certain details of those reports, which the IHS does not dispute. Defs.' Resp. to SOF, ECF No. 74-1, ¶¶ 15–17.

Community's statement that the cost center reports "show the balance of available revenues both at the beginning and at the end of each year[,]" Pl.'s SOF, ECF No. 71, ¶ 14, on the grounds that "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 occur after the end of the fiscal year, until IHS can perform a final reconciliation and adjustment," and that "here, IHS continued to adjust the cost center reports for FY 2012 through 2016 up through 2022." Defs.' Resp. to SOF, ECF No. 74-1, ¶ 14. While the IHS has not explained these "adjustments" and the Community presently cannot and does not concede that they are legitimate, the Community does not consider this issue material because as a legal matter (and as explained further below) the IHS cannot reject a Title V final offer submitted by a Tribe in 2017 on the basis of adjustments to its financial records made "up through 2022." *See infra*, § I(C).

IHS also disputes that the cost center reports reflect the Secretarial amount owed under 25 U.S.C. § 5325(a)(1), asserting that "Certain documents requested by the Community, such as the cost center reports, do not accurately reflect the Secretarial amount and are not ordinarily relied upon to determine the level of funding due under the contract." Defs.' Resp. to SOF, ECF No. 74-1, ¶ 12 (citing Decl. of Charles Ty Reidhead (hereinafter "Reidhead Decl."), ECF No. 74-3, ¶ 13). This is not a material factual dispute because whether or not the IHS has complied with the funding requirements under 25 U.S.C. § 5325(a)(1) is a legal question to be determined by this Court.

In addition to the cost center reports, the Community relies in part on provider collections data provided to the Community during compact negotiations. Decl. of Barry Brown (hereinafter "Brown Decl."), ECF No. 71-1, Ex. D; Pl.'s Mem., ECF No. 71 21-23. In response

to the Community's Statement of Material Facts, paragraphs 21–22, the IHS argues that the Community's reliance on the Declaration of Barry Brown is improper and that the declaration does not constitute admissible evidence because, the IHS asserts, it fails to satisfy the personal knowledge requirement of Rule 56(c)(4) of the Federal Rules of Civil Procedure. Defs.' Resp. to SOF, ECF No. 74-1, ¶¶ 21–22. To be clear, the facts stated in Mr. Brown's declaration are based on his personal knowledge, experience, and observations having worked as a consultant for the Community *alongside Michel Lincoln* in connection with the compact negotiations. Brown Decl., ECF No. 71-1, ¶ 1 ("I worked directly with another of the SRPMIC's consultants, Michel Lincoln, on the Salt River Clinic compact and funding agreement to obtain the data used by SRPMIC Management to plan, prepare and assume operation of the clinic under a Title V compact."). *See also id.* at ¶ 4.

Regardless, the IHS's own statement of facts asserts: "In making its requests 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." Defs.' SOF, ECF No. 77-1, ¶ 10 (citing Brown Decl., ECF No. 71-1, ¶ 10 & Ex. C). Even if the Court were to strike some portion (or even all) of Mr. Brown's declaration, then the fact that the IHS provided the collections data identified by the Community is not reasonably disputed. The Defendants likewise do not dispute any of the Community's statements of fact regarding the dollar amounts reflected in this provider collections data that was provided during negotiations, nor the Community's calculations comparing those amounts to the third-party revenue expenditure

amounts in the cost center reports. *See* Defs.' Resp. to SOF, ECF No. 74-1, ¶¶ 23–31.[11] In connection with these paragraphs, the IHS states in its response that "during negotiations, the Plaintiff only requested and IHS only provided third party revenues collected by providers who were stationed at the Salt River Clinic. Brown Decl., Ex. C." Defs.' Resp. to SOF, ECF No. 74-1, ¶ 29 (responding to Pl.'s SOF, ECF No. 71, ¶ 30). Accordingly, the "dispute" over these facts amounts to nothing more than a clarification that the provider collections data exchanged during the compact negotiations, and on which the Community partially relies in support of its claim, reflects collections received from providers *stationed* at the Salt River Clinic. Defs.' SOF, ECF NO. 77-1, ¶ 10. The Community does not dispute this clarification.

The IHS also contests the Community's reliance on the declaration of Brian Deveau, ECF No. 71-2. *See* Defs.' Br., ECF No 74, 25-26. The primary purpose of Mr. Deveau's declaration is to explain the reasoning and calculations underlying the Community's claim, which are based on the undisputed facts identified above. *See Fort McDermitt Paiute & Shoshone Tribe*, No. CV 17-837 (TJK), 2018 WL 4637009, at *2 (noting that the court could not determine the amount in dispute in part because "the parties have presented the Court with nothing more than a bare 'administrative record' with no supporting testimony. The record consists largely of correspondence between the Tribe and IHS, along with financial spreadsheets and similar documents. *See* AR. It is notably devoid of affidavits or testimony that explain what the numbers in these documents mean."). Mr. Deveau also offers additional analysis, opinion, and evaluation based on his experience and qualifications as a Certified Public Accountant and auditor. *See generally* Decl. of Brian Deveau (hereinafter "Deveau Decl."), ECF No. 71-2.

[11] The IHS states in response to those paragraphs that the Community's statements of fact are not disputed, but that Defendants disagree they are material.

The precedent relied upon by the IHS, *Londrigan v. Fed. Bureau of Investigation*, does not support the agency's attack on Mr. Deveau's declaration, as it expressly states that the declarant was competent to testify "to his own observations upon review of the documents," and on knowledge of procedures and "his personal experiences" as an FBI professional to the extent relevant to the case. 670 F.2d 1164, 1174 (D.C. Cir. 1981). These are analogous to the matters stated in Mr. Deveau' s declaration. Additionally, the IHS does not apply the correct evidentiary standard to Mr. Deveau, who offers his declaration as an expert witness. Mr. Deveau's declaration details his qualifications as an expert: he is "a Certified Public Accountant since 1982 in numerous states," "was a Partner for 16 years" at the accounting firm Moss Adams LLP, and during that time he "personally served dozens of Tribes annually as external auditor and as an advisor." Deveau Decl., ECF No. 71-2, ¶ 1. Because Mr. Deveau's statements are those of an expert in the field of accounting and financial auditing, his declaration properly includes his opinions and inferences and relies on information provided to him as necessary to explain the financial records and information relevant to this case.

The Defendants object that Mr. Deveau's declaration "relies on a chain of inferences and speculation." Defs.' Br., ECF No. 74, 26. However, "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." Fed. R. Evid. 702; *see also* Fed. R. Evid. 704, 2011 Amend. Notes ("The Committee deleted all reference to an 'inference' . . . because any "inference" is covered by the broader term 'opinion.'").[12] For example, the Defendants object to statements in Mr. Deveau's declaration such as: "[t]herefore, I consider it highly unlikely that IHS's management of the SR Clinic would

[12] The Federal Rules of Evidence also allow the expert to base opinions on facts not admissible in evidence if, among other qualities, "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." Fed. R. Evid. 703.

have resulted in Third Party Revenue collections attributable to the SR Clinic of $18,270,947 as shown in IHS's Cost Center Reports for 2012-2016, because that amount, which would result in a ratio of $2.46 to $1, would be almost 2.5 times higher than the $1 to $1 average for high performing similar facilities that would be expected based on my experience." Deveau Decl., ECF No. 71-2, ¶ 9.c.i. This statement, among others, demonstrates Mr. Deveau's careful reliance and application of his experience to the facts of this case—a normal and permissible use of expert testimony. *See Bazarian Int'l Fin. Assocs., LLC v. Desarrollos Aerohotelco, C.A.,* 315 F. Supp. 3d 101, 111 (D.D.C. 2018) ("an expert witness who 'is relying solely or primarily on experience . . . must explain how that experience leads to the conclusion reached . . . and how that experience is reliably applied to the facts.'"); *see also Bieghler v. Kleppe,* 633 F.2d 531, 533 (9th Cir.1980)).

Federal rules of evidence provide that "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." Fed. R. Evid. 703. "Unlike an ordinary witness . . . an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993) (discussing use of expert testimony at summary judgment); Fed. R. Evid. 802 (advisory committee's note listing "Rule 56: affidavits in summary judgment proceedings" as an exception to prohibition against hearsay). Therefore, to the extent Mr. Deveau relies on documents provided to him by Mr. Brown, he does so in order to evaluate them as an expert in the field of accounting and financial auditing, and those documents and information are independently established and identified in Mr. Brown's declaration. Brown Decl., ECF No. 71-1, ¶¶ 8–12. Moreover, the key facts and information upon which Mr. Deveau bases his analysis—including the cost center reports and the dollar amounts reflected in the third-

party collections data provided by the IHS during compact negotiations—are either in the Administrative Record or established as undisputed facts in the Defendants' own declarations and statements of fact, or both. *See supra*, 15–16; *compare* Deveau Decl., ECF No. 71-1, ¶ 8.c-8.d *with* Defs.' Resp. to SOF, ECF No. 74-1, ¶¶ 23–30 (responding to Pl.'s SOF, ECF No. 71, ¶¶ 23–31). Therefore, Mr. Deveau's use of this material in not merely a "vehicle by which evidence that is otherwise inadmissible may be introduced." *See Presley v. Com. Moving & Rigging, Inc.*, 25 A.3d 873, 893 (D.C. 2011).

Mr. Deveau's declaration properly draws on his expert inferences and opinions and is admissible as evidence to support the Community's motion for summary judgement.[13] If necessary, however, the Court may exclude any portion of the declaration that it deems impermissible, while retaining all other statements. *Am. C.L. Union v. Fed. Bureau of Prisons*, No. CV 20-2320 (RBW), 2022 WL 1262112, at *2 (D.D.C. Apr. 28, 2022) ("[a]lthough motions to strike are 'considered an exceptional remedy and ... generally disfavored[,]' 'a court may carefully strike improper portions of the affidavit, while retaining all properly stated facts") (alteration in original) (quotation omitted); *Judicial Watch, Inc. v. U.S. Dep't. of Com.*, 224

[13] The Community notes that the Parties in this case have not yet made initial disclosures, including disclosures of expert witnesses. Initially, the Parties did not anticipate that expert witnesses would be needed and did not request an order from the Court setting a deadline for disclosures. Second Meet and Confer Statement, ECF No. 44; First Meet and Confer Statement, ECF No. 16. "Absent a stipulation or a court order," disclosure of expert testimony is due "at least 90 days before the date set for trial or for the case to be ready for trial." Fed. R. Civ. P. 26(a)(2)(D). Undisclosed evidence is prohibited when a party "[f]ails to provide information or identify a witness *as required* by Rule 26(a)" and such failure is not substantially justified nor harmless, Fed. R. Civ. P. 37(c)(1) (emphasis added), and here the Rule 26(a) deadline for disclosure has not been set, let alone passed. There is no independent requirement to disclose an expert witness prior to filing a motion for summary judgment. *E.g., Strougo v. BEA Assocs.*, 188 F. Supp. 2d 373, 379–80 (S.D.N.Y. 2002); *In re Mercedes-Benz Anti-Tr. Litig.*, 225 F.R.D. 498, 505 (D.N.J. 2005); *Opperman v. Path, Inc.*, 205 F. Supp. 3d 1064, 1068 n.1 (N.D. Cal. 2016); *City of Rome, Georgia v. Hotels.com, L.P.*, No. 4:05-CV-249-HLM, 2012 WL 13024270, at *2 (N.D. Ga. July 9, 2012).

F.R.D. 261, 263 (D.D.C. 2004)).

Even if the Court were to strike the Deveau declaration in its entirety, the undisputed facts as set out above are sufficient to support the Community's claim, and the Community is entitled to summary judgment on the same. The factual basis for the Community's claim can be determined based on the cost center reports in the Administrative Record, the undisputed facts regarding collections attributable to Salt River Clinic providers, and application of simple math. *See* Defs.' SOF, ECF No. 77-1, ¶ 10; Defs.' Resp. to SOF, ECF No. 74-1, ¶¶ 23–30 (responding to Pl.'s SOF, ECF No. 71, ¶¶ 23–31, not disputing the Community's statements regarding the differences in amounts between Allowances from third-party revenues reflected in the cost center reports and third-party collections amounts from providers stationed at the Salt River Clinic). Ultimately, the IHS does not dispute the facts upon which the Community bases its claim, but rather bases its opposition on new evidence that the agency claims show that the Administrative Record is "outdated" and "incomplete."

C. The ISDEAA does not permit IHS to rely on after-the-fact accounting adjustments to justify rejection of a Title V final offer.

The IHS's reliance on evidence that post-dates not only the compact negotiations and the Community's final offer, but also the IHS's own rejection of that final offer, is precluded by the ISDEAA and cannot help the IHS meet its burden to show that the rejection was valid and properly supported. Numerous provisions of the ISDEAA establish that a tribe's right to funding is to be determined from the date of the compact proposal, based on information then available to the IHS and that the agency would otherwise use for its own budgetary planning purposes in the absence of the proposal. Were it otherwise, IHS could manipulate its funding decisions to deny tribes the full amount of funding it would have provided for itself, contrary to the statutory text and underlying purpose of the ISDEAA. *E.g., Pyramid Lake Paiute Tribe*, 70 F. Supp. 3d at

543. The IHS's attempt here to deny the reliability of the cost center reports in the Administrative Record—which it admits were used "[i]n the past, … for budgeting and estimating costs of operating the Salt River Health Clinic[,]" Todecheenie Decl., ECF No. 74-2, ¶ 6,—in favor of "adjusted" data created up through 2022 is thus impermissible and unsuccessful.

The amount awarded by IHS to a tribal contractor under the ISDEAA "shall not be less than the appropriate 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); *see also id.* at § 5388(c) (funds provided under Title V compact shall be equal to amounts the tribe would have been entitled to under Title I). If the tribe and the Secretary cannot agree on what that amount is, the ISDEAA provides that the tribe may submit a final offer. The Secretary must then "review and make a determination" on the final offer "[n]ot more than 45 days after such submission[.]" 25 U.S.C. § 5387(b). If the Secretary rejects the amount of funding proposed in a final offer, the Secretary must provide within those 45 days "a timely written notification to the Indian tribe that contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority, that … the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this title[.]" 25 U.S.C. § 5387(c)(1)(A).[14] If the Secretary fails to act within this 45-day time period, the final offer is deemed approved and becomes effective. 25 U.S.C. § 5387(b). Further, the statute prohibits the Secretary from "reducing the amount of funds required under this Act" in subsequent years

[14] The Secretary then has the burden "of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer" in any subsequent appeal or civil action challenging the rejection decision. 25 U.S.C. § 5387(d).

except under limited circumstances enumerated in the statute, such as a reduction in appropriations for the specific program or function under contract. 25 U.S.C. § 5388(d)(1)(C).

In short, these provisions require the Secretary to identify the amount of funding that will be available to a participating tribe or tribal organization *at the time of the contract proposal*, and to fully justify and document that amount within 45 days of the submission of a final offer (at the latest). Although the IHS may not have fully reconciled its accounting for the immediate prior year at that time, it must use the information it has available to it—and that it would use to formulate its own budget in the absence of the contract proposal—to arrive at an amount that fairly represents the amount the Secretary "would have otherwise provided for the operation of the program[.]" 25 U.S.C. § 5325(a)(1). The statutory provisions leave no room for IHS to argue, as it does here, that the funding level to which a tribe is entitled can be determined with reference to accounting adjustments the agency makes years after the final offer was submitted.

The point in time at which a tribal contractor's Section 106(a)(1) funding level must be determined was directly addressed in *Pyramid Lake*. 70 F. Supp. 3d at 543 ("The question before the Court is at what point must the agency calculate the applicable funding under section 450f(a)(2)(D) [for declination of a Title I proposal]: at the date of the proposal or at the date of the declination letter?").[15] The court held that "[g]iven the structure and purpose of the ISDEAA, … the applicable funding level for a contract proposal is to be determined from the date the agency receives the tribe's proposal." *Id.* In *Pyramid Lake*, the IHS had purported to

[15] 25 U.S.C. § 450f(a)(2)(D) is now codified at section 25 U.S.C. § 5321(a)(2)(D) and governs procedures for the Secretary's response to a Title I contract proposal, including a 90 day response deadline. While there are some differences between the declination criteria and procedures under Title I as compared with the rejection criteria under Title V, none are material for purposes of determining the amount owed under Section 5325(a)(1), which applies to Title V compacts as well as Title I contracts (*see* 25 U.S.C. § 5388(c)).

cancel the EMS program that was the subject of the proposal (thereby reducing the program funding amount to $0), after receiving the Tribe's proposal. *Id.* It then declined the contract proposal, in part, on the grounds that the amount of funds requested were in excess of the applicable funding amount under Section 106(a) (now Section 5325(a)). *Id.* at 539.

The court in *Pyramid Lake* correctly refused to allow the agency to circumvent the ISDEAA by determining funding amounts based on agency decisions made after the receipt of a contract proposal. The court reasoned: "Accepting the Secretary's alternative interpretation would undo the carefully-constructed declination criteria in the ISDEAA. The agency could simply circumvent these limited criteria whenever it wished by canceling a program after receiving a self-governance proposal and then declining the proposal, as IHS did here." *Id.* at 543.

The IHS seeks similar license here, asking the court to allow it to make *ex post facto* "adjustments" to its accounting to justify its decision on a final offer made years ago. Specifically, the IHS asserts that the expenditures of third-party revenues reflected in its own Administrative Record are not "current" and that the cost center reports documenting those expenditures cannot be relied upon because the IHS "continued to adjust the accounting for FY 2012 through 2016 up through 2022"—*six to ten years* after the close of those fiscal years. Defs.' Br., ECF No. 74, 19 (citing Todecheenie Decl., ECF No. 74-2, ¶ 6). As a result of these continued adjustments, IHS asserts, "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 Administrative Record. *Id.*

IHS offers no explanation for these significant adjustments made to its recorded expenditures years after the fact, and the Community has never received one. As far as the Community (or this Court) knows, these adjustments may be discretionary reallocations that the IHS has made years later for the specific purpose of justifying its rejection of the Community's final offer. The timing and size of the adjustments, at the very least, raise this question.[16] In the normal course of operations, accounting adjustments may be made for several months after the close of the fiscal year, but not several years. The Community itself—along with all other ISDEAA tribal contractors and federal grantees—is required to close its books, complete its audit, and file that audit with the federal government no later than nine months after the end of the fiscal year. *See* 25 U.S.C. § 5386(c); 31 U.S.C. § 7502(h). In any event, if the Court were to allow the IHS to rely on post-final offer accounting adjustments in defense of a final offer rejection, it would open an obvious loophole for the IHS to exploit in the future.

More importantly, and regardless of when the IHS ultimately closes its books on a particular year, the IHS had a legal obligation *as of the date of the Community's compact proposal* to determine, and to award, the amount the Secretary "otherwise would have provided" for operation of the program. When it operated the clinic program itself, the IHS used the cost center reports as budgeting tools to estimate the amount it would spend for operation of the clinic program. Todecheene Decl., ECF No. 74-2, ¶ 6. The cost center reports also show that, at least

[16] The consequences for failing to meet this deadline can be quite severe, including payment on a reimbursement rather than advance basis, withheld payment or disallowed costs, designation as a "high risk" grantee, loss of future eligibility for federal awards, and other sanctions. *See e.g.*, 45 C.F.R. § 75.205(c); *id.* at § 75.207; *id.* at § 75.371. The only cost center reports listing a prior year "Final Fiscal Year End Balance" that does not exactly match the "Fiscal Year End Balance (Surplus/Deficit)" from the prior fiscal year report are the FY 2016 and FY 2017 cost center reports. Record, ECF No. 18-1, 402–09; Pl.'s SOF, ECF No. 71, ¶¶ 15–18; Defs.' Resp. to SOF ¶¶ 15–18.

for purposes of budgeting, the IHS allocated for itself the amount of third-party revenues that was necessary to meet its anticipated (if not final, as adjusted years later) expenses, rather than begin the subsequent year with a significant deficit. Deveau Decl., ECF No. 71-2, ¶ 7.b; Record, ECF No. 18-1, 402–09. Notably, there are two exceptions to this rule: in fiscal years 2008 and 2009, the cost center reports show a sizeable deficit at the end of the year, most of which those same reports state were "applied against PIMC funds." Deveau Decl., ECF No. 71-2, ¶ 7.b.i-ii; Record, ECF No. 18-1, 402–03. IHS has not explained what this notation on the cost center reports means, if not that the agency has a history of transferring funding from PIMC to the Salt River Clinic to support clinic operations.

Instead, IHS has gone to great lengths to create the impression of a factual dispute over the contents of its financial records. It may be that IHS has now completed whatever accounting adjustments would be required to close (or partially close) the delta between the third-party revenues generated at the clinic and the total third-party revenue expenses allocated on paper to the clinic program. But to the extent those final "adjusted" expenditures currently reflected in the IHS's accounting system differ from its actual budgeting tools used consistently for years prior to the Community's assumption of clinic operations, they are immaterial. The question at issue here is whether IHS properly rejected the Community's final offer and adequately supported that rejection with specific factual findings and controlling legal authority demonstrating that the amount of funds requested by the Community was in excess of the amount the agency would have otherwise provided for itself. 25 U.S.C. § 5387(c)(1)(A). As a legal matter, as well as common sense, the IHS cannot justify a decision on a Title V compact final offer submitted by the Community and rejected by the IHS in 2017 based on accounting adjustments made as late as 2022.

Finally, even if the Court finds the IHS's current and "adjusted" expenditure data could be potentially relevant to the disposition of this case, the IHS has not established that it is entitled to summary judgment based on those figures. The IHS has provided no explanation of its expenditure adjustments and therefore it has not established—nor does the Community concede—that the adjustments are anything other than discretionary reallocations intended to reduce the amount of funding available to the Community. IHS's ordinary discretion to reallocate funding as it sees fit does not apply where Congress has enacted specific restrictions, such as the Community's entitlement to full funding of its compacted programs under 25 U.S.C. § 5325(a)(1). *See Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (although allocation of a lump sum appropriation is ordinarily discretionary, "an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes[.]"); *see also Pyramid Lake*, 70 F. Supp. 3d at 543 ("The Secretary's ability to use discretionary funds as she sees fit does not relieve her obligation to adhere to the standards of Act in assessing a tribe's proposal.") (citing *Lincoln*); *see also Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 107–08 (D.D.C. 2019) ("Congress passed the [ISDEAA] with the 'intent to circumscribe as tightly as possible the discretion of the Secretary.'").

The IHS does not support its motion with any evidence to establish that its accounting adjustments complied with the ISDEAA, nor has the Community has an opportunity to review any such materials or discover related materials that may be necessary to understand the adjustments. For these reasons, the IHS's motion should be denied even if the Court determines that the ISDEAA does not necessarily preclude the IHS from relying on subsequent accounting adjustments, and the Community should be permitted to obtain discovery regarding such

adjustments. *See Donofrio v. Camp*, 470 F.2d 428, 431 (D.C. Cir. 1972) (There is "an inherent danger of injustice in granting summary judgment to the moving party on his own version of facts within his exclusive control as set out only in *ex parte* affidavits"); *see also Shaw v. Foreman*, 59 F.4th 121, 128–29 (4th Cir. 2023) ("a district court abuses its discretion by granting summary judgment when it otherwise has fair notice of potential disputes as to the sufficiency of the summary judgment record[,]" especially when determinative facts "are exclusively in the control of the opposing party") (citations omitted). *See also* this Court's Minute Order dated November 21, 2023 (staying discovery pending resolution of the parties' dispositive motions, in response to Plaintiff's Response to Order for Motion for Discovery, ECF No. 69, seeking stay without prejudice to pursuing discovery at a later date pending resolution of the Parties' dispositive motions).

D. The IHS's new collections data is untimely, an attempt at post hoc justification, and does not dispose of the Community's claim.

The IHS also relies on additional third-party collections data that it admits it never provided to the Community during negotiations. Defs.' Br., ECF No. 74, 19-20. The ISDEAA imposes on the IHS a specific duty to negotiate in good faith, 25 U.S.C. § 5387(e), and to provide technical assistance to a tribe when it provides a notice of rejection of the tribe's final offer, 25 U.S.C. § 5387(c)(1)(B). And of course, the IHS must support its rejection of a final offer with written notification containing a "specific finding" or "controlling legal authority." 25 U.S.C. § 5387(c)(1)(A). As if these obligations did not exist, the IHS simply states:

> [U]nfortunately, during 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 2012-2016 reflecting third-party revenue collected at the Salt River Health Clinic pharmacy.

Defs.' Br., ECF No. 74, 19-20 (citing Todecheenie Decl., ECF No. 74-2, ¶ 10).

Not only does the IHS produce this information for the first time now, years into this litigation, but it does not even attempt to establish that it was or even could have been used as a basis for its rejection decision issued in 2017. As with the expense data above, IHS asserts that it continues to adjust its revenues data "for several years to reflect additional revenues (which may be higher or lower than originally anticipated)[.]" Defs.' SOF, ECF No. 77-1, ¶ 8. But IHS provides only aggregate, presumably "final" total collections amounts from these sources for the five-year period from FY 2012 through FY 2016. Defs.' Br., ECF No. 74, 20; Defs.' SOF, ECF No. 77-1, ¶ 13; Todecheenie Decl., ECF No. 74-2, ¶10 & Ex. B. To the extent these collections were received, recorded, or revised after receipt of the Community's final offer—or even after the IHS's rejection of the same—these figures could not have been the basis for the IHS's rejection decision. This is not to say that the IHS did not somehow account for unknown or fluctuating revenues in its budgeting process or could not have rationally done so in determining the amount owed to the Community under Section 5325(a)(1). However, the IHS has not justified its rejection of the Community's final offer with a coherent explanation for how it did so and how its method or process supports its rejection decision.

IHS has a duty to establish a record to support its decision. *Cook Inlet Tribal Council v. Mandregan*, No. 14-CV-1835 (EGS), 2019 WL 3816573, at *10 (citing parallel provision for declination of contract proposals under Title I and noting that it is the agency's burden to "develop the record" within the statutory time period for declination.) Not only did the IHS fail to provide this information to the Community during compact negotiations or in support of its rejection of the Community's final offer, but it did not even include this information in the Administrative Record filed with the Court. While this Court's review under the ISDEAA is not

necessarily limited to the administrative record, *supra*, 3, that does not mean that the agency is permitted to rely on post hoc justifications for its decision or escape its statutory duty to provide written justification of any rejection of a final offer within 45 days under 25 U.S.C. § 5387(b)-(c). *E.g., Fort McDermitt Paiute & Shoshone Tribe*, No. CV 17-837 (TJK), 2018 WL 4637009, at *4 (quoting *Pierce v. SEC*, 786 F.3d at 1034); *Susanville Indian Rancheria v. Leavitt*, No. 2:07-CV-259-GEB-DAD, 2008 WL 58951, at *6 (E.D. Cal. Jan. 3, 2008); *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). The fact that the IHS has never identified or produced this additional collections data until years into litigation challenging its 2017 rejection decision is a sure sign that is exactly what the agency is attempting to do here.

The IHS should not be permitted to justify its 2017 rejection decision on the basis of evidence produced for the first time at such a late date. Even if this Court were to allow it, however, the IHS needs *both* its additional collections data *and* its post-final offer expense "adjustments" to explain away the Community's claim. The IHS now states that total collections from the Salt River Clinic for the period FY 2014-2016 were $11,075,053. Todecheenie Decl., ECF No. 74-2, ¶ 9 & Ex. B. Adding the amount of third-party carryover that was available going into FY 2012 ($2,187,828),[17] this yields a total of $13,262,881 in third-party funds available for expenditure in the period FY 2012-2016 (according to IHS's new collections data). But the total expenditures from third-party revenues reflected in the cost center reports for FYs 2012-2016, prior to the IHS's post-decision "adjustments," are $18,035,720. Record, ECF No. 18-1, 406–10. This still leaves a difference of **$4,772,839** between third-party funds *collected*

[17] This carryover amount is shown in the cost center reports, Record, ECF No. 18-1, 406 (amount shown as "Final Fiscal Year End 2011 Balance" in the final column, "Grand Totals"). IHS's "current" data agrees with this carryover amount for FY 2012. Todecheenie Decl., ECF No. 74-2, ¶ 11 (citing "approximately $2.2 million in third-party revenue carryover carried into FY 2012.")

from the Salt River Clinic according to IHS now ($13,262,881) and third-party funds *expended* by IHS in support of the Clinic according to its cost center reports ($18,035,720)—an average of **$954,568** per year.

The IHS conveniently resorts to its unexplained and undocumented post-decision expenditure adjustments to explain away this difference, reducing third-party expenditures attributable to the clinic from $18,035,720 as reflected in the cost center reports (Record, ECF No. 18-1, 406–10), to $13,812,357 as shown on a report generated on April 12, 2023 (Todecheenie Decl., ECF No. 74-2, ¶ 8) (and which IHS says reflect adjustments made up through FY 2022 (*id.* at ¶ 6). *See* Defs.' Br., ECF No. 74, 20 ("Together with updated data reflecting actual third-party revenues collected and expended at the Salt River Clinic for FY 2012 through 2016, accounting for these additional third-party revenues disposes of the Community's contention[.]"). This kind of post hoc rationalization is not permitted and does not satisfy the IHS's burden under the ISDEAA. *See supra*, 3–4; *Kunaknana v. Clark*, 742 F.2d 1145, 1149 (9th Cir. 1984) (when an agency offers information not contained in the administrative record, such "additional information should be explanatory in nature, rather than a new rationalization of the agency's decision, and must be sustained by the record."). For this reason, and the reasons stated above, IHS should not be permitted to rely on post-final offer and post-decision expenditure adjustments and the Community would be entitled to an additional $954,568 in recurring funds *even if* the Court finds that the additional collections data is properly considered.

Finally, the Community expressly notes that the IHS's analysis as reflected in the Todecheenie Declaration appears internally inconsistent. The declaration states that "UFMS … currently shows that in FY 2018, after the Community assumed operation of the Salt River

Clinic, there was $3.1 million in third-party revenue carryover at the Salt River Clinic." Todecheenie Decl., ECF No. 74-2, ¶ 12. It further states that in 2022 "IHS transferred the final, remaining [FY 2017] balance of $2,045,583 in third-party revenue carryover (the remaining amounts that were left after all of IHS's obligations were reconciled) to the Community." *Id.* at ¶ 14.[18]

At the same time, IHS claims that (1) there was a total of $2.2 million in third-party revenue carryover carried into FY 2012, Todecheenie Decl., ECF No. 74-2, ¶ 11; (2) third-party revenues from the clinic totaled $11,075,053 for FYs 2012-2016, Todecheenie Decl., ECF No. 74-2, ¶ 9; and (3) expenditures of third-party revenues for FY 2012-2016 totaled $13,812,357. Those latter figures yield a deficit of third-party revenues at the end of FY 2016 of $537,304, as shown below:

Carryover into FY 2012	$2,200,000
Revenues 2012-2016	$11,075,053
Expenses 2012-2016	($13,812,357)
Carryover at end of FY 2016	**($537,304)**

The clinic program would then have had to earn a profit of $2,582,887 in FY 2017 to account for the $2,045,538 remaining balance transferred to the Community in FY 2022 for FY 2017. ($2,045,538 + $537,304 = $2,582,887.) This seems extraordinarily unlikely given that according to IHS's "final" numbers, annual third-party profits from the clinic in FYs 2012-2016 range from

[18] The difference between IHS's carryover amount of $3.1 million in Todacheenie's declaration, and the $2,045,583 carryover amount actually transferred to the Community, is not further explained.

an annual profit of $350,103 in FY 2015 to an annual deficit of $2,478,864 in FY 2016, and average a *negative* $547,461 over the five years.[19]

It is the Community's position that the IHS cannot rely on post-final offer accounting "adjustments" or post hoc justifications and thus the Court should not consider accounting data that was not actually before the Parties during compact negotiations and at the time of the Community's final offer. The calculations above underscore, however, that if the Court disagrees with the Community as a legal matter, then there are material disputes of fact relating to the IHS's evidence that preclude summary judgment in favor of the Defendants.

II. PSU/PIMC Tribal Shares

In Count II, the Community seeks payment of its full tribal shares of the IHS Phoenix Service Unit and Phoenix Indian Medical Center, which also operates in part as the PSU. Second Am. Compl., ECF No. 42, ¶¶ 43–49. In attempting to determine its full share of PSU

[19] These amounts can be determined by subtracting the annual totals in third-party expenditures from Exhibit A to the Todecheenie declaration from the annual totals in third-party collections shown in Exhibit B to the Todecheenie declaration, ECF No. 74-2, as shown below:

Fiscal Year	Collections	Expenditures	Net Third-Party Revenues
2012	$2,296,252	$2,427,235	($130,983)
2013	$1,863,100	$2,239,878	($376,778)
2014	$1,717,884	$1,818,668	($100,784)
2015	$2,563,594	$2,213,491	$350,103
2016	$2,634,224	$5,113,088	($2,478,864)
Total	$11,075,054	$13,812,360	($2,737,306)

funding, the Community sought to identify that portion of PSU funding that the Secretary "would have otherwise provided for the operation" of the Salt River Clinic program. *See* 25 U.S.C. § 5325(a)(1). To that end the Community requested from the IHS, and received what it believed to be, information reflecting "the number of days per annum" that PSU/PIMC staff "provided services and support to the Salt River Clinic program, which was the subject of [the] compact proposal by the community." Brown Decl., ECF No. 71-1, ¶ 12. The Community explained to the IHS, in an email from Barry Brown included in the Administrative Record, that the summary spreadsheet "represents the various costs at the Phoenix Service Unit (PIMC) that the IHS incurs in support of the Salt River Clinic program and community. The IHS identified these costs so it is the Community's belief that these, at a minimum, represent a portion of the costs the Secretary would otherwise incur in providing services to the Community." Record, ECF No. 18-1, 257.

The IHS claims not to understand this "methodology," which simply seeks to identify costs incurred by IHS at the PSU in support of the Salt River Clinic, and rejects it. As of the date of the Community's final offer, however, the IHS still had not provided the Community with its own documented or supported amount. The Community therefore stated in its final offer:

> The Community also reserves the right to separately negotiate with the IHS the amount of the [PSU/PIMC] shares and to add such negotiated shares to the FA—after the IHS provides the Community with more information about the formula and methodology the IHS proposes to use, and the IHS identifies PSU/PIMC shares for the Community. We were told during the negotiations that the information would be provided very soon and we expect and hope that it will be provided in time for the Community to review and add to this FA before it becomes effective.

Record, ECF No. 18-1, 78. In its rejection of the final offer, the IHS stated that it had held several consultation meetings with Tribes served by the PSU and "As a result of those meetings and the IHS's analysis, the IHS has identified an amount of $430,306 in tribal shares of the PSU

available to the Community for the Community's Funding Agreement." Record, ECF No. 18-1, 149–50. This amount was significantly lower than the amount the Community believed was historically used by the IHS PSU/PIMC in support of the Salt River Clinic, and therefore owed to the Community as a recurring tribal share amount.

Now, after several years of litigation, the IHS states that it made a calculation error in determining the Community's tribal share amount, and that it "has offered to pay the Community an additional $664,057 for the Community's tribal shares of the Phoenix Service Unit." Defs.' Br., ECF No. 74, 27, n.6 (citing Reidhead Decl., ECF No. 74-3, ¶ 16). IHS further invites the Court to "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." Defs.' Br., ECF No. 74, 27. Although the IHS does not explain the nature of this calculation error or how it was corrected, this "correction" brings the total amount of the Community's PSU/PIMC tribal shares as identified by the IHS much closer to the total amount previously identified by the Community for fiscal year 2018.

Based on the IHS's admission that it should have awarded at least an additional $664,057 for FY 2018 in recurring tribal shares, the Court should enter judgment on this claim in favor of the Community. *See Winder v. D.C.*, 555 F. Supp. 2d 103, 107 (D.D.C. 2008), *aff'd sub nom. Winder v. Erste*, 566 F.3d 209 (D.C. Cir. 2009) (entering judgment in favor of the plaintiff after defendant admits that payment is owed in its summary judgment motion and supporting affidavit). The judgment should also include an amount for FY 2017 based on the proportion of that fiscal year for which the Community's compact was in effect (7/365 = 1.92%, or $12,735).[20]

[20] The Compact was entered September 24, 2017, and was therefore in effect for seven days of that fiscal year. Record, ECF No. 18-1, 5.

Further, this amount is not only recurring, 25 U.S.C. § 5325(b)(2),[21] but based on the IHS's methodology it should be increased annually based on increases in appropriations allocated by the IHS to the PSU as a whole. The IHS explains its calculation of tribal shares as follows:

> 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[.]

Defs.' Br., ECF No. 74, 38 (citing Reidhead Decl., ECF No. 74-3, ¶¶ 7, 9. Therefore, the Court should direct the IHS to award to the Community at least an additional $12,735 for FY 2017 and $664,057 for FY 2018, to be paid as recurring tribal share amounts with increases in future years consistent with the IHS's tribal shares formula as corrected.

III. Contract Support Costs

The ISDEAA commands that contract support costs "shall be added" to the Secretarial amount. 25 U.S.C. § 5325(a)(2). Funding for PSU/PIMC tribal shares is, by definition, funding the Secretary would otherwise have used to run the PSU, including those functions carried out at PIMC. Under IHS's written contract support cost policy, service unit funding like PSU's generates CSC—in fact, such service unit funding has its own section in the policy. *See* U.S. Dep't of Health & Human Servs., Indian Health Manual (hereinafter "IHM") (Aug. 6, 2019), § 6-3.2E(3), Record at 193. IHS's argument that the Community's "request to increase the Secretarial amount fails," Defs.' Br., ECF No 74, 31, cannot be squared with its admission that the agency owed an additional $664,057 in recurring tribal shares in FY 2018 for Count II. To

[21] *See also* Defs.' Mem. at 4 (explaining "tribal shares").

fully correct this error and make the Community whole, the Community must also be paid the contract support costs associated with the additional tribal shares.

IHS contests this common-sense proposition with an elaborate but unfounded argument that "the ISDEAA only authorizes contract support costs to reimburse qualifying expenses that are actually incurred by a contractor"—as though ISDEAA agreements were cost reimbursement contracts for which the contractor is paid only upon presentation of an invoice following the provision of services. *Id.* This argument reveals a profound misstatement of the law and of IHS's own written policy on the calculation and payment of contract support costs. The ISDEAA requires payment—including payment of contract support costs—up front so that the contractor has the resources to provide the programs and services under contract. Section 5325, the central funding provision of the ISDEAA, states unequivocally: "*Upon the approval* of a self-determination contract, the Secretary *shall add* to the contract the *full amount of funds* to which the contractor is entitled under subsection (a) of this section . . . ." 25 U.S.C. § 5325(g) (emphasis added). Similarly, another statutory section provides that, at a Tribe's option, all contract funds are due in a single lump-sum payment at the beginning of the contract year. *Id.* § 5329(c) (Model Agreement § 1(b)(6)(B)(i)).

IHS's policy recognizes that contract support costs must be calculated and paid up front, not reimbursed after the fact. "*In advance of the contract year*, IHS and the awardee will negotiate an estimate of the awardee's [indirect cost] need using the awardee's most recent . . . indirect cost rate agreement." IHM, § 6-3.2E(1)a. (emphasis added), Record at 188. Alternatively, the parties can negotiate a lump sum for indirect-type costs, also in advance of the contract year. *Id*. § 6-3.2E(2), Record at 192–193.

This does not mean that actual costs are irrelevant; rather, the indirect cost rate system includes annual adjustments to reflect actual costs in the prior year. The parties recognize that the initial payments are estimates and may need to be adjusted or "reconciled" after the contract year. *Id*. § 6-3.2E(1)b, Record at 189–90 (describing determination of "final amount" of contract support cost need). At this stage, "costs incurred" may be relevant and require an adjustment, for example, in the contractor's indirect cost rate. *See, e.g.*, Defs.' Resp. to SOF, ECF No. 74-1, ¶ 45 (noting that Community's negotiated fixed carryforward rate may be adjusted to reflect "actual costs of carrying out its programs"). But such adjustments come after the contract year and have nothing to do with the contractor's initial entitlement under the statute and IHS policy.

A similar confusion pervades IHS's argument that the direct cost base to which the negotiated indirect cost rate is applied is comprised of "the amount [the contractor] expends, not the amount it is awarded." Defs. Br., ECF No 74, 32. IHS's citation of the regulations on indirect cost rate proposals is off base, confusing the direct cost base for the purpose of payment at the beginning of the year with the direct cost base used for rate proposals years later. *Id.* (citing 2 C.F.R. part 200, Appendix VII, § D(2)(c)). Rate proposals look back to actual audited costs in a base year, typically two years before the year for which the rate is proposed. By contrast, the direct cost base for the purpose of payment, as the IHS policy makes clear, is based on the award—typically "[t]he eligible funding in the Secretarial amount plus the [direct contract support cost] funding." IHM, § 6-3.2E(1)a.(i)(a), Record at 189.

IHS's acknowledgment that "it may be appropriate to use budgeted or funding amounts to estimate contract support cost needs at the outset of a performance period to provide up-front funding," Defs. Br., ECF No. 74, 32, is too equivocal. Such payment is not only "appropriate" but required by the ISDEAA and IHS policy. IHS attempts to waive away this principle here by

observing that "[t]he Community has proffered no evidence that it actually expended the amounts it claims under Count II." *Id*. But of course the Community did not expend the amounts it claims, because those amounts were never paid by IHS. This reveals the logical flaw at the heart of IHS's "costs incurred" theory: IHS can underpay with impunity, because funds not paid cannot be expended, reducing the costs "incurred" and thus the amount IHS owes. This self-serving interpretation is not only illogical but at odds with the ISDEAA.[22]

IHS's other arguments can be addressed in negotiations if the Court grants the Community's motion and directs the parties to negotiate contract support costs for the additional amounts of PSU/PIMC shares awarded. For example, IHS notes that the Community's indirect cost rate agreement requires the exclusion of capital expenditures and passthrough funds to arrive at the direct cost base. Defs. Br., ECF No. 74, 33. IHS says the Community has "not proffered any evidence of these [distorting] expenditures." *Id*. Again, this may be because the Community did not expend the shares at all because they were not paid by IHS to begin with. IHS notes that many factors can influence the amount of contract support costs owed, but IHS's policy provides useful guidance, including an entire section just on the calculation of contract support costs on service unit shares like those of PSU. IHM, § 6-3.2E(3), Record at 193 (describing alternative methods, including a simplified "97/3" method under which 97% of service unit shares are included in the direct cost base and 3% excluded as indirect). Contrary to

[22] Congress has specifically rejected the costs incurred theory of calculating unpaid contract support costs. A Senate report accompanying the 1988 amendments commented on a case in which the Bureau of Indian Affairs (BIA) acknowledged underfunding indirect contract support costs under the contract but sought to escape liability. "The rationale offered by the BIA for this argument was that since the contractor had not received the funds it was entitled to receive, it had also not spent them and, therefore, had not incurred any costs which could be recovered as an indirect cost under the contract. Clearly, this is an unacceptable argument." S. Rep. No. 100-274, at 37 (1987).

IHS's assertion, the Community does not contend that the Court should run its own calculation. Rather, the motion requests that, with respect to Count III, the Court "Declare the Community entitled to CSCs on additional funds awarded for Count II of this action and order the parties to negotiate CSCs consistent with this decision[.]" To the extent the Court approves an award of funding under Count II, it should also affirm that IHS owes contract support costs on that amount as required by the ISDEAA and IHS policy.

IV. Remand is Not Appropriate in this Case

As discussed above, the Court should enter judgment for the Community on Count II on the basis of the IHS's admission that its rejection of the Community's final offer for increased PSU/PIMC tribal shares was based in part on a calculation error. Remand is neither required nor appropriate for this claim. Further, the Community's motion seeks a declaration that the Community is entitled to contract support costs (Count III of the Second Amended Complaint) on the additional amounts awarded in Count II. Pl.'s Mot. for Summ. J., ECF No. 71, 2. In other words, the Community agrees that a *limited* remand is appropriate to determine the specific amount of contract support costs required to be paid in accordance with the ISDEAA.

As for the Community's third-party revenue claim, remand would be inappropriate and likely futile. Remand is frequently an unsuitable remedy under the ISDEAA because of its remedial purpose and the various specific provisions reflecting that purpose. *Maniilaq Ass'n v. Burwell*, 72 F. Supp. 3d 227, 240 (D.D.C. 2014). Title V of the ISDEAA provides a 45-day timeline for the Secretary to respond to a final offer. 25 U.S.C § 5387(b). "In the absence of a timely rejection of the offer, in whole or in part, *made in compliance with subsection (c) of this section*, the offer shall be deemed agreed to by the Secretary." 25 U.S.C § 5387(b) (emphasis added). Compliance with subsection (c) requires more than providing a mere response within 45 days—that response must "clearly demonstrate[]" that "the amount of funds proposed in the final

offer exceeds the applicable funding level to which the Indian tribe is entitled," among other requirements. 25 U.S.C § 5387(c). Where a tribe challenges the sufficiency of a final offer rejection, the ISDEAA authorizes the reviewing court to "order appropriate relief including money damages, injunctive relief ..., or mandamus ... (including immediate injunctive relief to reverse a declination finding ...)." 25 U.S.C. § 5331(a).

While some courts have found remand to agencies is appropriate in the ISDEAA context, they do so when "the agency's reasons for seeking a remand are 'substantial and legitimate,' . . . particularly when such a course would potentially save both the parties and the court time and resources." *Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d at 114–15 (citing *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 23 (D.D.C. 2008)). In their request for remand, the Defendants fail to explain how remand would result in the efficient resolution of this case. Instead, the request repeats their contentions that the third-party revenue amount requested in Count I is "unreliable and unverifiable" and that they cannot decipher "the application of the Community's proposed methodology for determining its tribal shares" in Count II. Defs. Br., ECF No. 74, 45–46. These statements are not substantial or legitimate reasons for remand, but demonstrate that such remand would be fruitless and result in even more delay in this case.

This case is analogous to *Fort McDermitt Paiute & Shoshone Tribe v. Azar*, where the court determined that "because IHS has failed to carry its burden to show that it properly rejected the Tribe's proposal, and because remand for further negotiations would serve little purpose, the Court finds that an injunction requiring IHS to accept the recurring funding amount proposed by the Tribe and to amend the funding agreement accordingly is the appropriate remedy." No. CV 17-837 (TJK), 2019 WL 4711401, at *9 (D.D.C. Sept. 26, 2019), *aff'd in part, rev'd in part on other grounds and remanded sub nom. Fort McDermitt Paiute & Shoshone Tribe v.*

Becerra, 6 F.4th 6 (D.C. Cir. 2021). The court noted that it had "rejected, as a matter of law, the justifications relied on by IHS for declining the Tribe's proposed amount," and the IHS failed to "muster sufficient evidence to otherwise show that it would not have spent the amount proposed by the Tribe" even "after being afforded multiple opportunities." *Id.* Here, the IHS likewise failed to include information "clearly demonstrate[ing]" why the Community's offer exceeds the funding to which it is entitled. *See* 25 U.S.C. § 5387(b)–(c). Further, it *has yet* to offer such information, over six years since the Community provided its final offer, and relies on instead on various justifications that this Court can and should reject as a matter of law.

Moreover, remand here would be prejudicial to the Community, as evidenced by the long procedural history of this case and the failure of the IHS to share with the Community relevant information in a timely manner. As shown above, the IHS has attempted to justify its rejection of the Community's final offer on the basis of "adjustments" to its financial records that it still has not explained or supported with documentation of any kind. This litigation began in 2018, but according to the IHS, it continued to make those adjustments through 2022. Defs.' SOF, ECF No. 77-1, ¶ 9. Remand would simply give the agency additional time to make further "adjustments" or to manufacture new justifications for a rejection of the Community's final offer. Moreover, the IHS has a history of withholding information needed by the Community to understand the IHS's determination of its funding entitlement, as evidenced by its argument that it failed to provide the Community with the third-party collections data the agency now relies on in defense of its rejection decision because the Community "did not ask" for it. Defs.' SOF, ECF No. 77-1, ¶ 12. The IHS offers this explanation even as it argues that the collections data is relevant and necessary to determining the source of third-party revenues historically used in support of the Salt River Clinic—the very issue the Community was attempting to determine

when it made its request for provider collections information. Defs.' Br., ECF No. 74, 19-21. Likewise, as indicated in the Community's final offer, Record, ECF No. 18-1, 78, the Community relied on its level of effort analysis to support its PSU/PIMC tribal shares request because the IHS itself had not provided timely its own calculation or explanation. Remand is likely to lead only to further litigation where the IHS presents a moving target and the Community is unable to obtain the information necessary to verify or evaluate the agency's position.

For the same reasons, in the event this Court does determine that remand is necessary, it should issue clear guidelines to ensure that the IHS complies with its statutory obligations on remand, including that the IHS must determine the amount of funding owed to the Community based on information and documentation that was available to the agency as of the date the Community submitted its final offer; that it may not base or justify its decision on the basis of actions or circumstances that arose after the final offer; and that its decision must be fully documented and explained on the record.

CONCLUSION

For the reasons stated above, the Court should deny the Defendants' Motion for Summary Judgment, grant the Plaintiff's Motion for Summary Judgment, and enter judgment as follows:

I. On Count I, for the third-party revenue component of the Secretarial amount:
   - Declare program income from non-Clinic sources historically used in support of the Clinic to be part of the Secretarial amount to which the Community was entitled under 25 U.S.C. § 5325(a)(1), and
     - Direct the IHS to award the full amount of the Community's claim ($3,697,957), because the IHS failed to properly support its rejection of the Community's final offer, or
     - In the alternative, Direct the IHS to award a lesser amount, $954,568, based on the IHS's additional provider collections data as compared

with its budgeting and expenditure data that is contemporary with the compact negotiations, final offer, and declination decision, or

- In the alternative, if the Court finds remand is necessary to determine the amount owed, order the IHS to determine the amount owed consistent with this Court's decision, and declare that the IHS must determine the amount of funding owed to the Community based on information and documentation that was available to the agency as of the date the Community submitted its final offer; that it may not base or justify its decision on the basis of actions or circumstances that arose after the final offer; and that its decision must be fully documented and explained on the record.

II. On Count II, for an increase in the Community's PSU/PIMC Shares:

- Declare that IHS did not meet its burden under 25 U.S.C. § 5387(c)(1)(A)(i), and
- Based on the IHS's admission that it miscalculated the Community's PSU/PIMC shares, direct the IHS to award at least an additional $12,735 for FY 2017 and $664,057 for FY 2018, to be paid as recurring tribal share amounts with increases in future years consistent with the IHS's tribal shares formula as corrected.

III. On Count III, for Contract Support Costs:

- Declare that the Community is entitled to contract support costs on the additional funds awarded for Count II, and
- Order the parties to negotiate contract support costs consistent with the Court's decision and with the ISDEAA.

Respectfully submitted,

/s/ Caroline P. Mayhew

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DATED: May 13, 2024.

CERTIFICATE OF SERVICE

I hereby certify that on this May 13, 2024, I caused service of the foregoing document and all attachments thereto by filing the same with the Clerk of the Court via the CM/ECF system, which will send a Notice of Electric Filing to all parties with an e-mail address of record who have appeared and consented to electronic service, including John Bardo and James Todd Jr., Attorneys for Defendants. To the best of my knowledge, all parties to this action receive such notices.

By: */s/ Caroline Mayhew*
Caroline P. Mayhew