



<input type="radio"/> <b>G. Habeas Corpus/ 2255</b>  <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee	<input type="radio"/> <b>H. Employment Discrimination</b>  <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation)  *(If pro se, select this deck)*	<input type="radio"/> <b>I. FOIA/Privacy Act</b>  <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act)  *(If pro se, select this deck)*	<input type="radio"/> <b>J. Student Loan</b>  <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> <b>K. Labor/ERISA (non-employment)</b>  <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> <b>L. Other Civil Rights (non-employment)</b>  <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education	<input checked="" type="radio"/> <b>M. Contract</b>  <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder's Suits <input checked="" type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> <b>N. Three-Judge Court</b>  <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)

**V. ORIGIN**  
 1 Original Proceeding  
  2 Remand from State Court  
  3 Remanded from Appellate Court  
  4 Reinstated or Reopened  
  5 Transferred from another district (specify)  
  6 Multi-district Litigation  
  7 Appeal to District Judge from Mag. Judge

**VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)**  
 41 U.S.C. § 7101 et seq. Breach of contract and statute - underpayment of contract support costs to Indian Tribe

<b>VII. REQUESTED IN COMPLAINT</b>	CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 <input type="checkbox"/>	DEMAND \$ 25,084,903	JURY DEMAND: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
<b>VIII. RELATED CASE(S) IF ANY</b>	(See instruction)	YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>	If yes, please complete related case form

DATE: 10/01/13	SIGNATURE OF ATTORNEY OF RECORD /s/ Lloyd B. Miller
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**INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44**  
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

RIVERSIDE-SAN BERNARDINO )  
COUNTY INDIAN HEALTH, INC., )  
11555 ½ Potrero Road )  
Banning, CA 92220, )

Plaintiff, )

v. )

KATHLEEN SEBELIUS, )  
Secretary of the U.S. Dep't of Health )  
and Human Services )  
200 Independence Avenue, S.W. )  
Washington, D.C. 20201, )

and )

YVETTE ROUBIDEAUX, )  
Director of the U.S. Indian Health Service )  
801 Thompson Avenue, TMP 450 )  
Rockville, MD 20852, )

Defendants. )  
\_\_\_\_\_ )

Case No.: \_\_\_\_\_

**COMPLAINT**

Riverside-San Bernardino County Indian Health, Inc. (Riverside) complains and alleges as follows:

**I. INTRODUCTION**

1. This action is a follow-on case to Cherokee Nation v. Leavitt, 543 U.S. 631 (2005), Salazar v. Ramah Navajo Chapter, 567 U.S. \_\_\_, 132 S. Ct. 2181 (2012), and Arctic Slope Native Ass'n, v. Sebelius, 133 S. Ct. 22 (2012), on remand Arctic Slope Native Ass'n, v. Sebelius, 501 Fed. Appx. 957 (Fed. Cir. 2012) (Arctic Slope II). It involves the failure of the federal government, acting through the Secretary of the U.S. Department of Health and Human

Services (HHS or Secretary) and the Director of the Indian Health Service (IHS or Director), to pay in full various “contract support costs” (CSCs) to which Riverside was entitled by operation of law and by contracts entered into pursuant to the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. §§ 450–458ddd-2.

2. In each instance alleged below, the Secretary failed to pay Riverside’s full contract support cost requirements based upon the Secretary’s assertion that appropriated funds were not legally available to make such payments in full. In Ramah Navajo and Arctic Slope II, the Supreme Court and the Federal Circuit rejected assertions by the Secretary of the Interior and the Secretary of HHS, respectively, in connection with identical underpayments made to other contracting Tribes. 132 S. Ct. at 2186; 501 Fed. Appx. at 959. Both courts held the Secretaries’ failure to pay was a breach of contract. See 132 S. Ct. at 2090-91; 501 Fed. Appx. at 959.

3. The claims covered by this Complaint assert that in Fiscal Year (FY) 2006, FY 2007, FY 2008, FY 2009, FY 2010, and FY 2011, the Secretary breached her contracts by failing to pay in full the contract support costs which the Secretary acknowledged were due and owing to Riverside under Riverside’s contracts. Riverside seeks as damages the unpaid funds which the Secretary should have paid, and would have paid at the time had there been no breach, and the associated lost third-party collections which Riverside would have collected had each year’s unpaid contract support costs been fully paid. These are the sums necessary to put Riverside back in the position it would have been in had the Secretary not breached her obligations under the ISDA and Riverside’s contracts.

4. Riverside also claims that the Secretary breached each of Riverside’s contracts by improperly failing to make adjustments to the indirect cost rates employed by the Secretary to

calculate Riverside's indirect contract support cost requirement as part of the contract price, and that such adjustments were necessary in order to lawfully calculate the full indirect costs associated with carrying out the Secretary's contracted programs. Riverside seeks damages for the Secretary's unlawful action in this respect as well.

## **II. JURISDICTION**

5. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1331, 1362; 25 U.S.C. §§ 450m-1(a), (d) of the ISDA; and 41 U.S.C. § 7103–7107 of the Contract Disputes Act (CDA).

## **III. PARTIES**

6. Riverside San-Bernardino County Indian Health, Inc. is a consortium of ten federally-recognized Tribes—the Agua Caliente, Cahuilla, Fort Mojave, Morongo, Pechanga, Ramona, San Manuel, Santa Rosa, Soboda, and Torres-Martinez Tribes—that provides health care services to beneficiaries of IHS programs and other eligible individuals. Its main office is in Banning, California. Riverside qualifies as a “tribal organization” under 25 U.S.C. §450b(1) and as an “Indian tribe” under 25 U.S.C. §458aaa(b).

7. Kathleen Sebelius is the Secretary of the U.S. Department of Health and Human Services. Secretary Sebelius exercises delegated responsibilities from Congress pursuant to the ISDA and other applicable law. Dr. Yvette Roubideaux is the Director of the Indian Health Service. Director Roubideaux exercises authority delegated to her by the Secretary to carry out the Secretary's responsibilities under the ISDA and other applicable law. As used throughout this Complaint (and unless context commands otherwise), the terms “Secretary,” “HHS,” “Director” and “IHS” are used interchangeably.

#### **IV. FACTS AND GENERAL ALLEGATIONS**

##### **A. The Contract Documents.**

8. Riverside operated various Federal health care programs, functions, services, and activities of the Indian Health Service within the IHS California Service Area pursuant to contracts between the IHS and Riverside. From July 15, 1996 to 2008, Riverside has operated federal IHS programs pursuant to Contract No. 235-96-0022 with the Indian Health Service, as initially authorized under Title I of the ISDA (25 U.S.C. §§450-450n).

9. From February 1, 2005 to present, Riverside also operated federal IHS programs pursuant to a Compact with IHS, as authorized under Title V of the ISDA (25 U.S.C. §§458aaa-458aaa-18). The tribally-operated federal IHS programs currently include six health clinics and one outreach office and associated IHS programs, functions, services and activities.

10. The Contract and the Compact are the basic contract documents at issue in this case. The terms of the Contract and the Compact are required by and inextricably intertwined with the ISDA. The Title I Contract states that “[e]ach provision of the [ISDA] . . . and each provision of this Contract shall be liberally construed . . . to transfer the funding and the following related functions, services, activities, and programs . . . from the Federal Government to the Contractor. Contract, Art. (a), § 2. Similarly, Title V (concerning Riverside’s Compact) provides that “[e]ach provision of this part and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe. 25 U.S.C. §458aaa-11(f).

11. The Compact was written to enable “tribal self-governance” and “intended to transfer the power to decide how federal programs, services, functions and activities (or portions thereof) shall be funded and carried out from the Indian Health Service to [Riverside] as authorized by the Tribes and Bands [Riverside] serves”. Compact, Art. I, § 1.2, 1.1.1, 1.1.3. Consistent with this purpose, the Compact relies heavily on the provisions of the ISDA.

12. According to Riverside’s Compact, the core purpose of the contracts between the IHS and Riverside was:

to enable [Riverside] to re-design health programs, activities, functions, and services of the Indian Health Service; to reallocate funds for programs, activities, functions, or services according to the priorities of [Riverside]; to enhance the effectiveness and long-term financial stability of [Riverside]; and to streamline the federal Indian Health Service bureaucracy.

Compact, Art. I, § 1.2, 1.1.2.

13. The contract documents also include Riverside’s Funding Agreements (FAs), which can cover single or multiple year periods. See generally 25 U.S.C. § 458aaa-4(e) (“[E]ach funding agreement shall remain in full force and effect until a subsequent funding agreement is executed.”). In FY 2006 Riverside operated pursuant to the FY 2005 FA for its Title V funds. This FA remained in effect through FY 2011. FAs for Title I funds are to be issued annually. See generally 25 U.S.C. 450l(c). Thus, in FY 2006 Riverside operated its Title I programs pursuant to the FY 2006 FA; in FY 2007 it operated its Title I programs pursuant to the FY 2007 FA, and in FY 2008 Riverside operated its Title I programs pursuant to the FY 2008 FA. Further, the FAs are often amended throughout the year to take account of new funds available to Riverside. Riverside’s FAs were incorporated in their entirety into the Contract and the Compact. See Contract, Art. (f)(2)(B); Compact, Art. V, § 1.

14. The contract documents that are controlling for the FY 2006 through FY 2011 claims asserted here are the Title I Contract, the Title V Compact, the FAs in effect for that year under Contract or the Compact, modifications to those documents, and other statutory and administrative provisions incorporated by law into such contract documents (including provisions of the Title I and V of the ISDA).

**B. The Contract Price.**

15. The contractual obligation of Riverside was to administer certain health care programs and provide certain health care services and functions previously provided by IHS. The contractual obligation of IHS, in return, was to make certain specified payments to Riverside; in other words, to pay the contract price.

16. During the fiscal years at issue here, Riverside's contracts were authorized by either Title I, 25 U.S.C. §§ 450f-450n, or Title V of the ISDA, 25 U.S.C. §§ 458aaa-458aaa-18. Section 508(c) of Title V of the ISDA, 25 U.S.C. § 458aaa-7(c), requires that "[t]he Secretary shall provide funds under a funding agreement under this part in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts under this subchapter, including amounts for direct program costs specified under section 450j-1(a)(1) of this title and amounts for contract support costs specified under section 450j-1(a) (2), (3), (5), and (6) . . . ." Thus, at all relevant times, 25 U.S.C. §§ 450j-1(a)(2), (3), and (5) and related funding provisions of Title I of the ISDA, controlled the Secretary's funding obligations under both the Compact and the contract. These are the same provisions that the Supreme Court construed in Cherokee Nation and Ramah, and that the Federal Circuit construed in Arctic Slope II.



17. The first referenced section, section 450j-1(a)(1), provides for the direct program funding, also called the “Secretarial amount,” representing “the amount the Secretary would have expended had the government itself [continued to] run the program.” Arctic Slope Native Ass’n, v. Sebelius, 629 F.3d 1296, 1298–99 (Fed. Cir. 2010), vacated on other grounds 133 S. Ct. 22 (2012). The FAs determined a contract price for the Secretarial amount prior to commencement of the contract. The Secretarial amount was subject to being increased or decreased during the contract year to the extent the appropriation supporting the contracted program increased or decreased. This would be done by a mid-year contract modification. All of Riverside’s contracts had mid-year amendments and modifications of this kind throughout the life of the contracts.

18. In addition to paying the “Secretarial amount,” the ISDA and FAs also requires that the IHS pay contract support costs. Section 450j-1(a)(2) provides that “[t]here shall be added to the amount required by paragraph (1) [i.e. to the Secretarial amount required by § 450j-1(a)(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 . . . .” 25 U.S.C. § 450j-1(a)(2).

19. These contract support costs are mostly “administrative expenses.” Cherokee v. Leavitt, 543 U.S. at 634. Contract support costs fall into two main categories: indirect contract support costs, “such as special auditing or other financial management costs,” id. at 635 (citing § 450j-1(a)(3)(A)(ii)), and direct contract support costs, “such as workers’ compensation insurance” for certain annually recurring costs attributable directly to the personnel and facilities employed or used to carry out the federal IHS programs being contracted under the ISDA, id.

(citing § 450j-1(a)(3)(A)(i)). Contract support costs also include non-recurring one-time “startup costs,” id. (citing § 450j-1(a)(5)).

### **C. The Calculation of Contract Support Costs.**

20. During the fiscal years at issue here, IHS calculated and paid contract support costs pursuant to, first, an IHS Circular and, later, the IHS Manual (collectively IHS Manual or IHM). The IHS Manual explains how CSC requirements are to be determined. IHS calculated the contract support cost requirement associated with Riverside’s FY 2006 through FY 2011 contracts pursuant to the IHS Manual.

21. Pursuant to the IHS Manual, IHS “determine[s]” a contractor’s “contract support cost requirement” prior to contract award. See IHM § 6-3.1E(5). IHS does this by calculating the contractor’s indirect contract support costs and direct contract support costs; by reviewing those costs against the Secretarial amount to eliminate any duplicative costs; and by then setting the net amount as the contractor’s “contract support cost requirement.” This is how IHS calculated Riverside’s contract support cost requirement in each of the years at issue here. This, then, is the amount for contract support costs which IHS is obligated to pay under the contract, and is the amount IHS would have paid each year had the agency believed it had sufficient appropriations each year to make such payment.

#### *i. Indirect contract support costs.*

22. Indirect contract support costs are the bulk of the contract support costs. The IHS Manual instructs how indirect contract support cost requirements will be determined in any given year. See IHM § 6-3.2E. Riverside’s indirect contract support cost requirements were

determined pursuant to the IHS Manual in connection with the Nation's FY 2006 through FY 2008 contracts.

23. Generally, indirect contract support costs are determined by a reference to a tribal contractor's "indirect cost rate." 25 U.S.C. § 450b(g). As the Secretary correctly told the Court in Cherokee,

[m]ost contract support costs are indirect costs "generally calculated by applying an 'indirect cost rate' to the amount of funds otherwise payable to the Tribe." Brief for Federal Parties 7; see 25 U.S.C. §§ 450b(f)–(g).

543 U.S. at 635. This is how IHS calculated Riverside's indirect contract support costs here.

24. The Manual instructs IHS to determine the contractor's contract support cost requirement "by applying the negotiated [indirect cost] rate(s) to the appropriate direct cost base . . . ." IHM § 6-3.2E(1). In so doing, IHS uses the contractor's most recent indirect cost rate so long as it is not "more than three-years old." Id. IHS multiplies the contractor's most recent indirect cost rate against the direct cost base paid under the contract (i.e., the Secretarial amount less appropriate exclusions) to calculate the amount due for indirect contract support costs. The direct cost base also includes all direct contract support costs. See IHM § 6-3.4E(1) ("The DCSC, along with other Section 106(a)(1) funds, will be considered part of the recurring base of the award."); IHM § 6-3.3A(3) ("[CSC] funding is based on the total amount associated with the [programs, functions, services, and activities] awarded from the date of assumption through the end of the FA performance period, not to exceed 12 months."). If, as was the case here, the contractor has contracted to operate Area or Headquarters "tribal shares," an adjustment is made to reflect that 20% of such tribal shares are not to be included in the direct cost base and are

instead to be considered a credit against the indirect contract support cost requirement. IHM § 6-3.2F(2). This is how IHS calculated Riverside’s indirect contract support costs here.

25. In broad terms, the rate used to calculate indirect contract support costs is determined by comparing the contractor’s overall administrative or overhead costs for all of a contractor’s functions (the indirect cost pool) as a percentage of the total money spent by the contractor for all of the programs it operates (the direct cost base).

26. Tribal contractors primarily use two different types of indirect cost rates: either a “provisional-final” rate or a “fixed with carry forward” rate. For each year at issue here, Riverside had two “provisional-final” rates for different aspects of its contracted operations. With a “provisional-final rate,” the contract price for contract support costs is subject to adjustment for that year if IHS initially employed a “provisional” rate to calculate the contract price, and if the final rate for that same period differed. See IHM § 6-3.4E.3 (explaining impact of a change when a provisional rate differs from that of a final rate). Each rate was calculated by Riverside’s “cognizant agency,” see Office of Management and Budget (OMB) Cir. A-87, § B.6, which for Riverside was the Division of Cost Allocation within the Department of Health and Human Services (DCA). For the contract years at issue here, DCA set Riverside’s provisional and final indirect cost rates as follows:

Year	Riverside’s Provisional Rate for “Total direct costs less items of equipment and other capital expenditures, major subcontracts, and hospitalization and other fees related to patient care.”	Riverside’s Provisional Rate for “Total costs of contract care.”	Riverside’s Final Rate for “Total direct costs less items of equipment and other capital expenditures, major subcontracts, and hospitalization and other fees related to patient care.”	Riverside’s Final Rate for “Total costs of contract care.”
2006			45.1%	11.6%

2007	45.1%	11.6%	46.2%	12.2%
2008	46.2	12.2%	47%	14.8%
2009	47%	14.8%	47.1%	17.8%
2010	47.1%	17.8%	47.4%	14.7%
2011 <sup>1</sup>	47.4%	14.7%	47.4%	14.7%

If a subsequent audit of a contract year showed that the rate for that year should have been higher (or lower), i.e., that the provisional rate did not accurately compensate Riverside for its actual indirect costs incurred for the year, a compensating adjustment would be made in the year's final rate.<sup>2</sup>

27. The product of applying the agency's indirect cost rate to the direct cost base is the contractor's indirect contract support cost requirement. This is the process IHS used to calculate Riverside's indirect contract support cost requirement in FY 2006-FY 2011.

*ii. Direct contract support costs.*

28. The IHS Manual also instructs how direct contract support cost requirements will be determined in any given year. Riverside's direct contract support cost requirements were determined pursuant to the IHS Manual in connection with Riverside's FY 2006-FY 2011 contracts.

29. The IHS Manual instructs that direct contract support costs are negotiated according to detailed guidelines set forth in the Manual and an Appendix. IHM § 6-3.2D; IHM Exhibit 6-3-H. Once negotiated, direct contract support costs are paid on a "recurring basis" (IHM §§ 6-3.2D, 6-3.2D(2)), meaning they "do not require annual rejustification to the Secretary

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<sup>1</sup> The rates provided for 2011 are the provisional rates, as a final rate has not yet been received.

<sup>2</sup> OMB Cir. A-87, Attachment E, § B.7 ("Provisional rate' means a temporary indirect cost rate applicable to a specified period which is used for funding, interim reimbursement, and reporting indirect costs on Federal awards pending the establishment of a 'final' rate for that period." "Final rate' means an indirect cost rate applicable to a specified past period which is based on the actual allowable costs of the period. A final audited rate is not subject to adjustment.").

. . . .” IHM § 6-3.1E(12). See also IHM § 6-3.3B(2) (“As stated in paragraph 6-3.2D, DCSC funding is provided on a recurring basis.”); IHM § 6-3.4E(1) (“The amount of the DCSC is provided to the awardee on a recurring basis and will not be reduced, but the amount may be renegotiated annually at the option of the awardee.”). Once negotiated, direct contract support costs are increased “by the amount needed to increase prior year DCSC funding by the national OMB non-medical inflation rate . . . .” IHM § 6-3.3B(2).

30. The IHS Manual provides a final step in connection with the determination of a Tribe’s contract support cost requirement, concerning duplicative costs. In this last step, all costs are reviewed for duplication to verify that the determined contract support costs do not duplicate contract funds being paid to a contracting Tribe as part of the Secretarial amount. IHM § 6-3.2B. At the conclusion of this process, “[t]his adjusted CSC requirement is the Section 106(a)(2) amount that the awardee is eligible to receive, subject to available appropriations.” Id. (emphasis added). This “adjusted CSC requirement” is the contract price for the contract support costs to be paid by IHS to a contracting Tribe.

#### **D. Other Terms of the Contracts.**

31. Riverside’s contracts, together with the ISDA provisions incorporated into the contracts by operation of law, required that Riverside be paid no less than the full amount of Riverside’s contract support cost requirement as determined under the IHS Manual.

##### *i. The timing of payments and earned interest.*

32. The contract price is to be determined at the beginning of the contract year. The ISDA provides that “[u]pon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of

this section . . . .” 25 U.S.C. § 450j-1(g) (citing § 450j-1(a)) (emphasis added); see also 25 U.S.C. § 458aaa-7(a) (authorizing “annual transfer of funding to be made at the beginning of a fiscal year”). Subsection (a), in turn, provides that the “contract price” consists of the two amounts—the Secretarial amount and the contract support costs—that “shall be added” to the contract. Necessarily, both of these amounts would be determined and fixed “[u]pon the approval of a self-determination contract.” In the event of additional payments, the Title V FA provided that “[u]pon enactment of any [Appropriations] Act or law, the amount of funding provided to [Riverside] in this Funding Agreement shall be adjusted as necessary. after Riverside has been notified of such pending action. . . .” 2005 Title V FA § 6.1.

33. Although the contract price is to be set at the commencement of the contract year, the statute permits the parties to choose whether the contract payments are to be made on an annual, semi-annual or quarterly basis. Riverside and IHS here agreed in the FAs for the payment to be made in a single lump sum annual payment at the beginning of the contract year. See, e.g., 2005 Title V FA § 5, 5.1.1 (“For each such funding year covered by the Compact, the Secretary shall make available the funds specified for that funding year under the Funding Agreements by paying the respective total amount as provided for in the Funding Agreement in advance lump sum . . . .”); Title I Contract “Payment Information” designating “Annual Lump Sum Advance Payment; 2006 Title I FA (indicating amounts of lump sums to be provided). Thus, under the express terms of the contracts, full payment to Riverside was due at the commencement of the contract year.

34. Riverside’s Contract, the Compact and the statute both provide that funds paid to Riverside could earn interest, and that any such interest income could be used by Riverside for

the provision of additional services and would not diminish the amount due to Riverside. See Compact Art. 2, § 2.4, 2.4.2 (Riverside “shall be permitted to retain interest earned on funds advanced pending disbursements as authorized by law. Interest earned on advances shall not diminish the amount of funds [Riverside] is authorized to receive under its Funding Agreement in the year earned or in any subsequent year.”); 25 U.S.C. §458aaa-7(h) (“An Indian tribe is entitled to retain interest earned on any funds paid under a compact or funding agreement to carry out governmental or health purposes and such interest shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the interest is earned or in any subsequent fiscal year.”) See also 25 U.S.C. §450j-1(m) (addressing right to retain and spend program income)

*ii. The right to collect third-party program income.*

35. When IHS operates a health facility, it is generally authorized to bill and collect payments from Medicare, Medicaid and private insurers for services provided to covered patients. Such collections generate funds supplemental to funds appropriated to IHS. See 25 U.S.C. §§ 1621e, 1645; 42 U.S.C. §§ 1395qq, 1396j. This is because an IHS health program is a “payer of last resort.” 25 U.S.C. § 1623(b) (“Health programs operated by the Indian Health Service, Indian tribes, tribal organizations, and Urban Indian organizations . . . shall be the payer of last resort for services provided by such Service, tribes, or organizations to individuals eligible for services through such programs, notwithstanding any Federal, State, or local law to the contrary.”)

36. The Compact with Riverside also provided that Riverside would engage in such third-party billing and collection. Section 3.7 of the Compact provided “[a]ll Medicare,



Medicaid or other program income earned by [Riverside] shall be in addition to that negotiated in the Funding Agreement and [Riverside] may retain such income, including Medicare/Medicaid, and expend such funds in the current year or future years. Such additional funds shall not result in any off-set or reduction in the negotiated amount of the Funding Agreement.” Thus, Riverside was entitled to collect supplemental revenues that would be generated by billings to and payments by federal, state and private insurers.

37. Pursuant to the authorities noted above, Riverside billed and collected revenues from Medicare, Medicaid and private insurers for services rendered to covered beneficiaries of those programs. Riverside’s annual audits for all of the subject years were regularly provided to IHS and they set forth Riverside’s collections from Medicare, Medicaid and private insurance plans.

*iii. The right to spend, reallocate or rebudget funds.*

38. Riverside’s Compact authorized Riverside, to “redesign or consolidate programs, services, functions, and activities (or portions thereof) included in the Funding Agreement and to reallocate or redirect funds for such programs, services, functions, and activities (or portions thereof) in any manner in which [Riverside] deems to be in the best interest of the health and welfare of the Indian community being served. . . .” Compact, Art. III, § 3.5. Similarly, the ISDA provides that Riverside may “reallocate or redirect funds for such [contracted] programs, services, functions, and activities (or portions thereof) in any manner which the Indian tribe deems to be in the best interest of the health and welfare of the Indian community being served . . . .” 25 U.S.C. § 458aaa-5(e). Title I also provides that “a tribal organization that carries out a self-determination contract may, with respect to allocations within the approved budget of the

contract, rebudget to meet contract requirements, if such rebudgeting would not have an adverse effect on the performance of the contract.” 25 U.S.C. § 450j-1(o).

39. Funds paid under the Compact were not required to be spent in the year for which they were paid. See Compact, Art. III, § 3.8 (Any funds “allocated in accordance with the Funding Agreement . . . may be expended by [Riverside] in accordance with its budget for the year for which the funds are appropriated or carried over and expended in any subsequent funding year, and such carry-over shall not diminish the amount of funds [Riverside] is authorized to receive under its Funding Agreement for any subsequent funding year.”). The related ISDA provision similarly states that “[a]ll funds paid to an Indian tribe in accordance with a compact or funding agreement shall remain available until expended. In the event that an Indian tribe elects to carry over funding from 1 year to the next, such carryover shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in that or any subsequent fiscal year.” 25 U.S.C. § 458aaa-7(i). Title I contains a similar provision, see 25 U.S.C. §13a (authorizing expenditure of contracted funds in “succeeding fiscal year”).

*iv. Interpretation.*

40. In interpreting the IHS’s obligations, the Supreme Court has said that “[c]ontracts made under ISDA specify that ‘[e]ach provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor . . . .’” 25 U.S.C. § 450l(c), (model agreement §1(a)(2)).” Ramah, 132 S. Ct. at 2191; see also 25 U.S.C. §458aaa-11(f) (similar Title V provision); The Supreme Court has interpreted this language to mean that the Government “must demonstrate that its reading [of the ISDA] is clearly required by the statutory

language.” Ramah, 132 S. Ct. at 1291. See also Compact, Art. IV, § 23 (“In the implementation of the Compact, the Secretary, to the extent feasible, shall interpret federal laws and regulations in a manner that facilitates this Compact in accordance with Section 303(e) of the Act.”); 25 U.S.C. §458aaa-11(a) (“[t]he Secretary shall interpret all Federal laws, Executive orders, and regulations in a manner that will facilitate—(1) the inclusion of programs, services, functions, and activities (or portions thereof) and funds associated therewith, in the agreements entered into under this section; [and] (2) the implementation of compacts and funding agreements entered into under this part . . .”).

#### **E. The Claims Presented.**

41. Riverside’s FY 2006-FY 2011 claims are based on the contract documents—the Contract, the Compact, Funding Agreements, Indirect Cost Rate Agreements and others—that are part of the Record.

42. Riverside’s contracts required that Riverside be paid no less than the full amount of Riverside’s contract support cost requirement as determined under the IHS Manual, subject only to the availability of appropriations. Under Cherokee, Ramah, and Arctic Slope II, appropriations during each of FY 2006 through FY 2011 were legally available to pay Riverside’s contract support cost requirement in full.

43. During each of fiscal years 2006 through 2011, the Secretary failed to pay the full amount of Riverside’s contract support cost requirement. The Secretary’s failure was contrary to Riverside’s statutory and contractual rights as set forth by the Supreme Court in Cherokee and Ramah, and as further specified in Riverside’s contracts with IHS and in the ISDA. See 25 U.S.C. §§ 450j-1(a)(2), 450j-1(a)(3), 450j-1(a)(5), 450j-1(b), 450j-1(d)(2), 450j-1(g).

44. On September 21, 2012, Riverside presented a claim letter to the IHS for breach of contract claims for FY 2006 through 2011. The letter claimed damages from the Secretary's breach of the duty to pay Riverside the full amount of contract support cost requirement calculated pursuant to IHS's policies, including amounts for the indirect contract support cost shortfall, the direct contract support cost shortfall, indirect contract support cost shortfall on the unpaid direct contract support cost amount, and the lost third-party revenue damages. Second, the letter claimed damages from the Secretary's breach of the duty to properly calculate the indirect administrative CSCs that Riverside was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997). Riverside sought "without limitation, all other damages arising out of IHS's failure to pay full contract support costs as required by the ISDEAA and [Riverside's] contracts."

45. The IHS failed to render a decision on these claims. In the face of this failure, Riverside has deemed the contracting officer's inaction to be a denial of all claims (41 U.S.C. § 7103(f)(5)). Riverside timely appeals to this Court from this denial.

#### **F. IHS Shortfall Reports.**

46. The Secretary has conceded that Riverside did not receive full payment of the contract support costs due to Riverside in each covered year, because the Secretary contemporaneously documented the underpayment each year. The ISDA requires IHS to report to Congress each year on the agency's calculation of the contract support costs that are due, and what it actually paid against what was due. 25 U.S.C. § 450j-1(c); see also IHM § 6-3.5B (requirement to prepare annual reports). Because IHS has chronically underpaid the amounts due to tribal contractors, Congress mandated that the annual report also include "an accounting

of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted . . . .” 25 U.S.C. § 450j-1(c)(2). These reports accordingly have become known as the “IHS Contract Support Cost Shortfall Reports.”

47. These Reports show the math which IHS employed to calculate Riverside’s indirect contract support cost requirement, including the “Direct Cost Base” (or “program base”); Riverside’s “IDC [indirect cost] Rate;” and the resulting “IDC [indirect cost] Need.” E.g. Fiscal Year 2008 IHS Contract Support Cost Shortfall Report, California Area, cols. N, O, Q. (Each Report was prepared a few months after the close of each fiscal year, so that the “2008 Report” actually details the data for fiscal year 2007, and so forth). The Reports also show the inflation-adjusted amount of direct contract support costs due. Id., col. I (“DCSC [Direct Contract Support Cost] Negotiated Need”).

48. The Reports were prepared after an opportunity for consultation with Riverside (IHM § 6-3.5B(1)); they were certified by the California Area Office as accurate (IHM § 6-3.5B(1)); and they were approved by the IHS Director (IHM § 6-3.5B(3)).

49. The IHS Shortfall Reports understate the actual amount of the shortfall owed to Riverside. For instance, they do not take account of the fact that IHS owes additional indirect contract support costs on any portion of the direct contract support cost requirement that was not actually paid to Riverside. The Reports also fail to take account of the third-party revenue damages owed to Riverside as a direct consequence of the Secretary’s breach of contract. Thus, the amounts set forth in the annual Shortfall Reports are the minimum additional amounts IHS would have paid Riverside had IHS each year fully paid all of Riverside’s contract support cost requirements.

50. Nonetheless, the Shortfall Reports constitute binding party admissions by the Secretary of the minimum additional contract support cost amounts owed by the Secretary to Riverside. The IHS is estopped from denying the accuracy, admissibility and completeness of these congressionally-mandated Shortfall Reports.

**V. FIRST CAUSE OF ACTION  
(Breach of Contract Shortfall Claim)**

51. Riverside incorporates all previous allegations of fact and law into this Cause of Action.

52. Riverside's contracts required the Secretary to fully fund Riverside's contract support cost needs. In doing so, the contracts incorporated the statutory provisions of the ISDA requiring full payment of contract support costs. In the Cherokee, Ramah and Arctic Slope decisions, the Supreme Court and the Federal Circuit affirmed the Government's duty to fully pay these contracts in the years at issue here.

53. Despite the Government's duty to pay Riverside the full contract price of its FY 2006 through FY 2011 contracts, the Secretary failed to do so. This failure was recorded in the Shortfall Reports, compiled by the agency and signed by the Secretary, certifying the amount of underpayment every year. In failing to pay Riverside the full contract price of its contracts, the Government breached its contracts with Riverside.

54. General contract principles control the calculation of damages in government contract litigation. This is so because "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." Winstar v. United States, 518 U.S. 839, 895 (1996) (quoting Lynch v. United States, 292 U.S. 571, 579 (1934)). See also Mobil Oil Exploration & Producing Se., Inc.

v. United States, 530 U.S. 604, 607–08 (2000) (quoting Winstar and relying on the RESTATEMENT (SECOND) OF CONTRACTS (1981) (“RESTATEMENT”)); Franconia Assocs. v. United States, 536 U.S. 129, 141 (2002) (quoting Mobil Oil and applying principles of general contract law).

55. General contract law on the issue of damages is clear: a contractor is entitled to damages which will protect “his ‘expectation interest,’ which is his interest in having the benefit of his bargain *by being put in as good a position as he would have been in had the contract been performed . . .*” RESTATEMENT § 344(a) (emphasis added).

56. In order to fulfill Riverside’s “expectation interest” arising from the Secretary’s breach of contract for failing to pay the contract amount owed, Riverside is entitled to three categories of damages, as set forth below.

**A. Damages for Underpayment of Direct and Indirect Contract Support Costs.**

57. During each of years FY 2006 through FY 2008, the Secretary failed to meet her statutory and contractual obligations to Riverside by failing to pay Riverside’s full contract support cost requirement, as recorded in the Shortfall Reports. The Secretary’s annual failure to pay Riverside the full contract support cost requirement constitutes for each year a separate breach of statutory and contractual rights.

58. Riverside’s contracts with the Secretary were fixed-price contracts. Each year the Secretarial amount was negotiated and fixed, the direct contract support cost amount was negotiated and fixed, and the indirect cost amount was based on a “final” rate. None of these amounts was made payable on a “reimbursement” basis, none was dependent upon receipt of invoices or vouchers, and none was refundable to the Secretary. All the indirect and direct

contact support cost sums identified by the Secretary in her CSC Shortfall Reports in connection with Riverside's contracts would have been paid in full to Riverside but for the Secretary's conclusion that appropriations were unavailable to make those payments. Thus, the Government is liable to Riverside for the unpaid amount of Riverside's full direct and indirect contract support cost requirements, together with accrued interest and attorneys' fees and costs, as specifically prayed below.

**B. Damages for Failure to Pay Indirect Contract Support Costs on Direct Costs Owed.**

59. Contract support costs are made up of direct costs and indirect costs. Direct contract support costs, comprising expenses directly attributable to a certain program or activity, are, by definition, not added to the indirect cost pool. Instead, these costs are part of the direct cost base. IHM § 6-3.4E(1) ("The DCSC, along with other Section 106(a)(1) funds, will be considered part of the recurring base of the award."). As part of the direct cost base, these direct costs are eligible for indirect contract support costs. In administering these direct costs, Riverside incurs costs which, under the IHS Manual, are to be included in its indirect contract support costs. See id.

60. The failure of the IHS to fully fund Riverside's direct contract support costs resulted in a corresponding shortfall in Riverside's indirect contract support cost payments, over and above the shortfall in indirect contract support costs recorded in the Shortfall Reports. To make Riverside whole, IHS is required to pay not only the underfunded amount of direct contract support costs but also an amount equal to this underfunded amount multiplied by Riverside's indirect cost rate.



### C. The Damages for Lost Third-Party Revenues.

61. Expectancy damages for breach of the Secretary's contracts with Riverside are measured by the amounts required to place Riverside in the position it would have been in had there not been a breach. Thus, "an award of damages will often include an amount representing the profits that were lost as a result of the defendant's breach of contract, because *only by awarding lost profits will the plaintiff be made fully whole.*" WILLISTON ON CONTRACTS § 64:2 (4th ed.) (emphasis added); see also RESTATEMENT § 347(b) (recoverable damages may include "incidental or consequential loss, caused by the breach").

62. In order to recover damages in the form of lost profits, a contractor must establish three elements by a preponderance of the evidence: foreseeability, causation and reasonable certainty; in other words that (1) the lost profits were actually foreseen by the breaching party at the time of contracting (or else were reasonably foreseeable by that party); (2) the Government's breach caused the contractor's loss; and (3) the amount of the loss can be established with reasonable certainty. Anchor Sav. Bank, FSB, v. United States, 597 F.3d 1356, 1361 (Fed. Cir. 2010); see also Bluebonnet Sav. Bank, FSB, v. United States, 266 F.3d 1348, 1355 (Fed. Cir. 2001) (citing RESTATEMENT §§ 347, 351, 352).

63. Riverside's receipt of collections from Medicare, Medicaid and private insurance plans for services provided by Riverside was both an integral part of the Compact, see Compact § 3.7, and was actually foreseeable. Indeed, the Government uses the prospect of these third-party revenues as a means of encouraging Tribes to enter into self-governance contracts. See OFFICE OF TRIBAL SELF-GOVERNMENT, INDIAN HEALTH SERVICE, U.S. DEP'T OF HEALTH AND

HUMAN SERVICES, THE INDIAN HEALTH SERVICE TRIBAL SELF-GOVERNANCE PROGRAM, available at <http://www.ihs.gov/selfgovernance/documents/zcard.pdf>.

64. At all relevant times the Government was well aware that the failure to pay full contract support costs to Riverside would result in reduced services and thus reduced collections from third-party payers. Since at least 1987, the federal government has been aware that when Tribes face contract support cost shortfalls, they are forced to use program money to cover the shortfall, which “results in decreased amounts of funds for services,” see S. REP. NO. 100-274 at 12 (1987), and that reduced program services meant there would be less billing to and collections from third-party payers. It was thus reasonably foreseeable that, if IHS underpaid Riverside the amounts due under Riverside’s contracts for contract support costs, Riverside would receive fewer collections from third-party payers.

65. The Government’s breach caused Riverside to lose third-party collections. Because of the Government’s failure to fully fund Riverside’s contract support costs, Riverside was required to divert program funds to pay for the shortfall in contract support cost payments. This resulted in a reduction of program services that Riverside could provide, and a consequent reduction in billings to third party payers. Thus, but for the Government’s breach in failing to pay full contract support costs, Riverside would have provided additional medical program services for which Riverside would have collected additional revenues.

66. Riverside’s damages for lost third-party collections are provable to a reasonable certainty based on the actual yearly rate of return on the services it did provide under its contracts. Riverside’s income from Medicare, Medicaid and private insurance plans is regularly reported in Riverside’s audits. From those audits one can readily calculate the ratio that actual

collections bore to IHS contract payments in each year. This actual historical rate of return provides a reasonable basis for calculating Riverside's damages for lost third-party collections. See Ramah Navajo School Board v. Sebelius, No. 6:07-cv-00289 at 62 (D.N.M. May 9, 2013) (finding that calculating third-party revenues based on a collection rate to be "a reasonable and satisfactory methodology" and on that basis awarding damages to an ISDA contractor).

67. The record here shows that (1) Riverside's lost collections from Medicare, Medicaid and private insurance plans were reasonably foreseeable by the Secretary; (2) the Secretary's breach by failing to pay in full the contract price caused these losses; and (3) the amount of the losses can be established with reasonable certainty by reference to Riverside's audits. Riverside is therefore entitled to recover additional damages against the Secretary to compensate for these losses in third-party revenues.

68. The Government is liable to Riverside in damages for the amounts required to place Riverside back in the position it would have been in had there been no breach of the Secretary's duty to pay Riverside's contract support costs in full, including not only the unpaid contract support costs but also the associated lost third-party collections.

## **VI. SECOND CAUSE OF ACTION (Miscalculated Rate Claim)**

69. Riverside incorporates all previous allegations of fact and law into this Cause of Action.

70. During each of FY 2006 through FY 2011, the Secretary failed to meet her statutory and contractual obligations to Riverside by failing to pay Riverside the full amount of indirect contract support costs to which Riverside was entitled under the ISDA. IHS, pursuant to its CSC Circulars, acted unlawfully by using, as an automatic proxy for the determination of

such CSCs, the unadjusted annual “indirect cost rate” assigned to Riverside by the CDA. The “indirect cost rate” annually assigned to Riverside was to be used strictly for certain cost-recovery accounting purposes, and the applicable OMB guidelines caution that such rates are not to be used to determine a federal agency’s funding obligations under contracts or grants. See, e.g., OMB Cir. A-87 (“The principles are for determining allowable costs only. They are not intended to identify the circumstances or to dictate the extent of Federal and governmental unit participation in the financing of a particular Federal award.”), 2 C.F.R. § 225.20 (same). Nonetheless, each year IHS, by policy and practice, required that the amount of Riverside’s indirect CSCs be determined by application of Riverside’s most recent “indirect cost rate” assigned to Riverside by the DOI. This practice was contrary to law, as held in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997).

71. The Secretary’s reliance on the unadjusted “indirect cost rate” disadvantaged Riverside in the following respect: the indirect cost rate relied upon by IHS calculated IHS’s responsibility for indirect costs based upon the incorrect assumption that all agencies contributing to Riverside’s direct cost base would contribute in full proportional amounts to the indirect cost pool, when in fact some such agencies did not so contribute to the pool. The impact of this assumption was to reduce the calculation of Riverside’s indirect costs as compared to the costs actually associated with operating Riverside’s contracts with IHS.

72. The Government is liable to Riverside for the amounts the Secretary would have paid had the Secretary used the properly adjusted indirect cost rates for calculating Riverside’s indirect contract support cost requirement associated with carrying out the Secretary’s programs under contract, together with accrued interest, attorneys’ fees and costs.

**VII. PRAYER FOR RELIEF**

WHEREFORE, Riverside prays that this Court grant the following relief:

- (a) A declaratory judgment (i) that the Secretary acted in violation of the ISDA by failing to pay Riverside the full amount of contract support costs that Riverside was due under its contracts with the Secretary, as properly calculated, and (ii) that the Secretary breached her contracts with Riverside by failing to pay the full contract support cost requirement, as properly calculated, that was due to Riverside in each of FY 2006 through FY 2011; and
- (b) A money judgment for the amount due to Riverside as a result of the Secretary's breach of contract in each of FY 2006 through FY 2011, including damages for underpayment of contract support costs, for miscalculation of contract support costs and for loss of third party revenues that Riverside would have received had the contract not been breached by IHS; and
- (c) Interest for one year from the payment due date for each payment the Secretary failed to make under each contract, as provided for under the Prompt Payment Act, 31 U.S.C. §§ 3901–3907; and
- (d) Interest under the Contract Disputes Act, 41 U.S.C. §§ 7101–7109, from the date of each claim until the date of payment upon entry of final judgment; and
- (e) Costs and attorneys' fees incurred in pursuing this claim, including the appeal before this Court, as provided for under the Equal Access to Justice Act, 5 U.S.C. § 504; 28 U.S.C. § 2412; 25 U.S.C. § 450m-1(c) and other applicable law; and
- (f) Such other monetary, declaratory and equitable relief as this Court may find to be just.

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Respectfully submitted this 1st day of October 2013.

SONOSKY, CHAMBERS, SACHSE  
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*/s/ Lloyd B. Miller*

By: \_\_\_\_\_

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