UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' REPLY IN SUPPORT OF
THEIR MOTION FOR SUMMARY JUDGMENT

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GLOSSARY OF ABBREVIATIONS

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

INTRODUCTION

This case concerns a misapprehension on the part of the Salt River Pima Maricopa Indian Community ("Community")—namely, that before the Community's 2017 takeover of the Salt River Health Clinic pursuant to the Indian Self Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 5301 *et seq*., IHS was diverting Medicare, Medicaid, and other third-party revenue generated from the provision of services at the Phoenix Indian Medical Center ("PIMC") to supplement operations at the Salt River Health Clinic. Based on that misapprehension, the Community now seeks an order of this Court requiring IHS to pay as part of the recurring "Secretarial amount" additional funds equivalent to what the Community erroneously infers IHS must have been redirecting to the Clinic, and to pay further sums on top of that in the form of additional contract support costs. As IHS explained in its partial rejection of the Community's Final Offer, the ISDEAA does not allow for this result.

Defendants' opening brief demonstrated that, in authorizing a federally-recognized tribe the option to take over and operate certain programs provided by the government for the benefit of the tribe or its members, the ISDEAA provides for IHS to pay the amount of funds that the government would have otherwise provided for the time period covered by the contract were it to continue operating the programs (the "Secretarial amount") and for the payment of additional funds to fill specific gaps in that funding so that the tribes are not put at a disadvantage when running the transferred program in the government's stead ("contract support costs").

Contrary to the Community's contention, the ISDEAA does not require IHS to add to the Secretarial amount additional funds reflecting revenues from third-party payors, such as Medicare, Medicaid, and private insurance, that it previously collected when it operated the programs, as the tribe itself collects those revenues in the course of operating the program. And the ISDEAA does not require the government to pay contract support costs unless the tribe

actually incurs certain reasonable and allowable costs.

Based on its misapprehension, that is what the Community seeks to do here. The Community's misapprehension appears to arise from one of its many requests, made when it first proposed to take over operation of the Salt River Health Clinic, for what turned out to be incomplete information about IHS's estimates of third-party revenues generated at the Clinic in the years before 2017. The Community asked for (and IHS, as a matter of comity, provided) IHS estimates of third-party revenues generated by providers stationed that the Clinic. But the Community did not ask for, and thus IHS did not provide, estimates of third-party revenues generated at the Clinic by visiting providers or by the Clinic pharmacy. Based on this incomplete information, the Community has erroneously inferred that IHS must have been using third-party revenues generated at the Phoenix Indian Medical Center to pay for Clinic operations.

Although each party disputes the other party's evidence, this Court need not resolve any factual dispute because the Community has made three critical admissions. First, the Community produces no evidence that IHS engaged in the consultations with affected tribes, including the Community, that are statutorily required to take place before IHS can divert third-party revenues generated at one facility to another. Second, the Community has not challenged Defendants' showing that the Community's collections information was incomplete. Third, Defendants' opening brief demonstrated that, after the Community took over operation of the Salt River Health Clinic, it billed for and collected revenue from Medicare, Medicaid, and other third parties for services provided by visiting providers, the Clinic pharmacy, and for Clinic dental services, and the Community has not challenged this showing.

Additionally, this Court need not resolve the Community's request for additional tribal shares, as the parties now agree on the additional amount due to the Community.

Finally, the Community is not entitled to additional contract support costs because it has admitted that it has not actually incurred reasonable, allowable, and allocable costs associated with its operation of the IHS health care programs. Absent a showing that it actually incurred such costs, payment of additional contract support costs to the Community would result in an improper windfall to the tribe. The ISDEAA does not require such a result.

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

ARGUMENT

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

Defendants' opening brief demonstrated that, when a tribe takes over operation of an IHS program provided for the benefit of the tribe or its members, the ISDEAA precisely defines the amount of funds owed to the tribe as the amount the agency "would have otherwise provided for the operation of the program[] … for the period covered by the contract," *i.e.*, the Secretarial amount. Defs.' Mem. at 21–22 (citing 25 U.S.C. § 5325(a)(1)). The ISDEAA expressly excludes third-party revenues from the Secretarial amount. *See id*. at 22 (citing 25 U.S.C. § 5388(j)). As a result, the D.C. Circuit's opinion in *Fort McDermitt Paiute & Shoshone Tribe v. Becerra*, 6 F.4th 6, 14 (D.C. Cir. 2021) ("*Ft. McDermitt*"), governs the resolution of this dispute. *See* Defs.' Mem. at 22–23.

In response, the Community attempts to distinguish *Ft. McDermitt* based on its misapprehension that IHS was diverting third-party revenues collected for services provided at other IHS facilities, including the Phoenix Indian Medical Center, and using them to fund IHS health care programs operated at the Salt River Health Clinic. *See* Pl.'s Opp'n at 8–11. Based on that misapprehension, the Community contends that *Ft. McDermitt* did not effectively overrule

Pyramid Lake Paiute Tribe v. Burwell, 70 F. Supp. 3d 534 (D.D.C. 2014) ("*Pyramid Lake*"), and that *Pyramid Lak*e applies. *See id*. at 12–13. The Community's contention does not withstand scrutiny.

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

Defendant's opening brief demonstrated that Section 1641(c)(1)(B) of the Indian Health Care Improvement Act limits IHS's ability to use Medicare and Medicaid reimbursements generated at another IHS facility to fund operations at the Salt River Health Clinic. *See* Defs.' Mem. at 18 (citing 25 U.S.C. § 1641(c)(1)(B)). The Community responds by noting that the provision does allow IHS to use funds in excess of the amount necessary to make improvements in IHS health care programs to achieve or maintain compliance with the applicable conditions and requirements of titles XVIII or XIX of the Social Security Act. *See* Pl.'s Opp'n at 5–6 (citing 25 U.S.C. § 1641(c)(1)(B)). But there is no evidence that IHS had excess funds after making necessary improvements to meet the Medicare and Medicaid conditions of participation. Moreover, section 1641(c)(1)(B) allows IHS to use any such excess funds only after engaging in tribal "consultation with the … Tribes … served by the Service unit." 25 U.S.C. § 1624(c)(1)(B). The Community produces no evidence that IHS engaged in any such tribal consultations with the six tribes served by the Phoenix Service Unit, including the Community. *See* Pl.'s Mem. at 6. The Community thus fails to rebut Defendants' showing that it is not the IHS Phoenix Area's policy or practice to use third-party revenue generated at another facility, or any other non-clinic source, including the Phoenix Indian Medical Center, to support the operations or expenditures at any Phoenix Area IHS clinic, and IHS did not do so for the Salt River Health Clinic. *See* Defs.' Mem. at 18; Decl. of Sheila Todecheenie ¶¶ 13–14, ECF No. 74-1.

B. The Community Does Not Contest Defendants' Showing That the Community Bases its Claim on Incomplete Collections Information

Defendants' opening brief also demonstrated that the collections data for providers at the Salt River Health Clinic that the Community asked for, and on which the Community bases its claim that IHS must have been diverting third-party revenues from other facilities to fund operations at the Salt River Health Clinic, was incomplete and therefore unreliable. Defs.' Mem. at 20. Specifically, Defendants showed that the cost center reports and collections data on which the Community bases its claim only showed estimates of services provided and revenues that would be generated by certain providers who were stationed at the Clinic and did not show services and revenue projections for services provided at the Clinic by visiting providers, for the Clinic pharmacy, or dental services. *See id.* The Community does not challenge this showing. *See* Pl.'s Opp'n at 19 ("The Community does not dispute this clarification."). Thus, the Community essentially admits that the data on which it bases its erroneous inferences—that IHS diverted third-party revenues generated at the Phoenix Indian Medical Center to the Salt River Health Clinic—is incomplete and therefore cannot serve as a valid basis for determining whether the Community is entitled to include third-party revenues in the Secretarial amount and, more critically, what that amount would be.

C. The Community Does Not Contest Defendants' Showing that It Has Billed for and Collected Third-Party Revenues for Services Provided by Visiting Staff, the Clinic Pharmacy, and for Clinic Dental Services

Defendants' opening brief also showed that, after the Community took over operation of the Salt River Health Clinic, it billed for and collected third-party revenues for services at the Salt River Health Clinic provided by providers *who were stationed elsewhere*, including the Phoenix Indian Medical Center, but who were visiting the Clinic when they provided the relevant services, and that the Community has billed for Clinic dental and Clinic pharmacy

services. *See* Defs.' Mem. at 21 (citing Todecheenie Decl. ¶ 15). The Community does not attempt to rebut this showing or claim otherwise. *See generally* Pl.'s Opp'n. Yet, even though the Community billed for and collected third-party revenues for services provided by visiting providers, pharmacy, and dental services, it still seeks to include equivalent funding in the Secretarial amount. It thus seeks the exact same kind of "double dipping" expressly prohibited by the D.C. Circuit. *See Ft. McDermitt*, 6 F.4th at 14. The Community thus fails to establish that it is entitled to include additional funds in the Secretarial amount for FY 2018.

D. The Community Fails to Show that *Pyramid Lake*, Rather Than *Ft. McDermitt*, Governs Resolution of the Community's Claim

Absent the ability to show that IHS was in fact diverting third-party revenues from other IHS facilities to funds programs at the Salt River Health Clinic, the Community cannot show that *Pyramid Lake* remains persuasive authority, as its facts do not actually align with the those at issue here.

In *Pyramid Lake*, the tribe proposed to take over operation of an IHS EMS program operated on the Ft. McDermitt Indian Reservation for the benefit of two tribes. *See* 70 F. Supp. 3d at 538. After the tribe submitted the proposal, IHS decided to close the Ft. McDermitt EMS program. *See id*. IHS thus declined the tribe's offer, explaining that it "ceased operation of the Fort McDermitt EMS program due to its large operating deficit." *Id*. at 539 (quotation marks omitted). The agency further explained that "operating costs for the EMS program were $502,611, while its revenues were only $102,711," and that the agency "had been making up the difference with revenues from the clinic and IHS discretionary funds." *Id*. at 538–39. The IHS thus declined the tribe's proposal on the alternative ground that "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," these "third-party revenues were not generated by the EMS

program" but were generated at the clinic. *Id*. at 539. Thus, the fact that IHS was using third-party revenues that were not generated by the EMS program to partially fund that program was not in dispute. *See id*.

Unlike *Pyramid Lake*, in this case the parties dispute whether IHS was using third-party revenues generated elsewhere to fund operations at the Salt River Health Clinic. But, as shown above, the Community has failed to show that IHS engaged in statutorily-required tribal consultations before IHS diverts third-party revenues generated at one facility to another; does not dispute that the data on which it bases its claim failed to account for third-party revenues generated at the Clinic by visiting providers, the Clinic pharmacy, and dental services; and does not dispute that for FY 2018, it billed for and collected third-party revenues for those services. As a result, there is no remaining basis for the Community's claim. *Pyramid Lake* is thus distinguishable.

E. The Community's Claims are Not Undisputed and Are Not Supported by Admissible Evidence

Defendants' opening brief demonstrates that the Community failed to offer admissible evidence that IHS diverted third-party revenues from other IHS facilities to fund the Salt River Health Clinic. *See* Defs.' Mem. at 25–27 (citing *Londrigan v. FBI*, 670 F.2d 1164, 1174 (D.C. Cir. 1981)).

In response, the Community claims that the content of the cost center reports is not in dispute. *See* Pl.'s Opp'n at 15–16. But Defendants' opening brief established that, at the time they were generated, the cost center reports were IHS's estimates of third-party revenues and that IHS continues to adjust the data that goes into those reports until all final revenues and expenditures have been accounted for. *See* Defs.' Mem. at 10. More critically (and as noted above), Defendants' opening brief demonstrated that the Community did not ask for, and

therefore IHS did not provide, information reflecting third-party revenue that was generated at the Salt River Health 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 Phoenix Indian Medical Center or elsewhere, or available data for FY 2012 through 2016 reflecting third-party revenue collected at the Salt River Health Clinic pharmacy, *see id*. at 11, 19–21, and the Community does not challenge this showing, *see* Pl.'s Opp'n at 19. Thus, Defendants showed that the cost center reports do not support the Community's contention that IHS was diverting third-party revenues generated at other IHS facilities to support the Salt River Health Clinic. *See* Defs.' Mem. at 20–21.

The Community also contends that the Declaration of Barry Brown is admissible because he worked with the individual who prepared the analysis. *See* Pl.'s Opp'n at 17–18 (citing Decl. of Barry Brown ¶ 1, ECF No. 71-1). But nowhere in the Brown declaration does he aver that he played any role in preparing the analysis on which the Community relies to support its claim that IHS was funding the Salt River Health Clinic with third-party revenues, *compare* Brown Decl. ¶¶ 5–11 (summarizing work performed by other individuals), or that he even reviewed or was familiar with it, *compare id*. ¶¶ 5–11 *with id*. ¶ 12 (expressly stating that Mr. Brown "reviewed" the "level of effort" analysis used to support the Community's claim for additional tribal shares). Thus, the Community fails to offer admissible evidence in the Brown declaration to support its claim.

The Community additionally contends that the Declaration of Brian Deveau is admissible because he is offering expert testimony. *See* Pl.'s Opp'n at 18–19. But up until the Community filed its opposition, the Community had not proffered Mr. Deveau's testimony as expert opinion. *See generally* Pl.'s Mot. for Summ. J., ECF No. 71. The Community also admits that, even

several years into this litigation, it did not believe expert witnesses were necessary due to the narrow legal issues presented in this case. *See id*. at 22 n.13 (referencing Second Meet & Confer Statement, ECF. No. 44). Yet the Community now proffers Mr. Deveau's opinion as the sole evidentiary basis for its claim that IHS was allegedly diverting third-party revenues collected for services performed other IHS facilities and using them to fund operations at the Salt River Health Clinic.

The Community fails to show that Mr. Deveau's proffered opinion is admissible as expert testimony. Federal Rule of Evidence 702 specifically requires expert testimony to be based upon "sufficient facts or data." Fed. R. Evid. 702; *Black v. M&W Gear Co*., 269 F.3d 1220, 1237 (10th Cir. 2001) (expert testimony must be based upon a reliable foundation); *In re Chaplaincy*, No. 1:07-MC-269, 2016 WL 11674271, at *1 (D.D.C. Nov. 9, 2016). Even when an expert relies upon his or her experience, "the reliability criterion remains a discrete, independent, and important requirement for admissibility." *Est. of Gaither ex rel. Gaither v. Dist. of Columbia*, 831 F. Supp. 2d 56, 68–69 (D.D.C. 2011) (quoting *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004) (en banc)); *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("nothing … requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."). Additionally, expert testimony "that rests solely on 'subjective belief or unsupported speculation,' is not reliable." *Groobert v. President & Dirs. of Georgetown Coll*., 219 F. Supp. 2d 1, 6 (D.D.C. 2002) (citing *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S.579, 590 (1993)); *see also Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V*., No. 1:11-cv-1623, 2015 WL 13680822, at *2 (D.D.C. June 12, 2015).

In this case, the Community fails to show that Mr. Deveau's proffered opinion is admissible. *See Meister v. Med. Eng'g Corp*., 267 F.3d 1123, 1127 n. 9 (D.C. Cir. 2001) (burden is on the proponent of the testimony to establish its admissibility by a "preponderance of proof") (quoting *Daubert*, 509 U.S. at 592 n.10). Defendant's opening brief demonstrated that Mr. Deveau's conclusions are nothing more than a chain of inferences based on incomplete data, *see* Defs.' Mem. at 20, and rather than rebut this showing, the Community instead only contends that Mr. Deveau relied on his experience, *see* Pl.'s Opp'n at 21. But the cost center reports and collections data that Mr. Deveau relied on only showed estimates of services provided and revenues that would be generated by certain providers who were stationed at the Clinic. As a result, Mr. Deveau's proffered opinion is based on incomplete data. His opinions therefore constitute inadmissible evidence under Rule 702. *Cf. Gilliam ex rel. Waldroup v. City of Prattville*, 667 F. Supp. 2d 1276, 1298 (M.D. Ala. 2009) ("Even if Bell were qualified to testify as an expert, his testimony would not be reliable. First, Bell relied on incomplete and insufficient data in the formulation of his opinion."), *rev'd in part on other grounds sub nom. Est. of Gilliam ex rel. Waldroup v. City of Prattville*, 639 F.3d 1041 (11th Cir. 2011).

Mr. Deveau's proffered opinion is also inadmissible because it consists of little more than "'subjective belief or unsupported speculation.'" *Heller v. Dist. of Columbia*, 801 F.3d 264, 272 (D.C. Cir. 2015) (quoting *Joy v. Bell Helicopter Textron, Inc*., 999 F.2d 549, 567 (D.C. Cir. 1993)); *see also United States. v. DynCorp Intl. LLC*, No. 1:16-cv-1473, 2024 WL 604923, at *14 (D.D.C. Jan. 25, 2024). Mr. Deveau produces no direct evidence that IHS diverted third-party revenues from other IHS facilities to the Salt River Health Clinic. He instead reaches his conclusion based on unsupported speculation to account for the supposed difference between the admittedly incomplete collections data he was evaluating and the estimated third-party revenues

and expenditures in the cost center reports he considered.[1] Notably, even after Defendants explained that the collections data was incomplete and the cost center report only consisted of estimates of revenues and expenditures, Mr. Deveau made no effort to adjust his conclusions. Mr. Deveau's speculative opinion is thus inadmissible. Finally, in light of the Community's admission that the information on which it relies to support its claim is incomplete, this Court need not resolve the question of whether Mr. Brown or Mr. Deveau have offered admissible opinion evidence to find that the Community has failed to produce any reliable evidence to support its claim.

F. Defendants' Additional Explanations About Why It Rejected the Community's Request to Include Third-Party Revenues in Secretarial Amount Are Not Contrary to the ISDEAA and Are Not *Post Hoc* Rationalizations

Contrary to the Community's contentions, *see* Pl.'s Mem. at 30–35, Defendants' additional explanations about the reasons IHS rejected in part the Community's request for third-party revenues to be included in the Secretarial amount are not contrary to the ISDEAA and are not *post-hoc* rationalizations. The Community claims that it is improper for IHS to rely on current information to determine amounts that IHS owes it for FY 2018. *See* Pl.'s Opp'n at 31–33. But that is not what IHS is using this information for. Rather, IHS is using this information to rebut claims and extra-record evidence that the Community advanced and proffered for the first time in litigation.

[1] Although Mr. Deveau characterized the amount of third-party revenue IHS generated at the Salt River Health Clinic as "extremely rare and highly unusual," Deveau Decl. ¶ 9, the Community likewise was generating equally large amounts of third-party revenue on the programs it was already operating. In FY 2015, for example, the Community collected approximately $5.2 million in third-party revenue for the health programs it was already operating, while there were appropriation allowances of approximately $1.4 million for the Clinic. FY 2015 Cost Center Report, AR 409. Thus, the Community generated approximately $3.70 for every dollar of appropriated funds, not dissimilar to $3.82 in IHS third-party collections for every dollar of FY 2016 appropriated funds that Mr. Deveau finds so unusual.

To start, the ISDEAA does not require an agency's response to a tribe's final offer to anticipate claims that a tribe later advances for the first time in litigation. Instead, when a tribe presents IHS with a final offer, the ISDEAA allows the government to reject in whole or part a tribe's offer on four enumerated bases, including that "the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under [the ISDEAA]." 25 U.S.C. § 5387(c)(1)(A)(i). The statute requires IHS to provide the reasons for its rejection in "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." *Id*. § 5387(c)(1)(A). IHS did so here.

Moreover, "[a]n agency's decision need not be 'a model of analytic precision to survive a challenge.'" *United Airlines v. Transp. Sec. Admin*., 20 F.4th 57, 62 (D.C. Cir. 2021) (quoting *Dickson v. Sec'y of Def*., 68 F.3d 1396, 1404 (D.C. Cir. 1995)). Courts "will 'uphold a decision of less than ideal clarity" so long as "the agency's path may reasonably be discerned." *Id*. (quoting *Bowman Transp., Inc. v. Arkansas-Best Motor Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). While courts sometimes greet post-hoc litigating positions with skepticism, an agency's counsel is not "bar[red] … from merely elaborating on the consistent stance the agency articulated below." *Chiquita Brands Int'l, Inc. v. SEC*, 805 F.3d 289, 299 (D.C. Cir. 2016). And in any event, the "*post hoc* rationalization rule" is "not a time barrier which freezes an agency's exercise of judgment after an initial decision has been made and bars it from further articulation of its reasoning." *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006) (internal citation and quotation marks omitted). The rule "does not prohibit [an agency] from submitting an amplified articulation of the distinctions it sees," *id*., least of all in response to claims raised for the first time in the midst of briefing.

In this case, the Community's Final Offer requested that IHS add, for FY 2018, $3,697,957 in third-party revenues to the Secretarial amount. *See* Final Offer, Funding Agreement App'x B, Funding Tables, AR 114 of 411. Contrary to the Community's contention, its Final Offer did *not* state that the amount it sought represented third-party revenues that it believed IHS had generated at other facilities and expended at the Salt River Health Clinic. *See id*. Instead, the Community's explanation of its request for these funds was contained in a single footnote in that funding table. *See id*. n.13. That footnote said only that "[t]hese funds have historically been collected and provided by the Secretary for the operation of the Salt River Health Clinic, from IHS's own Medicare, Medicaid, and Private Insurance collections, and are a part of the [Secretarial] amount." *Id*. The note went on to state that "[t]hese amounts have been reduced by the $1,647,466 worth of collections from the [Clinic] that the [Community] will generate when they operate the program." *Id*. But nowhere did the Community's Final Offer expressly state that the additional amount it sought was for third-party revenues that the Community believed had been generated at other IHS facilities and reprogrammed to the Salt River Health Clinic. *See id*.

In rejecting in part the Community's Final Offer, IHS expressly identified the legal basis for rejecting the Community's request to include third-party revenues in the Secretarial amount. *See* IHS Response at 7, AR 144 (citing relevant ISDEAA provisions and controlling case law in effect at the time the agency rendered its decision). IHS also explained that "[o]nce the Community assumes [operation of the Salt River Health Clinic], it will have the opportunity to collect third-party reimbursement associated with the performance of [services provided at the Clinic], and IHS will lose the capacity to seek recovery of third-party reimbursements." *Id*. In light of the request that the Community made in its Final Offer, IHS's Response was adequately

supported both by a "controlling legal authority" and a "specific finding." 25 U.S.C. § 5387(c)(1)(A).

Moreover, a review of the Community's original Complaint, First Amended Complaint, Second Amended Complaint, and initial summary judgment motion confirm that the Community did not characterize its Final Offer as seeking to include in the Secretarial amount funds for third-party revenues generated at other facilities and reprogrammed to the Salt River Health Clinic. For example, the Community's original Complaint did not allege that the third-party revenues it sought were generated at other IHS facilities and reprogrammed to the Salt River Health Clinic. *See generally* Compl., ECF No. 1. Rather, the Community only alleged that its Final Offer "proposed that the IHS award $3,697,957 in third party revenues collected by the Secretary … that would otherwise be used by the IHS to carry out [programs] serving the Community," *id*. ¶ 48, and that IHS's rejection of the Community request "has been rejected by this Court in *Pyramid Lake Paiute Tribe v. Burwell*," *id.* ¶ 51. The Community made the same allegations the following year in its Amended Complaint, *see* First Am. Compl. ¶¶ 50, 53, ECF No. 14, and two years later in its Second Amended Complaint, *see* Second Am. Compl. ¶¶ 38, 41, ECF No. 42.

Nor did the Community raise this argument in its first motion for summary judgment. *See generally* Pl.'s Mem. of Points & Auth. in Supp. of Mot. for Summ. J., ECF No. 19-2. Instead, the Community contended that it sought funds for "the total third-party revenue expended by IHS on [the Salt River Health Clinic] in FY 2016 … less the amount already provided to the Community in support of its existing FY 2016 … contract." *Id*. at 20.

Indeed, the Community did not raise the claim that IHS was diverting third party revenues collected at the Phoenix Indian Medical Center to fund operations at the Salt River

Health Clinic until its second summary judgment motion. *See* Pl.' Mem. of Points & Auth. in Supp. of Mot. for Summ. J., at 16–23, ECF No. 53. Notably, this was after the D.C. Circuit held in October 2021 that third-party revenues are not part of the Secretarial amount. *See Ft. McDermitt*, 6 F.4th at 14. Only then did the Community devise an argument and proffer evidence that this case was more like *Pyramid Lake*. So this was also the first time that the Community attempted to introduce non-record evidence to support its new assertions, including third-party collections data of certain Salt River Health Clinic Providers, which was not part of the Administrative Record in this case. *See* Decl. of Ronald Demaray, ECF No. 53-2; Decl. of Barry Brown, ECF No. 53-3. This Court dismissed without prejudice the Community's second summary judgment motion before Defendants responded. *See* Minute Order (Sept. 16, 2022). As a result, the first time Defendants had an opportunity to respond to the Community's claims about the source of the third-party revenue it sought were in Defendants' opposition and cross motion currently pending before this Court. *See generally* Defs.' Mem.

No reasonable reading of the ISDEAA requires IHS's Response to the Community's Final Offer to anticipate an argument and new data advanced five years after the Community submitted its Final Offer to IHS. Nor do the cases cited by the Community support its contention. *See* Pl.'s Opp'n at 3 (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *Ft McDermitt Paiute & Shoshone Tribe v. Price*, No. 1:17-cv-837, 2018 WL 4637009, *4 n.3 (D.D.C. Sept. 27, 2018); *Susanville Indian Rancheria v. Leavitt*, No. 2:07-cv-259, 2008 WL 58951, at *6 (E.D. Cal. Jan. 3, 2008)). In *Burlington Truck Lines*, the Supreme Court simply held that an agency could not advance new arguments on appeal that it had not raised below. *See* 371 U.S at 169. In *Ft. McDermitt*, the court noted in dicta that, in subsequent proceedings, the government may rely only on the particular grounds it specified below. *See* 2018 WL 4637009,

*4. And in *Susanville Indian Rancheria*, the court held that the agency's rejection of the tribe's offer did not contain a specific finding that the tribe's proposal would endanger public health. *See* 2008 WL 58951, at *6. None of these cases concerned an agency's response to new legal arguments raised and new extra-record evidence submitted years after the plaintiff initiated litigation.[2]

But even assuming that the Community's Final Offer should reasonably have been construed as requesting that IHS include in the Secretarial amount third-party revenues generated at other IHS facilities but expended at the Salt River Health Clinic, IHS's Response cited the applicable statutory criteria for rejecting that portion of the Community's Final Offer and provided a reasoned explanation doing so. *See* AR 144. Defendants' elaboration on that reasoning in its summary judgment briefing and accompanying declarations is thus a permissible response to the Community's summary judgment submissions. *Chiquita*, 805 F.3d at 299; *Alpharma*, 460 F.3d at 6; *see also* Fed. R. Civ. P. 56(c).[3]

[2] Nor is there any basis to the Community's complaint that IHS's rebuttal evidence allegedly shows a difference between third-party revenue collected for FY 2012 through 2016 and third-party revenue expended for that same time period. *See* Pl.'s Opp'n at 32–34 & n.18. IHS continued to operate the Salt River Health Clinic for all but seven days of FY 2017, and the Community's Compact acknowledged that it would take some time for IHS to transfer current and prior year funds associated with the operation of the program. *See* Compact Between the Salt River Pima-Maricopa Indian Community and the United States (Sept. 24, 2017), § 9(D), AR 33. Moreover, this third-party revenue carryover has since been paid to the Community pursuant to a partial settlement of the Community's claims in this case. *See* Notice of Settlement Partially Resolving Litig., ECF No. 40. As a result, the Community has waived its right to now complain about the alleged differences in revenues and expenditures during this time period.

[3] To hold otherwise would raise concerns not unlike those at issue in *Lussier v. Runyon,* 50 F.3d 1103 (1st Cir. 1995). In *Lussier*, the district court allowed one party to submit additional evidence after the close of trial but refused to consider the government's additional submission. *See* 50 F.3d at 1113. The First Circuit held that once the district received additional factual information, it had to allow the government the right to object to the evidence, and to question its source, relevance and reliability. *See id*. at 1133 n.13.

II. THIS COURT NEED NOT RESOLVE THE COMMUNITY'S CLAIMS FOR ADDITIONAL TRIBAL SHARES

Defendants' opening brief demonstrated that this Court need not resolve the Community's claim for additional tribal shares because the parties are in agreement on the additional amount of funding owed to the Community. *See* Defs.' Mem. at 27. Specifically, IHS has offered to pay the Community an additional $664,057 for the Community's tribal shares of the Phoenix Service Unit for FY 2018. *See id*. Defendants additionally explained that this Court can resolve the Community's claim for additional tribal shares without deciding whether the Community's level of effort methodology is valid because IHS is offering the Community more than its own analysis shows it is entitled to. *See id*. at 27–31.

In response, the Community agrees that it is entitled to an additional $664,057 for tribal shares of the Phoenix Service Unit for FY 2018 2018 "consistent with the IHS's admission and representation of its tribal shares methodology." Pl.'s Opp'n at 1; *see also id*. at 37. The Community also notes—correctly—that it is also entitled to approximately $12,000 for the seven days of FY 2017 that it operated the IHS program under its ISDEAA compact. *See id*.[4] The Community also notes—again, correctly—that the amount of for its tribal shares for FY 2018 should be awarded on a recurring basis, including fiscal years that are not at issue in this litigation. *See id*. at 37–38. Thus, there is no remaining dispute between the parties on the issue of additional tribal shares due to the Community.

III. THE COMMUNITY CANNOT BE REIMBURSED FOR COSTS IT HAS NOT INCURRED

Defendants' opening brief showed that the Community is not entitled to additional

[4] The Community's calculations appear to be erroneously based on FY 2018 amounts. However, FY 2017 amounts were slightly lower. Defendants are in the process of calculating the amount owed for the seven days in FY 2017.

contract support costs based solely on its request to add funding to the Secretarial amount. *See* Defs.' Mem. at 31–34. Specifically, Defendants demonstrated that the Community failed to: (i) proffer any evidence that it has actually incurred reasonable, allowable, and allocable costs that are eligible for additional contract support costs, *id*. at 31 (citing, *e.g*., 2 C.F.R. part 200, App'x VII, § B(1)); (ii) account for adjustments to the direct cost base to which the indirect cost rate should be applied, *id*. at 32–33 (citing, *e.g*., 2 C.F.R. part 200, App'x VII, § B(1)); and (iii) demonstrate that their claimed costs are eligible contract support costs under the ISDEAA and address potential duplication issues, *id*. at 33–34 (citing, *e.g*., 25 U.S.C. § 5325(a)(2), (3); *Cook Inlet Tribal Council, Inc. v. Dotomain*, 10 F.4th 892, 894 (2021)).

In response, the Community contends that because the ISDEAA Model Agreement provides for an amount for contract support costs to be paid at the beginning of each fiscal year, that somehow overrides the clear provisions of the ISDEAA. *See* Pl.'s Opp'n at 39. The Community also contends that it is entitled to the payment of contract support costs regardless of whether it actually incurred additional reasonable, allowable, and allocable costs in the course of operating the IHS health care program at the Salt River Health Clinic. *See id*. at 40. Both contentions are without merit.

Critically, the Community admits that it "did not expend the amount it claims." *Id*. at 41. But the ISDEAA only authorizes contract support costs to reimburse qualifying expenses that are actually incurred by a contractor. *See* 25 U.S.C. §§ 5304(f), 5325(a)(3); *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 185 (2012); *see also* 25 U.S.C. § 5386(c)(2) (applying applicable OMB cost principles to Title V compacts). Indeed, "nothing in the Act entitles a tribe to a windfall." *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1464 (10th Cir. 1997), *superseded by stat. on other grounds*, 25 U.S.C. §§ 5326–27; *see also Pyramid Lake Paiute Tribe v. Burwell*,

70 F. Supp. 3d at 545 ("Nothing in the Act requires the Secretary to provide a windfall to a tribe"). Thus, absent evidence that the Community actually incurred reasonable and allowable costs in the course of administering its Title V ISDEAA compact, the Community is not entitled to additional contract support costs. *See Samish Indian Nation v. United Sta*tes, 419 F.3d 1355, 1367 (Fed. Cir. 2005) ("Since the Samish never incurred any administrative costs, … no sensible reading of the ISD[EA]A would allow their present suit for these funds.").

Additionally, the Community admits that contract supports costs paid at the beginning of a year "are estimates and may need to be adjusted or 'reconciled' after the contract year." Pl.'s Opp'n at 40 (citing Indian Health Manual § 6-3.2E(1)(b)). Thus, the fact that the ISDEEAA Model provides for estimated contract support costs to be paid at the beginning of the year has no bearing on the determination of the amount, if any of the amount of contract support costs that the Community is entitled to now.

The Community thus fails to demonstrate that it is entitled to additional contract support costs.

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

Defendants' opening brief demonstrated that, if the Court denies the government's summary judgment motion, remand is the appropriate remedy. *See* Defs.' Mem. at 34–36 (citing, *e.g.*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). Defendants also showed that the ISDEAA provides a tribe with a right of action to challenge IHS's rejection of its Final Offer but does not mandate a specific remedy. *See id*. at 34 (citing 25 U.S.C. §§ 5331, 5387(c)(1)(C)). Thus, when an agency explanation is inadequate, courts routinely remand ISDEAA cases. *See id*. at 35 (collecting cases). Finally, Defendants established that the Community's request to increase Secretarial amount funding is unreliable and unverifiable, *see id*. at 35–36; *see also id*. at 17–27,

as is its request for additional contract support costs, *see id*. at 31–34.

In response, the Community agrees that a "limited remand is appropriate" to determine what additional contract support costs it may be entitled to. *See* Pl.'s Opp'n at 42. The Community contends, however, that remand to determine additional Secretarial amounts owed "would be inappropriate and likely futile." *Id*. at 42–43 (citing *Fort McDermitt Paiute & Shoshone Tribe v. Azar*, No. 1:17-cv-837, 2019 WL 4711401, at *9 (D.D.C. Sept. 26, 2019), *aff'd in part, rev'd in part sub nom. Fort McDermitt Paiute & Shoshone Tribe v. Becerra*, 6 F.4th 6 (D.C. Cir. 2021)). The district court's decision in *Ft. McDermitt* is distinguishable.

In *Ft. McDermitt*, the tribe submitted an ISDEAA proposal to take over operation of on an IHS clinic on the Ft. McDermitt Reservation that was operated for the benefit of several tribes. *See* 2019 WL 4711401, at *3. IHS rejected in part the tribe's proposal on grounds that the amount of funds sought by the tribe to operate the clinic exceeded the amount of funds IHS would have otherwise provided for the benefit of the tribe. *See id*. The tribe then brought suit, but the court initially rejected both parties' dispositive motions, finding that the record lacked sufficient context or supporting affidavits for the Court to make any sense of the parties' competing arguments. *Id*. at *4. Only after the parties developed the record did the court rule on the parties' motions. *See id*. It held that, because the tribe proposed to continue offering services to all tribes and tribal members served the clinic, the tribe was entitled to the full amount of funding used to operate the clinic for the benefit all tribes. *Id*. at *5–6.[5] The court then declined IHS's request for a remand on the grounds that the court had already rejected IHS's reasons as a matter of law and that IHS had already been "afforded multiple opportunities" to "muster

[5] The D.C. Circuit reversed the district court's other holdings. *See Ft. McDermitt*, 6 F.4th at 14.

sufficient evidence to otherwise show that it would not have spent the amount proposed by the [t]ribe." *Id*. at *9.

Unlike in *Ft. McDermitt*, here IHS has already demonstrated that the cost center reports on which the Community relies for its claim to increase its Secretarial amount did not include data about third-party revenue generated for services provided at the Salt River Health Clinic by visiting staff providers, the Clinic pharmacy, and dental services. *See* Defs.' Mem. at 19–21. And the Community has not only admitted that the cost center reports are incomplete, *see* Pl.'s Opp'n at 19, but has declined to challenge Defendants' showing that, after it took over operation of the Clinic, it billed for and collected third-party revenues for services provided by visiting staff, and for the Clinic pharmacy and dental services. *See generally id*. Thus, the cost center reports do not provide reliable information on which to base injunctive relief on the Community's claim for to increase its Secretarial amount. Accordingly, if the Court denies Defendants' summary judgment motion on this Count, remand is the only appropriate remedy. *See, e.g.*, *Yukon-Kuskokwim Health Corp. v. N.L.R.B*., 234 F.3d 714, 718 (D.C. Cir. 2000) (remanding ISDEAA claim to agency for further consideration); *Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 115 (D.D.C. 2019).[6]

CONCLUSION

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

[6] The Community additionally contends that remand would be prejudicial based on the long history of the case. *See* Pl.'s Opp'n at 44–45 (also alleging, without citation to any evidence, that IHS has a history of withholding information). Because the Community fails to support this contention, *see id*., this Court should disregard it as a basis for determining whether remand is appropriate here.

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Respectfully submitted,

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