No. 21-8046

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NORTHERN ARAPAHO TRIBE,
Plaintiff-Appellant,

v.

XAVIER BECERRA, in his official capacity as Secretary, U.S. Department of Health & Human Services, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, CASE NO. 0:21-cv-00037, HON. NANCY D. FREUDENTHAL; ORAL ARGUMENT REQUESTED

BRIEF FOR DEFENDANTS-APPELLEES

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

GLOSSARY

CDA – CONTRACT DISPUTES ACT OF 1978

CSC – CONTRACT SUPPORT COSTS

FY – FISCAL YEAR

HHS – DEPARTMENT OF HEALTH AND HUMAN SERVICES

IHS – INDIAN HEALTH SERVICE

ISDEAA – INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

OMB – OFFICE OF MANAGEMENT AND BUDGET

STATEMENT OF JURISDICTION

Plaintiff-appellant Northern Arapaho Tribe (plaintiff or "the Tribe") brought this action against defendants-appellees Norris Cochran, in his official capacity as Acting Secretary, U.S. Department of Health & Human Services;[1] Elizabeth Fowler, in her official capacity as Acting Director, Indian Health Service (IHS); and the United States of America (collectively, defendants), invoking the jurisdiction of the district court pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 5331(a), (d), and the Contract Disputes Act, 41 U.S.C. § 7104(b). *See* Compl., Appellant's Appendix (App.) 6, 7-8.[2] Defendants moved to dismiss. By Order filed on July 7, 2021, App. 116-30, and accompanying Judgment, App. 131, the district court granted defendants' motion and dismissed the action. On July 22, 2021, plaintiff filed a timely notice of appeal. App. 132. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the government provided full payment for "contract support costs" based on the parties' annual funding agreement, or whether the ISDEAA requires

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[1] Pursuant to Fed. R. App. P. 43(c)(2), the name of the current Secretary, Xavier Becerra, has been substituted for that of his predecessor, Acting Secretary Cochran.

[2] Although Appellant's Appendix uses the pagination "AP __," this brief will refer to the relevant page(s) as "App. __."

the government to pay an extra-contractual amount to support plaintiff's expenditures of program income earned from non-IHS sources.

RELEVANT STATUTES AND REGULATIONS

Pertinent statutes and regulatory materials are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

Indian Health-Care Programs

IHS delivers health care to more than two million American Indians and Alaska Natives directly through IHS-operated programs and indirectly through mechanisms including ISDEAA contracts with tribes. *See* 25 U.S.C. §§ 13 (Snyder Act), 1601-1683 (Indian Health Care Improvement Act), 5301 *et seq.* (ISDEAA).[3]

1. IHS-Operated Health-Care Programs

IHS provides health care to American Indians and Alaska Natives at IHS service units that it operates directly. In the course of providing direct services, IHS collects reimbursements from Medicare, Medicaid, and other third-party

[3] In 1954, Congress transferred the health-care related functions of the Snyder Act from the Department of the Interior to the Department of Health, Education, and Welfare, the predecessor of the Department of Health and Human Services. *See* Pub. L. No. 83-568, 68 Stat. 674 (1954) (codified at 42 U.S.C. § 2001).

payers and, rather than sending such reimbursements to the general fund at the U.S. Treasury, must credit them to the individual service unit that provided the service. *See, e.g.*, 25 U.S.C. §§ 1621e, 1621f, 1641. Congress has further provided that the collection of Medicare and Medicaid funds shall not be taken into account in determining the amount of funds otherwise appropriated for IHS. *Id.* § 1641(a).

2. Tribally Operated Health-Care Programs

At the request of a tribe or tribal organization, the ISDEAA requires the Secretary of Health and Human Services (HHS), through IHS, to enter into an ISDEAA contract for the tribal contractor to take over a health-care program, function, service, or activity (collectively referred to as "federal program") that IHS was performing for the benefit of the tribe and its members. *See* 25 U.S.C. §§ 5321(a)(1), 5396.[4] IHS can decline a tribe's proposal to obtain, renew, or amend an ISDEAA contract pursuant to one or more statutory criteria. *See id*.

[4] This case involves a contract entered into under Title I of ISDEAA. Tribes that meet certain criteria may instead enter into a government-to-government "compact" under Title V of ISDEAA to administer the federal program. *See generally* Pub. L. No. 106-260, § 4, 114 Stat. 711, 715 (2000). Tribes entering into such compacts are known as Title V tribes. Title V offers participating tribes greater flexibility in administering the program. *See* S. Rep. No. 106-221, 2, 189 (1999). The funding provisions, however, are the same. *See* 25 U.S.C. § 5396 (making § 5325(a)) applicable to compacts). There is no dispute that the resolution of this case does not depend on any distinction between Title I and Title V, and this brief therefore relies upon relevant statutory provisions and case law involving both Titles.

§§ 5321(a)(2)(A)-(E), 5387(c)(1)(A)(i)-(iv). A tribe can obtain de novo federal court review of an agency declination. *See id*. § 5331(a).

Once the parties enter into a contract, IHS transfers to the tribal contractor the amount of appropriated funds the agency had or would have allocated for its operation of the program for the period covered by the contract, for the tribal contractor to operate the program. 25 U.S.C. § 5325(a)(1). This is known as the "Secretarial amount" because this is the amount the Secretary, through IHS, would have allocated for its continued operation of the program.

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

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

Id. § 5325(a)(2). By defining CSC to cover these two categories, Congress ensured that CSC funding would prevent any "diminution in program resources when [federal] programs … are transferred to tribal operation." 140 Cong. Rec.

H11140-44 (daily ed. Oct. 6, 1994) (statement of Rep. Bill Richardson). In particular, these categories correspond to reasonable and necessary expenses that the contracting tribe must incur but which IHS would not have funded through the Secretarial amount, either because the federal government does not incur the relevant expense or because the federal government would fund the relevant activity using funds other than those transferred to the tribe.

Congress further provided that costs that are "eligible … for the purposes of receiving [CSC] funding … include the costs of reimbursing each tribal contractor for reasonable and allowable" expenses, including both:

> (i) direct program expenses for the operation of the Federal program that is the subject of the contract; and
>
> (ii) any additional administrative or other expense incurred by the governing body of the Indian Tribe or Tribal organization and any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program … pursuant to the contract.

25 U.S.C. § 5325(a)(3)(A)(i)-(ii). Congress additionally requires that CSC cannot "duplicate" activities already funded by the Secretarial amount. *Id*. § 5325(a)(3)(A).

In short, CSC contains two components:

(1) Direct CSC, which are direct costs that a tribe must incur to operate the specific program at issue and for which IHS did not already include any funding in the Secretarial amount. *See* 25 U.S.C. § 5325(a)(2), (a)(3)(A). Workers'

compensation paid to states for employees of the health facility is a common example of direct CSC, as federal agencies do not pay into state-run workers compensation programs.

(2) Indirect CSC, which are IHS's share of a tribe's indirect costs for which IHS did not already include any funding in the Secretarial amount. *See* 25 U.S.C. § 5325(a)(2), (a)(3)(A). Indirect costs are pooled overhead costs that benefit more than one program, such as the costs of conducting audits. *See id.*

The statute contains no formula for computing CSC. IHS has issued an Indian Health Manual (Manual) that specifies a methodology for computing such costs, which is typically incorporated by reference into ISDEAA contracts. The Manual provides that direct CSC are negotiated between the tribal contractor and IHS, based on an enumeration of direct costs by the tribe that is then negotiated with IHS. Manual § 6-3.2(D).[5] Although they also may be negotiated as a lump sum amount, indirect CSC are most often computed, subject to adjustments not at issue here, by applying a negotiated rate to the direct cost base. Manual § 6-3.2(E)(1)(a)(i)(a). The rate is determined by a negotiation between the tribal contractor and its "cognizant agency" (here, the Department of the Interior). Manual § 6-3.2(E). And the direct cost base is "[t]he eligible funding in the

[5] The Manual provisions cited herein are found at: IHS, HHS, *Indian Health Manual, Chapter 3—Contract Support Costs*, https://go.usa.gov/xvvZn (last visited Sept. 22, 2021). They are also reproduced in the Addendum to this brief.

Secretarial amount" plus the eligible funding in the direct CSC amount, unless an alternative calculation not relevant here yields a lower figure. Manual § 6-3.2(E)(1)(a)(i)(a); *see also* Manual § 6-3.2(E)(1)(a)(i)(b) (allowing alternative calculation only if it is lower); Manual § 6-3.2(E)(1)(b)(i)(a) (cross-referencing § 6-3.2(E)(1)(a)(i)(a)).

In addition to ISDEAA funds, many tribal contractors earn "program income" for health services by collecting reimbursements from Medicare, Medicaid, and other third-party payers. Tribal contractors may, for example, seek and directly collect reimbursements from Medicare and Medicaid, 25 U.S.C. § 1641(d); private insurance companies, *id*. § 1621e(a); workers' compensation funds, *id*. § 1621e(b); and tortfeasors, *id*. § 1621e(e)(3)(A). Tribal contractors generally have the option of determining whether to collect from those sources; Congress has compelled tribal contractors to obtain reimbursement only for services they choose to provide to patients who are not eligible for IHS services. *See, e.g.*, Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786, 1029 (2011) ("non-Indian patients may be extended health care at all tribally administered or [IHS] facilities, *subject to charges*" (emphasis added)).

These funds do not come from IHS, but originate from other sources through one of two payment mechanisms. Tribal contractors may choose to directly bill third-party payers and are directly reimbursed by those third parties. *See, e.g.,* 25

U.S.C. § 1641(d). Alternatively, tribal contractors may elect to use IHS as an intermediary for payments from Medicare and Medicaid. *See id*. § 1641(c). In that circumstance, Congress requires IHS to act as a pass-through entity and distribute 100% of the funds to the contractor. *See id*. Additionally, many tribes and tribal organizations receive state and other federal funding and choose to supplement the IHS funding with their own tribal funds so that they can provide additional health care services. Those funding mechanisms do not involve IHS at all.

The ISDEAA expressly provides that "program income earned by a tribal organization in the course of carrying out a[n] [ISDEAA] contract … shall be used by the tribal organization to further the general purposes of the contract[,]" 25 U.S.C. § 5325(m)(1), but "shall not be a basis for reducing the amount of funds otherwise obligated to the contract." *Id.* § 5325(m)(2). Additionally, for a subset of tribal contractors who enter into compacts under Title V of ISDEAA (*see* n.4, *supra*), the ISDEAA further provides that "[a]ll Medicare, Medicaid, or other program income earned by an Indian tribe shall be treated as supplemental funding to that negotiated in the funding agreement," 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).

Congress ensured that IHS funding is used solely to support IHS programs by enacting 25 U.S.C. § 5326, which provides that

> notwithstanding any other provision of law, … no funds appropriated by this … Act shall be available for any contract support costs or indirect costs associated with any … funding agreement entered into between an Indian tribe or tribal organization and any entity other than the [IHS].

Id.

When a dispute arises after the ISDEAA contract is awarded, a tribal contractor must pursue a claim for breach of contract pursuant to the requirements of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 7101 *et seq*. *See* 25 U.S.C. § 5331(a), (d) (incorporating requirements of the CDA for breach of contract claims). After exhausting administrative remedies, a tribal contractor may bring an action in federal court to challenge a contracting officer's decision. 41 U.S.C. § 7104(b)(1), (3); *see also* 25 U.S.C. § 5331(a) (allowing a tribal contractor to proceed in the Court of Claims or in a district court). In such cases, the tribe—not the government—bears the burden of proving its position under the law. *See, e.g.*, *Allen v. United States*, 140 Fed. Cl. 550, 560 (2018) (citing *San Carlos Irrigation & Drainage Dist. v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989)); *Haehn Mgmt. Co. v. United States*, 15 Cl. Ct. 50, 60 (Cl. Ct. 1988) (citing *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987)), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989); *see also Ketchikan Indian Cmty. v. HHS*, CBCA 1053-ISDA, 1054-ISDA, 1055-ISDA, 13 BCA ¶ 35,436 (stating that burden to establish liability in CSC claims includes "establishing that a particular cost is a CSC"). As

such, the ISDEAA's standard for declinations and final offer rejections, which are not subject to the CDA, is inapplicable in this case.

B. Factual and Procedural History of this Case

1. Plaintiff is a federally recognized Indian tribe located on the Wind River Reservation in Wyoming. Compl., App. 9. In January 2016, plaintiff entered into an ISDEAA contract with IHS to take over operation of a range of IHS health care programs on the Wind River Reservation, and has continued to contract under the ISDEAA on an annual basis. *See id*. For Fiscal Year (FY) 2016, plaintiff's ISDEAA contract consisted of plaintiff's "model agreement," *see* 25 U.S.C. § 5329(c), its Annual Funding Agreement, and its Scope of Work Attachment (incorporated into the Annual Funding Agreement) spelling out the Tribe's responsibilities for the relevant year. *See* Contract (Jan. 15, 2016), App. 71-80; 2016 Annual Funding Agreement (Jan. 15, 2016), App. 81-90 (Annual Funding Agreement); Scope of Work Attachment, App. 91-106 (Jan. 15, 2016) (Scope of Work).

The above-mentioned documents specify that the Tribe will operate, among other things, multiple direct health care programs and health-related programs, along with support services, including a billing program with the capacity for third-party billing. *See* Contract, Art. I, §§ I-IV, App. 72-73; Scope of Work, Art. III, § C, App. 105-06. The Annual Funding Agreement further specifies CSC in the

estimated amount of $457,489.00 for FY 2016, subject to "recalculat[ion] as necessary as additional data becomes available" (because CSC is negotiated prior to performance and actual costs may differ), "to reflect the full CSC required under [25 U.S.C. § 5325[6]], and, to the extent not inconsistent with the ISDEAA, as specified in IHS Manual Part 6, Chapter 3." Annual Funding Agreement, § 5.A, App. 84.[7]

2. By letters dated May 30, 2019, plaintiff submitted claims to the IHS contracting officer for an additional $538,936.00 in CSC funding for FY 2016 and an additional $1,001,201.00 for FY 2017. *See* Compl., App. 16-18. The Tribe claimed this additional amount, totaling $1,540,137.00, based on IHS's alleged failure "to pay CSC associated with the portion of the Tribe's federal health care program funded by third-party revenues, such as payments from Medicare, Medicaid, and private insurance." *Id*. at App. 18 (quotation marks omitted). IHS's contracting officer denied plaintiff's claim on the ground that CSC is only available with respect to the Secretarial amount, not third-party revenues. *See id*.

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[6] The agreement cites 25 U.S.C. § 450j-1, which has since been recodified as 25 U.S.C. § 5325.

[7] Because FY 2016 was the original year of plaintiff's ISDEAA contract, the contract also contains a provision for pre-award and start-up CSC. *See* Annual Funding Agreement, § 5.B, App. 84. That provision is not germane to the instant dispute. Although the contract was initially entered into on a calendar-year basis and subsequently amended in its first year (and prospectively) to be on a fiscal-year basis, that fact likewise has no bearing on the issue before the Court.

3. The Tribe brought suit against defendants (collectively referred to as "IHS" or "the agency") in the district court, seeking both declaratory relief and the award under the CDA of additional ISDEAA funds totaling $1,540,137.00 for FYs 2016 and 2017. *See* App. 21. The court granted the agency's motion to dismiss. App. 116-31.

The district court first rejected the Tribe's analysis of 25 U.S.C. § 5325(a), holding that the statute clearly and unambiguously does not provide for payment of CSC on "program income" obtained by the Tribe from third parties and expended as required by the statute and the ISDEAA contract. *See* App. 122-26. The court ruled that 25 U.S.C. § 5325(a)(2) defines CSC and controls its availability, limiting it to "the reasonable costs for activities which '*must* be carried on by the Tribe '*as a contractor* to ensure compliance with the terms of *the* contract and prudent management [emphasis added].'" App. 122 (quoting § 5325(a)(2)); *see also* App. 125-26. Invoking the D.C. Circuit's recent decision in *Swinomish Indian Tribal Community v. Becerra*, 993 F.3d 917 (D.C. Cir. 2021), which had rejected an identical claim, the court stated that "neither the ISDEAA nor the IHS contract suggests that, in spending third-party program income, the Tribe is acting 'as a contractor' for IHS." App. 123 (citing *Swinomish*, 993 F.3d at 920).

The district court distinguished between ISDEAA contract funds provided by IHS, which give rise to CSC, and non-ISDEAA contract funds provided by

third parties, which do not. *See* App. 124 (stating that third-party reimbursements "are not [resources] 'provided by the Indian Health Service.'"); *see also* App. 130 ("While the federal program in fact includes supplemental funding from third-party payers above and beyond that provided for the operation of the program by IHS, Congress allowed only for the funding of *contract* support costs, not *program* support costs."). The court found further support for this view in 25 U.S.C. §§ 5325(m) and 5388(j), which establish that third-party income is an additional benefit conferred by statute on the tribal contractor—an independent supplement that may not result in a diminution of funds provided under the ISDEAA statute and contract, but that does not constitute part of the contract. *See* App. 122-24.

Next, independently of 25 U.S.C. § 5325(a), the district court "f[ound] persuasive *San Carlos Apache Tribe v. Azar*, 482 F. Supp. 3d 932 (D. Ariz. 2020), *appeal pending,* which concluded that 25 U.S.C. § 5326 prohibits payment of CSC on expenditures of reimbursements from Medicare, Medicaid and any other third-party payers." App. 126. The court agreed with *San Carlos Apache Tribe* that the CSC plaintiff seeks to recover here are not "'directly attributable'" to the ISDEAA contract within the meaning of § 5326, "but rather are associated with agreements with Medicare, Medicaid and other third-party payers which result in reimbursements to the Tribe." *See* App. 126-27.

By contrast, the district court rejected as unpersuasive *Navajo Health Foundation—Sage Memorial Hospital, Inc. v. Burwell*, 263 F. Supp. 3d 1083 (D.N.M. 2016). *See* App. 128-29. The court concluded that *Sage Memorial Hospital* had misread 25 U.S.C. § 5325(a), essentially for the reasons the court had already explained in its discussion of that provision. Specifically, the court held that § 5325(a)(2) defines CSC, while § 5325(a)(3) is an additional eligibility provision that cannot expand the scope of CSC to include costs not already encompassed within the § 5325(a)(2) definition. App. 128-29. Moreover, although "[t]he law requires any expenditures by the Tribe of its earned income be to further the purposes of the contract, . . . it does not bring [those] expenditures within the IHS contract nor does it convert the Tribe into an IHS contractor in spending its earned income." App. 129.

Finally, the district court dismissed the Tribe's policy argument that it is "disadvantage[d]" by IHS's interpretation of the statute. *See* App. 129-30. The court saw no disadvantage to the Tribe with respect to an interpretation that permits it to use its program income without penalty as decreed by the plain language of the ISDEAA, but concluded that in any event the resulting funding structure was Congress's decision: "[w]hile the federal program in fact includes supplemental funding from third-party payers above and beyond that provided for the operation of the program by IHS, Congress allowed only for the funding of

contract support costs, not *program* support costs." *Id.* at 130. The court accordingly stated that plaintiff must look to Congress for any relief, rather than the courts. *Id*.

SUMMARY OF ARGUMENT

Like the D.C. Circuit in *Swinomish Indian Tribal Community v. Becerra*, 903 F.3d 917 (D.C. Cir. 2021), and the district court in *San Carlos Apache Tribe v. Azar*, 482 F. Supp. 3d 932 (D. Ariz. 2020), *appeal pending*, No. 21-15641 (9th Cir.), the district court in this case correctly held that a tribal contractor is not entitled to CSC on funds received from third-party sources such as Medicare, Medicaid, private insurance companies, workers' compensation funds, and tortfeasors. Such funds are not part of the amount furnished by IHS under an ISDEAA contract, and therefore cannot give rise to CSC under ISDEAA.

A. Plaintiff has received the full amount of CSC funding agreed upon by the parties in the Annual Funding Agreement. In particular, the Annual Funding Agreement specified the amount of CSC to which plaintiff was entitled, based on actual costs identified by plaintiff and ultimately negotiated by the parties. The Annual Funding Agreement also cross-references the Indian Health Manual, which provides a formula for calculating indirect CSC. Both direct and indirect CSC were paid according to the terms of that agreement.

B. Although the Annual Funding Agreement authorizes plaintiff to obtain any additional amounts to which it might be entitled by statute for CSC, plaintiff's argument that it is entitled to additional CSC funding under the terms of the ISDEAA is meritless. The statute does not provide a formula for calculating CSC, much less override the calculation and amount to which plaintiff agreed. Moreover, as the district court recognized, to the extent the statute addresses the relevant issues, it reinforces rather than contradicts the Annual Funding Agreement.

Under 25 U.S.C. § 5325(a)(2), IHS must pay plaintiff the full amount of CSC required for the Tribe to operate the IHS-funded health care programs on the Northern Arapaho Reservation. Plaintiff asserts erroneously that this mandate also requires IHS to pay CSC on the Tribe's expenditure of "program income" the Tribe has earned from billing and obtaining reimbursements from non-IHS entities including Medicare, Medicaid, and other third-party payers.

No reasonable reading of the ISDEAA requires IHS to pay CSC on these additional expenditures of non-IHS funds. The ISDEAA, 25 U.S.C. §§ 5325(a)(2), (a)(3)(A), 5326, only requires IHS to pay CSC on funds provided by IHS, and expressly prohibits payment of direct and indirect costs associated with expenditures of non-IHS funding. And the ISDEAA's distinct treatment of "program income" from Medicare, Medicaid, and other third-party revenue, 25

U.S.C. §§ 5325(m), 5388(j), is entirely consistent with these clear statutory provisions.

STANDARD OF REVIEW

The district court's order of dismissal for failure to state a claim is subject to *de novo* review. *See, e.g., Santa Fe All. for Pub. Health & Safety v. City of Santa Fe*, 993 F.3d 802, 811 (10th Cir. 2021).

In interpreting the ISDEAA's provisions, as in all cases of statutory interpretation, the Court should begin with the "language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). "If the statute's text is unambiguous, then its plain meaning controls, and our inquiry ends." *United States v. Broadway*, 1 F.4th 1206, 1211 (10th Cir. 2021). "The plain meaning of a statute 'is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Id*. The court may rely on the canons of statutory construction to discern Congress' intent. *See, e.g.*, *Chickasaw Nation v. United States*, 534 U.S. 84, 94-95 (2001); *Navajo Nation v. Dalley*, 896 F.3d 1196 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1600 (2019).

Only if the terms of a statute are ambiguous may the court apply the interpretive canon that statutes are construed liberally in favor of Indian tribes, *see* 25 U.S.C. § 5321(g), to adopt the tribe's interpretation, if reasonable. *See, e.g.*

Southern Ute Indian Tribe v. Sebelius, 657 F.3d 1071, 1078 (10th Cir. 2011). The Indian canon of construction consequently is not determinative of how to read the ISDEAA and, instead, applies only when the court cannot discern Congress' intent. *Accord Chickasaw Nation*, 534 U.S. at 94 ("[T]o accept as conclusive the canons on which the Tribes rely would produce an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote."). The Indian canon "does not permit reliance on ambiguities that do not exist." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986).

ARGUMENT

PLAINTIFF HAS RECEIVED ALL THE FUNDING TO WHICH IT IS ENTITLED, BECAUSE THE ISDEAA AUTHORIZES CONTRACT SUPPORT COSTS EXCLUSIVELY AS NECESSARY TO SUPPORT THE SECRETARIAL AMOUNT AWARDED UNDER THE CONTRACT—NOT TO SUPPORT ADDITIONAL SERVICES THE CONTRACTOR PROVIDES USING NON-IHS FUNDS

A. The Government Properly Paid Plaintiff Pursuant to the Terms of the Annual Funding Agreement.

1. Plaintiff Has Not Disputed the Secretarial Amount or Its Ability to Collect Third-Party Funds.

When a tribal contractor chooses to take over a health care program from IHS, the ISDEAA requires IHS to provide funding to allow the tribal contractor to carry out the program. Under 25 U.S.C. § 5325(a)(1), IHS must pay a tribal contractor an "amount of funds … not … less than the appropriate Secretary would have otherwise provided for the operation of the programs … for the period

covered by the contract." *Id*. This is known as the "Secretarial amount." In this case, the Secretarial amount is the amount of appropriated funds IHS has allocated, pursuant to its discretion, from its annual lump sum appropriations for IHS health care programs on the Wind River Reservation. *See Lincoln v. Vigil*, 508 U.S. 182 (1993) (recognizing IHS's discretion in the allocation of its appropriations). Plaintiff does not dispute that it received the Secretarial amount or urge that the Secretarial amount was miscalculated.

Tribal contractors are also entitled, but not required, to collect income from third parties such as Medicare, Medicaid, and private insurers. *See* 42 U.S.C. § 1395qq (Medicare); *id.* § 1396j (Medicaid); 25 U.S.C. § 1621e (private insurers). Any such funding is treated as supplemental to that negotiated in the Annual Funding Agreement. *See* 25 U.S.C. §§ 5325(m), 5388(j). Plaintiff does not urge that it was unable to collect these funds.

2. The Government Paid Contract Support Costs in Compliance with the Annual Funding Agreement.

The present dispute, instead, relates solely to the category of funding known as "CSC," *i.e.*, contract support costs. Generally speaking, CSC funding is designed to ensure that tribal contractors can pay for needed activities that IHS normally does not perform or that IHS performed with funding sources other than those transferred under the ISDEAA contract. Specifically, Congress directed IHS to "add" to the Secretarial amount:

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

25 U.S.C. § 5325(a)(2).

Congress has further defined CSC and divided them into two categories. First, tribes are eligible for direct CSC, which are "direct program expenses for the operation of the Federal program that is the subject of the contract." 25 U.S.C. § 5325(a)(3)(A)(i). These costs include things like workers' compensation for employees of a health facility; because the federal government does not incur workers' compensation costs, they would not be accounted for in the Secretarial amount. Second, tribal contractors are eligible for indirect CSC, which encompass "any additional administrative or other expense related incurred by the governing body of the Indian Tribe or Tribal organization and any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program … pursuant to the contract." *Id.* § 5325(a)(3)(A)(ii). These costs may include items like conducting audits, which IHS is not required to perform and thus would not be funded through the Secretarial amount. Both types of CSC are limited by the requirements of § 5325(a)(2) and a proviso that "such funding shall not duplicate any funding provided" as part of the Secretarial amount. *Id.* § 5325(a)(3)(A); *see*

also Cook Inlet Tribal Council, Inc. v. Dotomain, 10 F.4th 892, 895-96 (D.C. Cir. 2021) (recognizing that both types of CSC are limited by the requirements of § 5325(a)(2)).

The statute does not specify a mechanism for calculating the appropriate amount of these costs. Instead, tribal contractors may negotiate the proper amount of these costs, which is generally done either by negotiating a dollar figure or by incorporating by reference a methodology adopted in the Indian Health Manual promulgated by IHS. Here, plaintiff signed an Annual Funding Agreement that provided for a fixed dollar figure for CSC, "to be recalculated as necessary as additional data becomes available … to reflect the full CSC required under [25 U.S.C. § 5325], and, to the extent not inconsistent with the ISDEAA, as specified in IHS Manual Part 6, Chapter 3 (approved April 6, 2007)." App. 84.[8]

The Indian Health Manual provides that direct CSC are negotiated between the tribal contractor and IHS, based on an enumeration of direct costs by the tribe. Manual § 6-3.2(D). Thus, to the extent that the Tribe could identify specific costs that it had incurred that it does not believe the federal government would likewise have needed to pay from the Secretarial amount, the proper course would be to

[8] Although we cite the current version of the Manual throughout this brief (*see* n.5, *supra*), the relevant provisions are materially indistinguishable from the 2007 version referenced in plaintiff's Annual Funding Agreement. As noted above (*see* n.6, *supra*), although the agreement cited 25 U.S.C. § 450j-1, that provision has since been recodified at 25 U.S.C. § 5325.

identify them in that process. Plaintiff now asserts that direct CSC have been underpaid, but does not identify any specific direct costs that the government failed to pay. Plaintiff thus has no basis for challenging the calculation of direct CSC.

Indirect CSC are computed, subject to certain adjustments not at issue here, by applying a negotiated rate to the direct cost base. Manual § 6-3.2(E)(1)(a)(i)(a). The rate is determined by a negotiation between the Tribe and its "cognizant Federal agency" (here, the Department of the Interior). Manual § 6-3.2(E)(1). Plaintiff does not challenge the applicable rate. *See* App. 117 n.3. Instead, plaintiff urges that the rate was applied to the incorrect direct cost base. It was not.

Under the terms of the Manual, incorporated by reference into the Annual Funding Agreement, the direct cost base is, at most, "[t]he eligible funding in the Secretarial amount" plus the direct CSC amount. Manual § 6-3.2(E)(1)(a)(i)(a); *see also* Manual § 6-3.2(E)(1)(a)(i)(b) (allowing alternative calculation only if it is lower); Manual § 6-3.2(E)(1)(b)(i)(a) (cross-referencing § 6-3.2(E)(1)(a)(i)(a)); Funding Agreement § 5, App. 84 (incorporating Manual). There is no dispute that IHS included all eligible direct program funding within the Secretarial amount, and as noted above the direct CSC amount was negotiated between the parties; plaintiff has identified no basis for disturbing it. Thus, plaintiff does not seek to enforce the methodology in the contract it signed, but rather seeks to demonstrate that the statute compels the government to add a third element to the direct cost base that is

beyond the terms of that methodology: income earned and then spent by the funded program, such as income from Medicare or Medicaid. As discussed below, the statute does not entitle plaintiff to deviate from the agreed-upon methodology.

B. The Statute Does Not Compel the Government to Deviate from the Terms of the Annual Funding Agreement.

1. The Statute Does Not Override the Annual Funding Agreement to which Plaintiff Agreed.

The Tribe could succeed in superseding the methodology and amounts agreed to by the terms of the contract only if it could establish that it was entitled, by statute, to a larger amount. *See* Annual Funding Agreement § 5.A, App. 84 (stating that CSC amount shall be calculated based on the IHS Manual "to the extent not inconsistent with the ISDEAA"). But as the district court properly recognized—agreeing with the only court of appeals to address this issue, *see Swinomish Indian Tribal Cmty. v. Becerra*, 993 F.3d 917, 921 (D.C. Cir. 2021)—the statute provides no entitlement to additional funds. Plaintiff identifies no respect in which the formula set out in the IHS Manual is inconsistent with the statute.

As to direct CSC, as shown in Section A, *supra*, plaintiff's agreement was based on a negotiation of the costs identified by plaintiff. That is entirely consistent with the statute, which states that tribal contractors should be reimbursed for "reasonable and allowable costs." 25 U.S.C. § 5325(a)(3)(A).

There is nothing in the statute that suggests that, instead of identifying the actual reasonable allowable costs, the parties must calculate direct CSC in some other fashion.

Similarly, as to indirect CSC, the statute just describes in general terms the expenses that indirect CSC are designed to cover. *See* 25 U.S.C. § 5325(a)(3)(A)(ii) (tribes are entitled to "any additional administrative or other expense related incurred by the governing body of the Indian Tribe or Tribal organization and any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program … pursuant to the contract"). The statute does not specify how indirect CSC are to be computed, and thus provides no entitlement to the calculation plaintiff would now prefer, as opposed to the calculation that plaintiff agreed to. *See Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 110 (D.D.C. 2019) ("The Act … does not say how indirect CSCs should be estimated.").

To the extent that the statute addresses the relevant issue, it reaffirms the appropriateness of the calculation here. In rejecting an identical challenge to the one brought in this case, the D.C. Circuit properly focused on the provision that authorizes the payment of and defines CSC, which authorizes "the reasonable costs for activities which must be carried on … to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. § 5325(a)(2). As the D.C.

Circuit explained, in the contract, "a tribe promises to provide certain services to its community," while "the government promises to provide the tribe with a certain amount of money—the secretarial amount—for those services." *Swinomish*, 993 F.3d at 920. And "when the Act speaks of contract support costs, it does not mention money received from third parties, like insurance providers. Instead, the Act says reimbursements for contract support costs cover activities that 'ensure compliance with the terms of *the* contract' conducted by the tribe 'as a contractor.'" *Id.* (quoting 25 U.S.C. § 5325(a)(2) (D.C. Circuit's emphasis). Thus, "the scope of contract support costs is … limited to those under *one* 'contract' — the one between a 'contractor' (the tribe) and the contracting agency (Indian Health Service)." *Id*.

Critically, Congress has not used the term "program income" in 25 U.S.C. §§ 5325(a)(1), (2), or (3)(A), nor has Congress characterized "program income" as part of the Secretarial amount. *See Swinomish*, 993 F.3d at 920. To the contrary, the ISDEAA consistently treats program income as separate from, rather than contributing to, the amounts provided by IHS. *See Fort McDermitt Shoshone and Paiute Tribe v. Becerra,* 6 F.4th 6, 13-14 (D.C. Cir. 2021). For example, § 5388(j) provides 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." 25 U.S.C. § 5388(j).[9] And § 5325(m) provides that "program income earned by a trib[e] … in the course of carrying out a self-determination contract … shall be used by the trib[e] to further the general purposes of the contract." *Id.* § 5325(m). In drafting these provisions, Congress specified that "[s]uch [program income] shall not result in any offset or reduction in the amount of funds the Indian tribe is authorized to receive under its funding agreement." *Id.* § 5388(j); *see also id.* § 5325(m)(2) (program income "shall not be a basis for reducing the amount of funds otherwise obligated to the contract"). Correspondingly, Medicare and Medicaid reimbursements may not be taken into account when determining appropriations. *See id.* § 1641(a).

Congress thus made clear in multiple ways that Medicare and Medicaid were to be considered a separate, supplemental source of funding from the funding provided under the contract. These provisions are necessary to override generally applicable OMB cost principles, to which the ISDEAA makes repeated reference. *See* 25 U.S.C. §§ 5304(f), (g), 5305, 5322(e)(1), 5386(c)(2); *see* 2 C.F.R.

[9] 25 U.S.C. § 5388(j) applies only to compacts under Title V, not to contracts under Title I, and thus does not apply in this case. *See* n.4, *supra*; *San Carlos Apache Tribe v. Azar*, 482 F. Supp. 3d 932, 939-40 (D. Ariz. 2020), *appeal pending*, No. 21-15641 (9th Cir.). Nonetheless, § 5388(j) illustrates Congress's treatment of third-party income. *See* App. 124 & n.6 (district court citation of 25 U.S.C. § 5388(j)); Pl. Br. 2 (also citing 25 U.S.C. § 5388(j)). Moreover, given that Congress conferred additional benefits on Title V compactors, it would have made no sense for Congress to authorize additional funding for Title I contracts and then limit that funding in the later-enacted Title V.

§ 200.101(d) (identifying the ISDEAA as departing from generally applicable OMB cost principles). Those principles generally require income earned by a federal program to be deducted from a federal funding recipient's otherwise allowable costs when computing the amount of a federal award. *See* 2 C.F.R. § 200.307(e)(1). Congress's determination that those principles should not apply to Medicare and Medicaid funding highlights that Congress considered such funding to be separate from the funds awarded under the contract.

Contract support costs are to be awarded only for costs required to comply with the contract. The district court thus properly recognized that although "[t]he law requires any expenditures by the Tribe of its earned income be to further the purposes of the contract, . . . it does not bring [those] expenditures within the IHS contract nor does it convert the Tribe into an IHS contractor in spending its earned income." App. 129. As the D.C. Circuit held in *Swinomish*, "[i]f you take [plaintiff's] theory of the scope of 'the Federal program' to its logical conclusion, Indian Health Service would be on the line for unlimited contract support costs based on the unlimited sources of outside-the-contract funding available to a tribe. That's not what the Act requires." *Swinomish*, 993 F.3d at 921.

The Tribe does not advance its argument by noting that it assumed responsibility for various third-party billing functions when it entered into its ISDEAA contract. Before turning the program over to the Tribe, IHS funded its

third-party billing activities through the Secretarial amount, which, as noted above, the Tribe now receives. *See Cook Inlet*, 10 F.4th at 893 (noting that activities IHS would have also carried out were paid from the Secretarial amount). To the extent that the Tribe has costs associated with the third-party billing function itself that IHS was not required to incur, it could identify them as direct contract support costs. Similarly, although plaintiff's amici point out that IHS's budget includes "Direct Operations," *see* Am. Br. 13-14 & n.3 (citing IHS, *Fiscal Year 2022 Justification of Estimates for Appropriations Committees* (2022 CJ)[10]), the document on which amici rely also makes clear that contracting tribes receive their allocable share of those funds. *See* 2022 CJ at CJ-201 – 202.

The Tribe thus misses the point when it argues that the "collection of third-party revenues is … squarely within the scope of, and part of the performance of, the contract itself and the contracted federal program." Pl. Br. 27. The Tribe has received all appropriate funding for expenses associated with collection. *See Swinomish*, 993 F.3d at 921 (noting that the plaintiff in that case was likewise required to operate a third-party billing program but did "not point to any outstanding costs that Indian Health Service still owes for maintaining that program"). The Tribe's argument here does not relate to expenses associated with the billing function that it assumed from IHS; rather, the Tribe asserts that its

[10] https://go.usa.gov/xMH8x

subsequent expenditure of funds that it received from third parties (which could have been spent on any program under the contract, not just the billing program) means that the amount that it collected should have been added to the direct cost base, and thus generate CSC. It does not attempt to identify any basis in the IHS Manual, which sets out the applicable methodology for negotiating indirect CSC, for this position. And unlike the third-party billing program that the Tribe expressly agreed to take over from IHS when it assumed responsibility for the program, the expenditure of third-party funds was not part of the ISDEAA contract. *See id.* ("Swinomish gets contract support costs with regard to the billing program's expenses, but not with regard to its income.").

The billing system that plaintiff took over from IHS is designed to allow plaintiff to obtain those reimbursements directly from Medicare, the State of Wyoming, and other third-party payers, if it *chooses* to do so. The Tribe cites 25 U.S.C. § 1623(b)—which is not even part of the ISDEAA, but rather belongs to the Indian Health Care Improvement Act, 25 U.S.C. §§ 1601-1683—for the proposition that it must collect third-party funds, but that provision only provides that the funded program will be a payer of last resort to the extent that there is a dispute among potential payers; it protects the Tribe from being forced to pay for items and services for which third parties are responsible, but imposes no obligation on plaintiff. The Tribe is only required to collect payments when it

provides services to non-Indians, which it is not required under the contract to do at all. *See, e.g.*, Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786, 1029 (2011) ("non-Indian patients *may* be extended health care at all tribally administered or [IHS] facilities, subject to charges") (emphasis added).

2. The Statutory Context and Purpose Confirm the Appropriateness of the Calculations in the Annual Funding Agreement.

The crux of plaintiff's argument is that the agreed-upon formula and amount for indirect CSC will undercount its true administrative costs because the formula does not account for administrative costs associated with services provided with funds received from third parties such as Medicare and Medicaid. In addition to seeking to elevate statutory purpose over statutory text, this assertion misunderstands both the nature of third-party funding and the relevant provisions of the ISDEAA. *See Swinomish*, 993 F.3d at 920-21.

The Tribe asserts that the Indian Health Care Improvement Act "requires IHS to spend third-party revenues on facility improvements or additional services, and not on overhead." Pl. Br. 16 (citing 25 U.S.C. § 1641(c)(1)(B)). But the cited provision says that such funds shall be used "for the purpose of making any improvements" in IHS programs "which may be necessary to achieve or maintain compliance with the applicable conditions and requirements" of Medicare and Medicaid. The statute does not preclude expenditures on overhead, and many

expenditures that plaintiff characterizes as overhead are likely necessary expenses to maintain compliance with Medicare and Medicaid.

Similarly, when a tribal contractor receives Medicare and Medicaid funds, it may use them for a wide range of purposes, including "any health care-related purpose" or "to achieve the objectives provided in [25 U.S.C. § 1602]." 25 U.S.C. § 1641(d)(2)(A). And the cited list of objectives is extraordinarily broad, including "to ensure the highest possible health status for Indians … and to provide all resources necessary to effect that policy" and "to provide funding for programs and facilities operated by Indian tribes and tribal organizations in amounts that are not less than the amounts provided to programs and facilities operated directly by [IHS]." *Id.* § 1602(1), (7). There is no basis for the Tribe's assertion that Medicare and Medicaid funds cannot be spent on overhead by either IHS or the Tribe.

The rationale for providing that CSC funding be added to the Secretarial amount does not apply to third-party revenues. In order for tribal contractors to be put in the same position as IHS when they assume control of the program, they must have access to funding sufficient to cover the costs of the activities the Tribe is required to perform under the contract. *See* S. Rep. No. 100-274, at 9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2628 (noting that before contract support costs were provided, "the Federal agencies provide[d] less funding to Indian tribes

to operate programs than [wa]s provided to the Federal agencies," thereby causing financial hardship to the tribes). For the same reasons, in 1994, Congress expanded the Secretarial amount to specifically include administrative functions, 25 U.S.C. § 5325(a)(1), and ensured that both direct and indirect costs could be treated as contract support costs, *id.* § 5325(a)(3)(A). *See* Pub. L. No. 103-413, tit. I, § 102, 108 Stat. 4250, 4257-59 (1994). Once again, the overarching "objective" was "to assure that there is no diminution in program resources when programs, services, functions or activities are transferred to tribal operation" and to prevent Tribes from being required "to divert program funds to prudently manage the contract." 140 Cong. Rec. H11140-41, H11144 (daily ed. Oct. 6, 1994). But that rationale has no application to services that the Tribe provides using funding other than the funding transferred from the IHS appropriation in the ISDEAA contract; to the extent that it provides services that are paid for by other, non-IHS resources, it must use non-IHS resources to fund all costs associated with those services.

Plaintiff mistakenly asserts that the *Swinomish* court acknowledged and accepted a "self-determination penalty" against tribes. Pl. Br. 36. The *Swinomish* court discussed a hypothetical in which a tribe has unreimbursed costs in connection with the expenditure of insurance revenue, while the federal government would not have equivalent costs. *See Swinomish*, 993 F.3d at 922. The D.C. Circuit did not dismiss that hypothetical on the ground that "the Tribe

can tap into its general treasury." *See* Pl. Br. 36 (quoting *Swinomish*, 993 F.3d at 919). That quotation appears in a different part of the D.C. Circuit's opinion, where the court noted that IHS funding is not the Tribe's exclusive source for health-care funding, because the Tribe can also provide health care with money obtained from third-party billing or from the Tribe's own resources. *See Swinomish*, 993 F.3d at 919.

The D.C. Circuit instead rejected the argument based on the hypothetical on two grounds. First, it explained that "[a]lthough Swinomish endorsed the assumptions behind that hypothetical at oral argument, it is not at all clear that this hypothetical reflects the reality." *Swinomish*, 993 F.3d at 922. Plaintiff here does not even attempt to prove that these assumptions are warranted, and thus has not even tried to demonstrate that the funds it receives fall short of the amount that would have been available to IHS if IHS had continued to run the program. Instead, plaintiff merely asserts that "the reality is borne out by simple math and tribes' government-wide, negotiated indirect cost rates." Pl. Br. 37. The assertion that the presence of program income renders the funding available to the Tribes different from those of the federal government in a manner relevant here does not reduce to a question of "math," but rather would depend on an accounting of the relevant costs and the available funding sources that is entirely absent here. Among other things, it would need to account for the fact that the expenditure of

program income can yield additional program income to the extent that the services provided are themselves subject to reimbursement.

But in any event, the D.C. Circuit further explained that regardless of the adequacy of third-party funding for activities outside the contract, IHS has fully complied with the statute by paying "contract support costs attached to the contract expenses." *Swinomish*, 993 F.3d at 922. The statute does not support the proposition that the Tribe is also entitled to contract support costs in connection with the expenditure of funds received from sources other than IHS.

Plaintiff's position likewise cannot be reconciled with 25 U.S.C. § 5326, upon which the district court also relied. *See* App. 126-28. That provision states that "contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act," and that "no funds appropriated by this or any other Act shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service." 25 U.S.C. § 5326. Under the plain terms of § 5326, IHS was not required to provide funding to cover "indirect costs associated with" funding received from third parties, as opposed to costs "directly attributable to" the ISDEAA contract. *Id.*; *see also San Carlos Apache Tribe v.*

Azar, 482 F. Supp. 3d 932, 938-39 (D. Ariz. 2020) (Because "[r]evenue from third parties such as Medicare and Medicaid cannot be collected by virtue of an agreement to which they are absent[,] [i]t can therefore hardly be said that the Tribe's third-party revenue was 'directly' attributable to its contract with IHS."), *appeal pending*, No. 21-15641 (9th Cir.); *Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 422, 424 (D.D.C. 2008) (rejecting the arguments (1) that IHS was obliged "to pay for *all* indirect costs arising from services benefiting programs provided by self-determination contracts regardless of whether those costs were covered in whole or in part by outside funding"; and (2) that the phrase "associated with" should be construed more broadly). Plaintiff cannot account satisfactorily for this provision.

Section 5326 was enacted in response to this Court's 1997 decision holding that an analogous CSC provision applicable to the Bureau of Indian Affairs required the agency to increase its CSC to make up for "the failure of other agencies to pay their full share of indirect costs." *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997); *see* H.R. Rep. No. 105-609, at 57 (1998) (criticizing *Ramah* decision); *Tunica*, 577 F. Supp. 2d at 418 (noting that section 5326 was enacted in response to the *Ramah* decision). Plaintiff's position seeks to restore the rule that Congress expressly rejected.

Plaintiff extensively relies on the U.S. District Court for the District of New Mexico's decision in *Navajo Health Foundation—Sage Memorial Hospital, Inc. v. Burwell*, 263 F. Supp. 3d 1083 (D.N.M. 2016), but that reasoning did not account for the analysis above and is against the weight of authority in other district courts and in the D.C. Circuit. *See* Pl. Br. 33 n.5 (acknowledging that "[o]ther courts have declined to follow *Sage Memorial*"). In particular, the *Sage* court did not address the meaning of 25 U.S.C. § 5326, did not address how § 5325(a)(2) and (3)(A) should be interpreted in light of § 5326, and did not identify any actual costs that were being inadequately reimbursed. *See, e.g.*, 263 F. Supp. 3d at 1163-68.

Plaintiff's reliance on the "Indian canon" that ambiguous statutes must be interpreted in favor of the tribes, *see* 25 U.S.C. § 5321(g), is also misplaced. It is well established that only if the terms of a statute are ambiguous must the court adopt the tribe's interpretation, if reasonable. *See, e.g., Southern Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1078 (10th Cir. 2011). The Indian canon of construction consequently is not determinative of how to read the relevant provisions of the ISDEAA, and instead applies only when the court cannot discern Congress's intent. *Accord Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) ("[T]o accept as conclusive the canons on which the Tribes rely would produce an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote."). The Indian canon "does not permit reliance on

ambiguities that do not exist." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). Here, IHS's "reading [of ISDEAA] is clearly required by the statutory language." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 194 (2012).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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OCTOBER 2021

STATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully suggest that oral argument might aid the Court in its deliberations in this case. Furthermore, not only is the issue one of great importance to the parties, but the question has broad significance extending beyond this case and Circuit; it has already been adjudicated in the D.C. Circuit, and is currently pending in the Ninth Circuit as well.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure. 32(a)(7)(B) because it contains 8,800 words, excluding exempt material, according to the count of Microsoft Word.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that all required privacy redactions have been made under 10th Cir. R. 25.5; that the seven (7) hard copies that will be submitted to the Court are exact hard copies of the version submitted electronically; and that the electronic submission has been scanned for viruses with Symantec Endpoint Protection and is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2021, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system, and that I served counsel for Appellant by the same means.

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ADDENDUM

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25 U.S.C. § 5325. Contract funding and indirect costs. (Excerpts)

(a) Amount of funds provided

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this chapter 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, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which--

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this chapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of--

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the governing body of the Indian Tribe or Tribal organization and any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this chapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

25 U.S.C. § 5325. Contract funding and indirect costs. (Excerpts)

(m) Use of program income earned

The program income earned by a tribal organization in the course of carrying out a self-determination contract--

(1) shall be used by the tribal organization to further the general purposes of the contract; and

(2) shall not be a basis for reducing the amount of funds otherwise obligated to the contract.

25 U.S.C. § 5326. Indian Health Service: availability of funds for Indian self-determination or self-governance contract or grant support costs.

Before, on, and after October 21, 1998, and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act or any other Act for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act and no funds appropriated by this or any other Act shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service.

25 U.S.C. § 5388. Transfer of funds. (Excerpt)

(j) Program income

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. The Indian tribe may retain all such income and expend such funds in the current year or in future years except to the extent that the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.) provides otherwise for Medicare and Medicaid receipts. Such funds shall not result in any offset or reduction in the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the program income is received or for any subsequent fiscal year.

Indian Health Manual (Excerpts)
§ 6-3.2

D. Direct CSC.

Direct costs eligible for CSC funding, pursuant to 25 U.S.C. § 5325(a)(2)-(3), may be incurred directly by the awardee or by an eligible sub-awardee. DCSC amounts are generally awarded on a recurring basis.

(1) Examples of DCSC are described in the standards for the review and approval of CSC in Manual Exhibit 6-3-G. These may include, but are not limited to:
   a. unemployment taxes on salaries funded in the Secretarial amount;
   b. workers compensation insurance on salaries funded in the Secretarial amount;
   c. cost of retirement for converted civil service and United States Public Health Service Commissioned Corps Officer salaries;
   d. insurance, but only for coverage not included in the IDC pool (or indirect-type-costs budget) and not covered by the Federal Tort Claims Act;
   e. facility support costs to the extent not already made available;
   f. training required to maintain certification of direct program personnel to the extent not already made available; and
   g. any other item of cost that meets the definition of CSC at 25 U.S.C. § 5325(a)(2)-(3), but is not included in the awardee's IDC pool (or indirect-type-costs budget) or the 25 U.S.C. § 5325(a)(1) amount.

(2) Funds for DCSC need not be recalculated each year and will be provided to the awardee on a recurring basis, except for in the following instances:
   a. If an awardee submits a proposal or request and renegotiates DCSC.
   b. If a cost that has previously been funded as DCSC is moved to the Tribe's IDC pool (See Section 6-3.2E).
   c. In the case of a withdrawal as outlined in Section 6-3.3A.
   d. To add amounts in connection with IPA or MOA employees who have converted after the effective date of the preceding DCSC negotiation. This shall not require a renegotiation of ongoing DCSC amounts.

Renegotiated DCSC requirements become effective for the contract period covered by the DCSC request and are awarded on a recurring basis. IHS will provide technical assistance at the request of the Tribe.

(3) Unless a negotiation occurs under the preceding subparagraph, the amount of each awardee's ongoing DCSC need shall be adjusted at the end of the first quarter of the Federal fiscal year (FY) by the most recent OMB medical inflation rate in order to account for the normal increased DCSC need.

(4) Unless otherwise requested by the awardee, DCSC calculated on new PFSA and expanded PFSA shall not require a recalculation of DCSC on ongoing PFSAs, as long as the additional DCSC is allocable only to the new or expanded PFSA being awarded.

E. Indirect CSC.

Guidelines for the Principles Involved in Negotiating Indirect and Indirect-Type Costs. A plan for the allocation of IDC is required to support the distribution of any IDC related to the awardee's program and the determination of which IDC are eligible for indirect CSC funding. All IDC included in the plan are required to be supported by accounting records that substantiate the propriety of the IDC and establish the costs as either: (a) funded in the Secretarial amount; or (b) eligible for indirect CSC funding. The allocation plan should cover all IDC of the awardee and contain, but not necessarily be limited to, the nature and extent of services provided and their relevance to the awardee's program; the item of expense to be included in the IDC pool; and the methods to be used in distributing costs.

Title 2 CFR Part 200 establishes principles and standards for determining IDC applicable to the awardee and the negotiation of IDC rates with the awardee's cognizant agency. 25 U.S.C. § 5325(k) has made modifications to the OMB cost principles otherwise applicable to awardees. Once these principles are applied to identify an awardee's total IDC, the costs must be analyzed to ensure they meet the definition of CSC in 25 U.S.C. § 5325(a)(2)-(3). See also the standards for the review and approval of CSC in Manual Exhibit 6-3-G.

In determining the amount of CSC funding required in relation to the awardee's IDC, Areas should review the awardee's cost allocation plan, its associated IDC proposal, its approved IDC negotiation agreement, and the requirements of 25 U.S.C. § 5325(a)(2)-(3). The allowable IDC of an eligible sub-awardee may be included in the indirect CSC requirement of the awardee when the sub-awards are excluded from the IDC base of the awardee, or are subject to a pass-through IDC rate. The awardee shall be responsible for providing documentation of these costs to the IHS.

(1) Use of Negotiated IDC Rates. The amount of IDC expected to be incurred by awardees using rates negotiated with the cognizant Federal agency will be estimated annually by applying the most recent negotiated IDC rate(s) to the appropriate direct cost base amount, as discussed below in this paragraph and subject to paragraphs 6-3.2E(3)-(4).

The amount determined as the awardee's CSC requirement will be consistent with the individual awardee's IDC rate agreement and reflect any exclusions required by the IDC rate agreement.

If an awardee's IDC rate is applicable to a FY that is more than three years old, IHS will not provide IDC associated with the application of that IDC rate. In these cases, the Area will negotiate "indirect-type costs" with the awardee (see paragraph 6-3.2E(2) that follows). The rate applicable to the current FY is considered current, and the rate applicable to the previous FY shall be considered one year old. Thus, for example, in FY2016 a rate agreement for FY2013 is the oldest rate that will be used in these calculations.

Based on these principles, IHS will apply the IDC rate to determine a Tribe's IDC need (which shall be adjusted consistent with 25 U.S.C. § 5325(a)(2)-(3), as discussed below, to determine the indirect CSC need) as follows:

a. Estimate of Indirect CSC Need and Funding Prior to the Contract Year

In advance of the contract year, IHS and the awardee will negotiate an estimate of the awardee's IDC need using the awardee's most recent (no more than three years old) negotiated IDC rate agreement.

(i) Total direct costs will be used based on either:

(a) The eligible funding in the Secretarial amount plus the DCSC funding (or the salaries (or salaries and fringe) for those awardees that use a salary (or salaries and fringe) base), if the total direct costs of the total health care program reflected in the IDC rate agreement or other documentation of prior-year expenditures demonstrate that amount; (Footnote /2) or

(b) The total direct costs of the total health care program operated by the awardee, if those costs as reflected in the IDC rate agreement are less than the eligible funding in the Secretarial amount plus the DCSC funding.

(ii) The IDC transferred in the Secretarial amount, negotiated pursuant to 25 U.S.C. § 5325(a)(2)-(3) and this chapter, shall be deducted from the total direct costs determined in (a)(1).

(iii) The pass-through and exclusion amount will be determined consistent with the awardee's IDC rate proposal. This amount will be deducted from the total direct costs determined in (a)(1), less the amount determined in (a)(2), if any, to determine the direct cost base.

(iv) Application of IDC rate: the IDC rate will be applied to the direct cost base determined in paragraphs (a)(1)-(3) to estimate the total amount of IDC applicable to the IHS-funded program.

(v) The amount identified in (a)(2), if any, shall be deducted from the total IDC amount determined in paragraph (a)(4) to determine the amount of indirect CSC need and funding to be paid.

b. Determination of Final Amount for Indirect CSC Need and Funding

After the end of the contract funding period IHS and the awardee will negotiate the final amount of indirect CSC as follows:

(i) Total direct costs will be based on the amount negotiated pursuant to paragraph (a)(1) above, without further information being required of the awardee, except that:

(a) Increases in eligible funding in the Secretarial amount or DCSC funding awarded during the contract year will be added, to the extent the new total direct costs of the total health care program reflected in the IDC rate agreement or other documentation of prior year expenditures demonstrate that amount;

(b) The awardee may propose to increase the amount for:

1. Expenditures of prior-year Secretarial funding for which IHS did not pay CSC funding in the year awarded and that the awardee carried over and expended in the current year; and
2. Increases in expenditures of Secretarial funding above the amount estimated;

(c) Reductions to the Secretarial amount shall be subtracted.

(d) Reductions to DCSC, if any, as specified in section 6-3.2D(2) shall be subtracted.

(ii) The IDC transferred in the Secretarial amount, negotiated pursuant to 25 U.S.C. § 5325(a)(2)-(3) and this chapter, shall be deducted from the total direct costs determined in (b)(1).

(iii) Pass-through and exclusion amounts will be based on the amounts negotiated pursuant to paragraph (a)(3) above, without further information being required of the awardee, though the awardee may propose adjustments based on expenditures throughout the year and the amounts may need to be adjusted if the awardee proposes increases pursuant to paragraph (b)(1).

(iv) Application of IDC rate: the applicable IDC rate - i.e., either the fixed carryforward rate or the final rate applicable to the contract funding year- will be applied to the direct cost base to determine the amount of IDC. If the IDC rate applicable to the contract year is not available within 90 days after the end of the performance period, at the awardee's request IHS shall apply the fixed carryforward rate for the funding year or one year prior, or the final rate for the funding year or two years prior (Footnote /3). The final IDC amount will not be determined until the awardee has received an IDC rate that meets the requirements of this subparagraph.

(v) The amount, if any, identified pursuant to paragraph (b)(2) shall be deducted from the total IDC amount determined in paragraph (b)(4) to determine the amount of indirect CSC need and any additional funding to be paid.

(vi) Once final reconciliation is complete and both parties agree on the amount of indirect CSC funding, the parties shall enter into a bilateral amendment/modification setting forth the amount as the indirect CSC funding required under the ISDEAA for the award. If any amount is still owed, IHS will make payment according to the payment provisions of the award. If the awardee was overpaid, the awardee will have the option to either: (a) reimburse IHS for the overpayment; or (b) agree that IHS will apply the overpayment to the awardee's CSC need in the subsequent year.

MANUAL EXHIBIT 6-3-F

Contract Support Costs (CSC) Negotiation Template (Fiscal Year 20XX)[1]

Check one box: ☐ **Estimate of CSC Need** ☐ **Final CSC Reconciliation**	
Check one box: **FA Amendment #** **FA Cumulative Funding Report (CFR) #**	
Date Completed:	

	Funding/Costs	Subtotals	Totals	Source of Inputs
A	Program (Service Unit) Funding	$655,943.00		Recurring and non-recurring eligible funding for the T/TO's programs, functions, services, or activities (PFSA) at the Service Unit level. Depending upon the structure of an awardee's indirect cost (IDC) rate, this may include buy-backs.
A.1	Expenditures from Carryover Funds (for which CSC was not funded previously), Net of Pass-throughs and Exclusions	$0.00		Pursuant to Section 6-3.2.E.1.b.1.b.i. This is determined by whether the parties included the funds in the CSC calculation in the year awarded and not by how the T/TO allocates funding in its accounting records.
B	Total Area Tribal Shares	$25,000.00		Recurring and non-recurring eligible funding for the T/TO's PFSA at the Area Level (Area Office Tribal Shares, or AOTS).
C	Total Headquarters Tribal Shares	$10,000.00		Recurring and non-recurring eligible funding for the T/TO's PFSA at the Headquarters Level (Headquarters Tribal Shares, or HQTS).
D	Total Secretarial Amount	$690,943.00		Items A + B + C (Total recurring and non-recurring eligible funding awarded under the Secretarial Amount)
E.1	IDC Associated With –Recurring Service Unit Shares	$0.00		Negotiated and calculated pursuant to Section 6-3.2.E.3 either: (a) case-by-case analysis, or (b) 97-3 method.

[1] This Template is a tool used by the Indian Health Service (IHS) for calculating and negotiating CSC. Neither this Template nor any other negotiation documents creates a contractual obligation on behalf of either IHS or a T/TO. The CSC amount that the parties agree is required under any Indian Self-Determination and Education Assistance Act (ISDEAA) agreement will be identified in the agreement itself.

	Funding/Costs	Subtotals	Totals	Source of Inputs
E.2	IDC Associated With Tribal Shares	$7,000.00		Negotiated and calculated pursuant to Section 6-3.2.E.4, either: (a) case-by-case analysis, or (b) 80-20 method.
E.3	Total IDC Identified As Associated With the Secretarial Amount	$7,000.00		This represents PFSA funded in the Secretarial amount determined to be duplicative of costs in the T/TO's IDC pool.
F	Direct Costs Funded through the Secretarial Amount		$683,943.00	Item D - E.3
G	Prior Year Direct CSC (DCSC) Need	$76,390.00		Per prior-year agreement.
H	Inflation Factor	1.6%		To be provided by IHS when final inflation rate for previous year becomes available (usually in November). Final rate would be used to update this amount and award T/TO inflation on DCSC at the end of IHS's first quarter. See Section 6-3.2.D.3
I.1	Current Year DCSC Need	$77,612.24		Incorporate either the prior-year DCSC need or, if there is a current-year renegotiation, the renegotiated amount.
I.2		$0.00	$77,612.24	
I.3	Startup and Pre-Award Need		$450.00	Summarizes the negotiation for non-recurring Pre-Award and Startup costs for new or expanded PSFAs in the upcoming year.
J	Total Direct Costs		$762,005.24	Items F + I, but subject to Section 6-3.2, Paragraphs E.1.a, Estimate of Indirect CSC Need and Funding Prior to the Contract Year and E.1.b, Determination of Final Amount for Indirect CSC Need and Funding.
K	Less: Pass-throughs and Exclusions		$14,262.29	The amount of pass-throughs and exclusions funded by IHS.
L	Direct Cost Base		$747,742.95	Item J - K
M	Most Current IDC Rate		25.12%	Current IDC rate. If T/TO has multiple IDC rates, enter blended rate and submit detailed calculation of the blended rate.
N	IDC Need (Non-Recurring) Based on IDC Rate		$187,833.03	Item L * M (Direct Cost Base x IDC Rate)

	Funding/Costs	Subtotals	Totals	Source of Inputs
O	Credit for IDC Associated with the Secretarial Amount		$7,000.00	Equals Item E.3 if the T/TO has higher than a 25.00% IDC rate; if T/TO has a rate of 25.00% or lower the credit in Item O is based on the total IDC need for Tribal Shares generated by the T/TO's rate plus the IDC Associated with Recurring Service Unit Shares (Item E.1)
P	Current-Year Indirect CSC Need		$180,833.03	Item N - O (Total IDC need less IDC associated with the Secretarial Amount.)
Q	IDC-Type Costs		$0.00	As negotiated pursuant to Section 6-3.2.E.2; see also Exhibit G, footnote 10. Enter $0 if the T/TO negotiates indirect CSC solely based on its IDC rate.
R	Current-Year Total CSC Need		$258,445.27	Items I.2 + I.3 + P +Q (Total need for DCSC, indirect CSC, and Pre-Award and Startup)
S	Current-Year DCSC Need		$77,612.24	Item I.2
T	Total DCSC Paid Year-to-Date		$0.00	Total DCSC funding paid to the T/TO year-to-date.
U	Current-Year Indirect CSC Need		$180,833.03	Items P + Q
V	Total Indirect CSC Paid Year-to-Date		$100,000.00	Total indirect CSC funding paid to the T/TO year-to-date.
W	Current-Year Startup and Pre-Award Need		$450.00	Item I.3
X	Total Startup and Pre-Award CSC Paid Year-to-Date		$0.00	Total Startup and Pre-Award CSC funding paid to the T/TO year-to-date.

Note Regarding Sub-Awards: The Template awards CSC on the direct cost base incurred by the T/TO. If the T/TO has an agreement(s) with a sub-awardee whose costs are eligible to be considered in the CSC need of the T/TO and the T/TO treats sub-awards as a pass-through cost when determining its direct cost base, the total CSC negotiated can be adjusted to incorporate eligible costs specifically identified for each sub-awardee (while recognizing sub-awardee pass-throughs and exclusions and the sub-awardee's IDC rate.