IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NAVAJO HEALTH FOUNDATION - SAGE MEMORIAL HOSPITAL, INC.,	)	
PLAINTIFF,	)	
v.	)	**NO. 1:14-cv-958-JB-GBW**
SYLVIA MATHEWS BURWELL, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; MARY SMITH, PRINCIPAL DEPUTY DIRECTOR, INDIAN HEALTH SERVICE; DOUGLAS GENE PETER, M.D., ACTING AREA DIRECTOR, NAVAJO AREA INDIAN HEALTH SERVICE; and MARGARET SHIRLEY-DAMON, CONTRACTING OFFICER, NAVAJO AREA INDIAN HEALTH SERVICE,	)	**PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF DUPLICATION**
DEFENDANTS.	)	

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I. Introduction

In this action, Sage seeks, in part, to recover damages from the Indian Health Service (IHS) for underpayments of contract support costs (CSC) made in fiscal years (FY) 2009-2013. Sage has calculated the indirect CSC it is owed by reference to the amounts for administrative overhead and other program support costs that it actually incurred for the years at issue.

The government has challenged the amounts of CSC claimed by Sage because, among other reasons, the government argues that these claimed overhead costs duplicate amounts already paid by IHS as part of the "Secretarial amount," and that such "duplication" in the calculation of CSC is prohibited by statute. *See* Ans. to Sec. Am. Compl. with Suppl. Cl., Dkt. 184 ("Ans."), at 11 ("Plaintiff bears the burden of proving that it has additional costs above the contract price and that those costs meet all aspects of the statutory definition of costs eligible for CSC funding."); *e.g.* Ex. A, 4/1/16 Report from Def. Expert Sam Hadley, at 5, 9 n. 1 (Sage "[c]laimed costs that are duplicative of amounts awarded as part of the annual Secretarial amount . . . ."); Ex. B, Letter from Elizabeth A. Fowler, Deputy Director for Management Operations for IHS to Sandra Hadley, CPA, Cotton & Co., LLP (Mar 29, 2016), at 2 ("[C]ertain costs submitted by Sage do not differentiate which costs duplicate those activities already paid as part of the Secretarial amount."). The government's interpretation of the duplication provision is, however, overbroad and contrary to law.

This motion raises a pure question of law based on interpretation of the provisions of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.* (ISDEAA). IHS contends the Act's prohibition against duplication of funding, 25 U.S.C. §450j-1(a)(3)(A), refers not to a double payment for the same cost, as Sage contends, but to any additional payment for a type of cost that may have been included in the Secretarial amount. IHS's interpretation of the duplication provision is contrary to law, contrary to the Act's legislative history, and contrary to long-standing agency practice. The government's expert, Sam Hadley, reveals in her report that this issue is one of the bases for the government's tenth defense to Sage's claim for damages. For this reason, Sage seeks declaratory relief to establish the correct meaning of this statutory provision.

There are no material facts in dispute with regard to IHS's duplication argument, which is grounded in the government's misreading of the ISDEAA. In order to resolve this question of law, Sage moves for an order granting it partial summary judgment that the ISDEAA requires a duplication offset in contract support costs only for the dollars actually paid by the agency to Sage as part of the Secretarial amount for a given type of cost. In accord with D.N.M.LR-Civ. 7.1(a), Sage made a good-faith request of Defendants' counsel for their concurrence with this motion, but Defendants represent they oppose the motion.

II. Statement of Material Facts as to Which There is No Genuine Issue

Pursuant to D.N.M.LR-Civ. 56.1(b), Sage sets out the following statement of material facts as to which no genuine issue exists.

1. Sage is a Navajo tribal organization for purposes of contracting with the Indian Health Service under the ISDEAA that operates a health care facility in Ganado, Arizona, within the exterior boundaries of the Navajo Reservation. Sec. Am. Compl. with Suppl. Cl., Dkt. 180 ("Compl.") ¶¶ 6, 19; Ans. ¶¶ 6, 19.
2. IHS is an agency within the United States Department of Health and Human Services ("HHS") and is responsible for providing federal health services to American Indians and Alaska Natives. Indian Health Service, *About IHS*, http://www.ihs.gov /aboutihs/ (last visited Feb. 25, 2016).
3. Since fiscal year 2005, Sage has contracted with IHS under the ISDEAA to provide health services to a largely Navajo patient population. Compl. ¶ 19; Ans. ¶ 19.
4. Defendant Burwell is the Secretary of HHS and has ultimate responsibility for carrying out all the functions, authorities, and duties of HHS including contracting on behalf of the United States with Indian tribal organizations under the ISDEAA to provide health care to Native Americans. Compl. ¶ 7; Ans. ¶ 7.
5. Defendant Smith is the Principal Deputy Director of the IHS and has the overall responsibility for carrying out all the functions, authorities, and duties of the IHS within HHS regarding contracting with Indian tribal organizations under the ISDEAA to provide health care to Native Americans. *See* Compl. ¶ 8; Ans. ¶ 8 (Defendant Smith was substituted for Defendant McSwain).

6. Defendant Shirley-Damon is the Contracting Officer for the Navajo Area IHS and is responsible for ISDEAA contracts and funding agreements for IHS programs, functions, services, and activities ("PFSAs") undertaken by ISDEAA contractors within the Navajo Area IHS, including Sage. Shirley-Damon has the authority to sign ISDEAA contracts and funding agreements with Sage for such IHS programs and to award funds pursuant to those agreements. Compl. ¶ 10; Ans. ¶ 10 (Defendant Shirley-Damon was substituted for Defendant Dayish).
7. In 2009 Sage contracted with IHS under the ISDEAA. Compl. ¶ 19; Ans. ¶ 19. Sage and IHS were parties to ISDEAA contracts and AFAs for FY 2009 through FY 2013 (collectively, the "2009-2013 Contracts"). Compl. ¶ 21; Ans. ¶ 21.
8. The 2009 contract included the following PFSAs: Inpatient Services, General Ambulatory and Specialty Care Services, Emergency Department, Emergency Medical Transport, Optometry Clinic, Behavioral Health Services, Radiology, Pharmacy, Laboratory, Physical Therapy, Public Health Nursing, Employee Health Services, Health Education, Transportation Services, School Based Services, Diabetes Program, Traditional Medicine, Dental Clinic, and Podiatry Clinic. Compl. ¶ 20; Ans. ¶ 20.
9. Sage and IHS entered into successive contracts from 2009 through September 30, 2013 without interruption. Compl. ¶ 21; Ans. ¶ 21.

10. Defendants were obligated to pay Sage no less than the full amount of CSC under the 2009 through 2013 Contracts, including indirect costs and direct contract support costs associated with Sage's operation of the PFSAs operated by Sage under those contracts. 25 U.S.C. § 450j-1(a), (g); *see Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2190-91 (2012); *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 501 Fed. App'x 957, 959 (Fed. Cir. 2012).

11. The IHS Contracts stated "Each provision of the [ISDEAA] and each provision of this Contract shall be liberally construed for the benefit of Sage to transfer certain programs, functions, services, and activities (hereinafter 'PFSAs'), or portions thereof, and associated resources, that are otherwise contractible under section 102(a) of the ISDA (25 U.S.C. § 450f(a)), including all related administrative functions, from the Secretary to Sage." Ex. C, 2008-2010 Contract, Art. 1, § 2(B); Ex. D, 2011-2013 Contract, Art. 1, § 2(B).[1]

12. By letter dated August 25, 2014 to then-Contracting Officer Dayish, Sage submitted to IHS a CSC claim for FY 2009 through 2013 for a total of $62,569,681. Compl. ¶ 68; Ans. ¶ 68; CSC Claim Letter, Dkt. 27, Ex. 2.

13. By letter dated July 16, 2015, IHS asserted a counterclaim against Plaintiff for FY 2009 through 2013 in the amount of $4,218,357. Letter from then-Contracting Officer Dayish, Dkt. 84-1 ("Dayish letter"). This counterclaim

[1] Defendants have admitted the authenticity of these contract documents. *See* Ex. E, Defs.' Resp. to Pl. Request for Admission No. 8 (2008-2010 Contract); No. 11 (2011-2013 Contract).

was based on IHS's assertions that "Plaintiff did not expend the indirect CSC funding on activities that the parties agreed were eligible for indirect CSC funding (*i.e.* reasonable, necessary, non-duplicative costs incurred for activities carried on to operate the Federal program)." Ans. to Sec. Am. Compl., Dkt. 84 at 15, ¶23; see also Dayish Letter, at 1, 5-6. This counterclaim was later dismissed. Stipulation of Dismissal of Countercl., Dkt. 165.

14. Despite the fact that Defendants dismissed their counterclaim, their expert continues to reduce her calculations of Sage's damages for these same reasons; specifically, that the amounts claimed for indirect CSC were not expended on items that were reasonable, necessary, or non-duplicative. Ex. A at 5, 9 n. 1, 16 ¶1, 18 ¶1, 20 ¶1, 22 ¶1.

15. IHS asserts that

> "CSC" is not interchangeable with "indirect costs," as both the Secretarial amount and CSC funding each include amounts for both "direct" and "indirect" costs; whether a particular cost is funded through the Secretarial amount or as CSC turns primarily on whether the Secretary normally carries on the related activity and therefore transferred the associated funding for that activity through the Secretarial amount.

Ex. B at 1.

16. IHS asserts that

> CSC . . . is only generated by the Secretarial amount, not additional amounts a tribal contractor may choose to contribute to its ISDEAA programs from other sources. . . . [T]he purpose of CSC funding is to ensure that tribal contractors are not required to reduce the program, as operated by the Secretary, to

> cover their additional costs necessary for contract compliance when the program is transferred from federal to tribal operation.

Ex. B at 1.

17. Defendants' expert asserts that

> Sage based its claim for indirect CSC for FYs 2009 through 2013 on actual, historical cost data; however, it:
>
> a. Claimed costs that are duplicative of amounts awarded as part of the annual Secretarial amount . . . .

Ex. A at 5.

18. As part of her analysis, Defendants' expert subtracted costs in Sage's claim that IHS "considered to be duplicative," explaining:

> IHS determined that some claimed amounts or activities are duplicative of activities funded in the Secretarial amount. . . . Those activities that are already funded in the Secretarial amount cannot also be funded as CSC. For example, Sage is claiming costs associated with linens and cleaning supplies as indirect costs. Linens and hospital housekeeping would be part of direct hospital operations (i.e., direct program funds) and would be funded in the Secretarial amount. Other specific cost areas that appear duplicative include activities related to "Dietary," "Wellness," "Med Rec," "Utilities," and "Grounds," as these are direct functions of hospital operations that were funded within the core Secretarial funding.

Ex. A at 9.

III. Standard of Review

Summary judgment is warranted where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *J.H. ex rel. J.P. v.*

Bernalillo County, 61 F. Supp. 3d 1085, 1134 (D.N.M. 2014) (Browning, J.). This motion presents no dispute of material fact, but rather seeks resolution of a matter of statutory interpretation. The only issue presented is whether Sage is entitled to judgment as a matter of law. *See Thomas v. Metropolitan Life Ins. Co.*, 631 F.3d 1153, 1160 (10th Cir. 2011) ("Statutory interpretation is a matter of law appropriate for resolution on summary judgment." (internal citation omitted)).

As the Tenth Circuit has instructed, "[t]he starting point in any case involving statutory construction is the language of the statute itself." *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1460 (10th Cir. 1997) (citing *United States v. Thompson*, 941 F.2d 1074, 1077 (10th Cir. 1991), cert. denied, 503 U.S. 984 (1992)); *see also Chickasaw Nation v. United States*, 208 F.3d 871, 876 (10th Cir. 2000), *aff'd*, *Chickasaw Nation v. United States*, 534 U.S. 84 (2001). Moreover, "'[w]hen the terms of the statute are clear and unambiguous, that language is controlling absent rare and exceptional circumstances.'" *Ramah Navajo Chapter*, 112 F.3d. at 1460 (quoting *Thompson*, 941 F.2d at 1077); *accord Chickasaw Nation*, 208 F.3d at 876; *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1062 (10th Cir. 2011), *aff'd* 132 S. Ct. 2181 (2012). When a statutory provision is ambiguous, the court "'look[s] to traditional canons of statutory construction to inform our interpretation.'" *Ramah Navajo Chapter v. Salazar*, 644 F.3d at 1062 (*quoting Conrad v. Phone Directories Co.*, 585 F.3d 1376, 1381 (10th Cir.2009))..

One such canon is that the Court must consider the statute as a whole to determine

the meaning of a particular phrase. The court "take[s] into account the broader context of the statute as a whole when ascertaining the meaning of a particular provision." *Ramah Navajo Chapter v. Salazar*, 644 F.3d at 1062 (quoting *Conrad*, 585 F.3d at 1381). The court "should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132-33 (2000) (*citing Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context.")). In other words, the statute must be read as a whole since "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp*., 502 U.S. 215, 221 (1991) (internal citations omitted). Indeed, "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Brown & Williamson*, 529 U.S. at 133 (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)).

The Court must also consider the unique canon of statutory interpretation that applies to cases involving Native Americans. Although courts usually defer to the administering agency when interpreting ambiguous statutes, *see Chevron U.S.A., Inc. v. Nat. Res. Defense Council*, 467 U.S. 837, 843 (1984), that rule does not apply here. Instead, when it comes to statutes impacting Indian tribes, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *Ramah Navajo Chapter v. Lujan*,

112 F.3d at 1461 ("In cases involving Native Americans, . . . we have taken a different approach to statutory interpretation, holding that 'normal rules of construction do not apply when Indian treaty rights, or even non-treaty matters involving Indians, are at issue.'" (quoting *E.E.O.C. v. Cherokee Nation,* 871 F.2d 937, 939 (10th Cir. 1989)). This canon is "rooted in the unique trust relationship between the United States and the Indians." *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985). This means that "if the [Act] can reasonably be construed as the Tribe would have it construed, it must be construed that way." *Ramah Navajo Chapter v. Salazar*, 644 F.3d at 1062 (alteration in original) (quoting *Ramah Navajo Chapter v. Lujan*, 112 F.3d at 1462).

This canon of statutory interpretation is doubly applicable when it comes to the ISDEAA, because it is repeated both in the ISDEAA itself and in Sage's contracts. The Supreme Court has recognized that "[c]ontracts made under [the] 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 . . . .' " *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2191 (2012) (quoting 25 U.S.C. § 450*l*(c) (Model Agreement, § 1(a)(2))); Ex. C, § 2(B)(stating, "Each provision of the ISDA and each provision of this Contract shall be liberally construed for the benefit of Sage . . . ."); Ex. D, § 2(B) (stating same). The Supreme Court has interpreted this language to mean that the Government "must demonstrate that its reading [of the ISDEAA] is clearly required by the statutory language." *Ramah*, 132 S. Ct. at 2191.

As this Court has already recognized, the Tenth Circuit "has said that Indian deference trumps *Chevron* deference—at least when it comes to interpreting the ISDEA[A]'s ambiguous provisions." Amended Mem. Op. and Order, Dkt. 109, at 62 (citing *Ramah Navajo Chapter v. Lujan*, 112 F.3d at 1462); *see also Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996) (no deference due agency positions on CSC issues because Congress withheld from the agency all authority to regulate CSC issues).

IV. Background on the ISDEAA's CSC Provisions

The ISDEAA was enacted to give Indian communities more control over the federal services they receive so that these services would be "more responsive to the needs and desires of those communities." 25 U.S.C. § 450a(a). The Act achieves this purpose through the "establishment of a meaningful Indian self-determination policy," which encourages the transition from federal control of programs serving Indian Tribes to tribal operation of these programs. *Id.* § 450a(b). Accordingly, Congress provided that, "upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract," the Secretary must by law contract with the Tribe or tribal organization to plan, conduct and administer the federal programs that otherwise would be administered by the Secretary. *Id.* § 450f(a)(1).

The ISDEAA further mandates that Tribes are to be paid two types of funding to operate the contracted programs. First, tribal contractors are entitled to be paid the Secretary's program funds: "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), *on remand*, 501 Fed. App'x 957 (Fed. Cir. 2012); *see also* 25 U.S.C. § 450j-1(a)(1). This is called the "[S]ecretarial amount." *Arctic Slope Native Ass'n*, 629 F.3d at 1298-99.

Second, beginning in 1988, Congress also required the agency to add to the Secretarial amount a second type of funding called "contract support costs" ("CSC"). Indian Self-Determination Amendments of 1987, Pub. L. No. 100-472, tit. II, § 205, 102 Stat. 2285, 2292-93 (1988). Congress added this funding because it realized that the Secretarial amount alone did not provide sufficient money to allow Tribes to provide the same level of services the Secretary would have provided if the Secretary had continued to operate the program directly, instead of contracting the operation of the program to the tribal organization. *See* S. Rep. No. 100-274, at 9 (1987). CSC cover costs for services that IHS receives from other federal agencies when it directly operates a program, from payroll to legal expenses to procurement activities (among others). Since a contracting Tribe would not have access to those additional federal services, the tribal contractor necessarily would have to provide them with funding that was not transferred in the Secretarial amount. CSC were also intended to cover additional requirements, such as annual audits and insurance, that apply to Tribes but not to the federal government. *Id.* at 8-9. The costs of those additional requirements would also not be transferred in the Secretarial amount because IHS does not have to pay them. For both reasons, Congress

required the agencies to supplement the Secretarial amount by paying "contract support costs" to Tribes in an amount necessary to fund "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).

In 1994, Congress expanded the costs eligible for CSC, making clear that CSCs include both "indirect administrative costs, such as special auditing or other financial management costs" that are part of a contractor's general overhead, and also certain "direct costs, such as workers' compensation insurance" that are attributable directly to the personnel and facilities associated with a particular program. *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 635 (2005) (citing 25 U.S.C. § 450j-1(a)(3)(A)(i), (ii)); S. Rep. No. 103-374, at 8-9 (1994); 140 Cong. Rec. H28631 (daily ed. Oct. 6, 1994). The 1994 amendments were added to ensure tribal contractors receive sufficient funding to manage the contract even if the Secretarial amount is insufficient. S. Rep. No. 103-374, at 9 (1994); 140 Cong. Rec. H28631 (daily ed. Oct. 6, 1994). Congress was concerned that if CSC could not supplement such sums, program funds would have to be used to cover those costs:

> [T]he Committee's objective [was] to assure that there is no diminution in program resources when programs, services, functions or activities are transferred to tribal operation. In the absence of [the amended section], a tribe would be compelled to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid.

S. Rep. No. 103-374, at 9 (1994); 140 Cong. Rec. H28631 (daily ed. Oct. 6, 1994) (same).

The ISDEAA mandates that upon award of each year's contract, contract support costs "shall be added" to the Secretarial amount. 25 U.S.C. § 450j-1(a)(2) (emphasis added). The total funding amount "shall not be less than" the applicable amount determined pursuant to section 450j-1(a) of the ISDEAA, *i.e.*, the full Secretarial amount and the full contract support cost amount to which the tribal contractor is entitled. *Id.* (emphasis added).

V. Sage is Entitled to Judgment as a Matter of Law that the ISDEAA Prohibits Duplication of the Funding Provided, Not Duplication of the Activities Funded

The CSC sections that were added in 1994 contain a provision stating that a Tribe's CSC funding may not duplicate funds already being paid as part of the Secretarial amount: "such [CSC] funding shall not duplicate any funding provided under subsection (a)(1) of this section [(the Secretarial amount)]." 25 U.S.C. §450j-1(a)(3)(A) (emphasis added). The plain language of the statute contemplates a dollar-for-dollar offset of "funding" to ensure the contractor is not paid twice for the same costs, *i.e.*, not paid in CSC for costs already funded in the Secretarial amount. As Congress explained, this provision was added to the ISDEAA to "assure against any inadvertent double payment of contract support costs which duplicate the Secretarial amount already included in the contract." 140 Cong. Rec. S28326 (daily ed. Oct. 6, 1994) (statement of Sen. McCain) (emphasis added) (discussing proposed amendment of S. 2036); 140 Cong. Rec. H28629 (daily ed. Oct. 6, 1994) (notes to Committee amendment of H.R. 4842) (emphasis added). Since the 1994 ISDA amendments expanded the definition of CSC, the

duplication provision assured that, notwithstanding that expansion, Congress was not authorizing the agency to pay the same costs twice and thus make a "double payment."

But neither is the contractor to be paid less than the full amount needed for activities to prudently manage the contract. The Senate Report removes all doubt on this point: "In the event the Secretarial amount under [§ 450j-1(a)(1)] for a particular function proves to be insufficient in light of a contractor's needs for prudent management of the contract, contract support costs are to be available to supplement such sums." S. REP. NO. 103-374, at 9 (1994) (emphasis added).

A. IHS asserts the duplication provision prohibits the agency from providing any CSC funding for any activity funded in the Secretarial amount.

IHS asserts that a Tribe cannot receive both Secretarial amount funding and CSC funding for the same activity. IHS states that "whether a particular cost is funded through the Secretarial amount or as CSC turns primarily on whether the Secretary normally carries on the related activity and therefore transferred the associated funding for that activity through the Secretarial amount." Ex. B at 1. Similarly, IHS's expert states that she determined "some claimed amounts or activities are duplicative of activities funded in the Secretarial amount" and "[t]hose activities that are already funded in the Secretarial amount cannot also be funded as CSC." Ex. A at 9 ¶1; *accord* Ex. B at 1 (stating that "costs for activities funded in the Secretarial amount cannot also be funded as CSC"). Under the agency's interpretation, if IHS includes in the original Secretarial amount any sum for a particular overhead function—presumably, even just one dollar—that

categorically bars the contractor from being paid any CSC to cover the actual costs the contractor incurs for that same function.

IHS's interpretation is actually more extreme because it goes one step further. IHS argues that if $1 would "normally" be included in the Secretarial amount paid to a Tribe, that fact precludes paying any CSC for that activity, even if the actual Secretarial amount paid to the Tribe was zero. *See* Ex. B at 1 (emphasis added); *id.* at 2 ("Sage's proposed indirect-type costs include x-ray and laboratory costs, as well as salaries for quality assurance/risk management. However, these and other activities are all activities that the Secretary likely would have carried on in running the program and would typically have transferred as part of the Secretarial amount provided to Sage through its ISDEAA contract.") (emphasis added) (citation omitted). So IHS seeks a duplication offset in CSC for the full amount Sage incurred on any activity that theoretically would have been funded in the Secretarial amount, even if it was not so funded and even if Sage never actually received any Secretarial funding for that activity. This extreme position is the basis for the assertion by IHS's expert that the amounts Sage has requested for indirect contract support costs "are duplicative of amounts awarded" as part of Sage's Secretarial amount. Ex. A at 5. According to Ms. Hadley, Sage has requested costs for activities that "would be part of direct hospital operations (i.e., direct program funds) and would be funded in the Secretarial amount." *Id.* at 9 (emphasis added). Although IHS claims the costs for the specific activities identified by Ms. Hadley "would be part of direct program funds," the government provides no evidence that any amounts for these

activities were ever actually transferred to Sage as part of the Secretarial amount. Of course, under IHS's theory, no such evidence is needed because the amount actually transferred is irrelevant—IHS gets a credit offset to reduce CSC if the activity theoretically could have been funded in the Secretarial amount. Ex. A at 9 (rejecting any line items that "would be part of direct hospital operations" even if no funding for those items was ever provided by IHS).

B. The ISDEAA duplication provision prohibits duplication of funding, not activities, and therefore IHS's interpretation is wrong.

The agency's interpretation of the statute makes no sense and has no legal support. IHS's argument ignores the clear statutory language that covers duplication of "funding," not duplication of activities funded. 25 U.S.C. §450j-1(a)(3)(A) (emphasis added). It also ignores Congress's intent in creating the 1994 provisions in the first place—to provide supplemental funds "[i]n the event the Secretarial amount under [§ 450j-1(a)(1)] for a particular function proves to be insufficient in light of a contractor's needs for prudent management of the contract." S. Rep. No. 103-374, at 9 (1994) (emphasis added). The most natural reading of the statute, and indeed the only one that fits with the statutory context, is that "duplication" is avoided when the agency is given a full credit for the amount of dollars it provided in the Secretarial amount for any particular function.

Sage's claim respects this statutory principle. The additional funding Sage seeks is for increased costs it incurred above the amounts IHS provided. Those increased costs over the amount funded by IHS cannot, by definition, be "duplicative." IHS cannot

plausibly claim that paying these increased costs can "duplicate" payments it never actually made. The ISDEAA provides that CSC funding is to pay a Tribe its overhead and administrative costs in whatever amount is "reasonable" for activities that "must be carried on" in order to "ensure compliance with the terms of the contract and prudent management." 25 U.S.C. § 450j-1(a)(2). So long as the additional costs Sage claims are reasonable and necessary for Sage to prudently carry out the contract, then those additional costs are eligible CSC costs that "shall" be added in full to the contract.

The linchpin to IHS's argument about the duplication provision in § 450j-1(a)(3) is to point to a different provision of the statute, § 450j-1(a)(2), which IHS says suggests that a Tribe's CSC costs must be unique to tribal operations—a kind of cost which, for whatever reason, the Secretary did not incur at all in her direct operation of the program. But it is precisely that kind of restrictive reading of the Act that led Congress in 1994 to withdraw from the Secretary all delegated authority to regulate eligible CSC, *see* 25 U.S.C. § 450j-1(a)), and which further led Congress to add a new section—25 U.S.C. § 450j-1(a)(3)—that expands the definition of CSC beyond that limitation, *see* S. Rep. No. 103-374, at 8-9 (new subsection (3) "defines" eligible CSC). If IHS were correct that the language in subsection (2) prohibits paying as CSC the costs a Tribe incurs for any activity partially paid for by the Secretarial amount, then subsection (3) would largely be surplusage, and the duplication language in that subsection would be entirely unnecessary: if the two categories (CSC and Secretarial amount) cannot overlap at all

under IHS's reading of subsection (2), there is no way the one could ever duplicate the other. So IHS's interpretation cannot be correct.

Perhaps more to the point, the Secretary here cannot meet her duty to "demonstrate that [her] reading [of the Act] is clearly required by the statutory language." *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. at 2191 (emphasis added). Not only is IHS's interpretation contrary to the statutory language (much less not "clearly required" by it), it is contrary to the intent reflected in the legislative history. The duplication provision in subsection (3) ensures that the agency does not pay the same amount of funding twice; it does not mean that an initial or partial payment in the Secretarial amount for a type of overhead cost is all that IHS ever has to pay for that whole category of cost, even if the Tribe's increased cost is "reasonable," "necessary," and "prudent" to operate the program. In other words, if the agency is annually paying some amount of money for overhead costs as part of the Secretarial amount, the duplication provision in subsection (3) assures the agency will not have to pay that same amount again. But it does not mean the agency can avoid reimbursing additional CSC amounts that are necessary and reasonable to operate the contract. The statutory prohibition on duplicated payments does not prohibit a tribal organization from recovering otherwise necessary costs in a given category of overhead simply because IHS in the beginning paid $1 toward that cost. Since the agency's interpretation is not reasonable, much less "clearly required," it cannot stand.

Defendants' more extreme secondary argument—that Sage cannot receive any CSC funding for any activity that could have been included in the Secretarial amount (even if it wasn't)—is even more far-fetched. Since one can fairly say that almost anything could have been included in the Secretarial amount, IHS's reading of the statute would wipe out most CSC, even if the entire amount of Secretarial funding is just $1. After all, that $1 could have been for personnel costs, or financial management costs, or employee benefit costs, or procurement costs, or information management costs (all routine CSC costs). But as IHS sees it now, since that one dollar could have been for any one of those costs, none of those activities is eligible for CSC funding.

That is an absurd reading of the Act that does nothing to facilitate tribal self-determination, much less honor the CSC provisions Congress added in 1994, and would compel Tribes and tribal organizations to rob their programs to cover their actual overhead costs. Moreover, the Secretary's reading is contradicted by her own admissions. IHS acknowledges that, in principle, some costs for direct program activities funded in the Secretarial amount *may* be eligible for CSC funding. Deputy Director Fowler explains that "'CSC' is not interchangeable with 'indirect costs,' as both the Secretarial amount and CSC funding each includes amounts for both 'direct' and 'indirect' costs. Ex. B at 1 (emphasis added). And, in determining a Tribe's direct CSC requirement, which is subject to the same statutory duplication provision, IHS applies a dollar-for-dollar offset. *See id.* at 3 ("When calculating the direct CSC amount, however, the funding for fringe benefits categories that IHS provides in the Secretarial amount

must be 'offset' against the tribe's total fringe benefits amount; the amount above what was funded in the Secretarial amount will be funded as direct CSC."). Indeed, in examining Sage's direct CSC claim, Ms. Hadley calculates a dollar-for-dollar credit to determine the amount of direct CSC funding transferred as part of the Secretarial amount. *See, e.g.*, Ex. A at 25-26 ¶¶ 3-6. IHS's position is also contradicted by its own CSC Manual, which repeatedly states that certain costs are eligible for CSC funding even though that activity may have received some funding in the Secretarial amount. *See, e.g.*, Ex. F at 10-11 & 12-15, Indian Health Manual § 6-3.2D, Manual Ex. 6-3-H (direct), § 6-3.2E(2), Manual Ex. 6-3-H (indirect). These costs include items such as "[m]anagement and [a]dministration" including "[r]ecords [m]anagement" and "[o]ffice [s]ervices"; "[f]acilities and [f]acilities [e]quipment" including "[u]tilities" and "[r]epairs and [m]aintenance"; and "[g]eneral [s]ervices and [e]xpenses" including "[l]egal [s]ervices" and "[g]eneral [s]upport [s]ervices." Ex. F, § 6-3.2E(2). Yet, IHS maintains that Sage is not entitled to any CSC funding—whether direct or indirect—for activities IHS believes "would have been" part of the Secretarial amount.

There is only one reading of the ISDEAA that honors its statutory terms and Congress's overall objective: a Tribe must be reimbursed for all direct or indirect CSC costs it incurred that are reasonable and necessary to operate the contracted programs and that meet the definition of CSC in subsection (3), so long as a dollar-for-dollar credit is applied for any funding IHS already transferred to the tribe for those costs. And, even if

there were some ambiguity in how best to read subsections (2) and (3), the ISDEAA and Sage's contracts direct that the ambiguity be resolved in Sage's favor.

VI. Conclusion

For the foregoing reasons, Sage is entitled to judgment as a matter of law holding that the duplication provision prohibits duplication of funding and is satisfied as long as a dollar-for-dollar credit is applied to any amounts that were actually transferred to Sage as part of the Secretarial amount.

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2016, I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record in this matter.

s/ Lloyd B. Miller