UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SWINOMISH INDIAN TRIBAL COMMUNITY,	)	
PLAINTIFF,	)	Case No. 1:18-cv-01156-DLF
v.	)	Honorable Judge Friedrich
ALEX M. AZAR, et al.,	)	
DEFENDANTS.	)	

OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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The statutory language that governs this case is found in the Indian Self-Determination and Education Assistance Act (ISDEAA) at 25 U.S.C. § 5325(a)(1): the amount of funds provided "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs" under contract. This court, in the *Pyramid Lake* case,[1] and again in the recent *Seminole* decision,[2] has interpreted this language to include both funds appropriated by Congress to the Indian Health Service (IHS) *and* third-party revenues IHS would otherwise have spent on direct services to the Tribe. The statute goes on to command that "there shall be added" to the Secretarial amount contract support costs (CSC). 25 U.S.C. § 5325(a)(2).

Third-party revenues and the additional services that they fund are part of the "Federal program" that generates CSC under 25 U.S.C. § 5325(a)(3)(A). The Tribe's contracts with IHS require the Tribe to bill third parties, and the resulting "program income" must, by law, be used for the purposes of the IHS contract. 25 U.S.C. § 5388(j). Because these funds are "earned in … the course of carrying out" an ISDEAA agreement, 25 U.S.C. § 5325(m), they cannot be excluded from the direct cost base for purposes of the CSC calculation. *Seminole*, 2019 WL 1359478 at *9.

I. The Secretarial Amount includes third-party funding used to provide health care services under the funding agreement, and this funding generates CSC.

The ISDEAA (codified as amended at 25 U.S.C. § 5301 *et seq*.) requires that the IHS pay CSC in support of the so-called Secretarial amount: the amount of funds the Secretary "would have otherwise provided for the operation of the programs" taken over by the Tribe. 25 U.S.C. § 5325(a)(1). Defendants do not contest the basic fact that the funds IHS "would have otherwise

[1] *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534 (D.D.C. 2014).

[2] *Seminole Tribe of Fla. v. Azar, et al*., No. 1:18-cv-776, 2019 WL 1359478 (D.D.C. Mar. 26, 2019).

provided" for health care to the Tribe include third-party revenues, such as Medicare, Medicaid, and private insurance payments.[3] Complaint, ¶ 18; Amended Answer, ¶ 18. Under the plain language of the ISDEAA, "there shall be added" to that amount direct and indirect CSC. 25 U.S.C. § 5325(a)(2).

Defendants repeatedly assert that the Secretarial amount cannot include "non-IHS" funds—by which they mean funds not appropriated by Congress to IHS and transferred to the Tribe in its ISDEAA funding agreement. Defendants' Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment (Def. Opp.) at 15, 17, 21, etc. It is true that most types of non-IHS funding do not fit within the definition of the Secretarial amount—for example, state funds or the Tribe's own funds—because IHS would not otherwise have used those funds to provide services to the Tribe. But third-party revenues are different. When IHS collects such revenues while providing direct service to a tribe, IHS is required by law to use those funds on facilities or additional services benefiting that tribe. *See* 25 U.S.C. § 1641(c)(1). Had the Tribe not taken over responsibility for health care services under the ISDEAA, IHS would have provided services to the Tribe not just with "IHS funds" but with "non-IHS" third-party resources. The latter are therefore part of the Secretarial amount.

Now that the Tribe has compacted to provide health care services under the ISDEAA, any third-party revenues it collects are required by law and contract to be spent on additional services within the scope of the compact and funding agreement. 25 U.S.C. § 5388(j); Plaintiff's Exhibit (Pl. Ex.) A (Compact), Art. III, § 5. Third-party funding used to carry out the contract is part of the "Federal program" that generates CSC needs. *See* 25 U.S.C. § 5325(a)(3)(A); *Navajo*

[3] As this Court has observed, the phrase "would have otherwise provided" simply means "would otherwise have spent." *Pyramid Lake*, 70 F. Supp. 3d at 544.

Health Foundation—Sage Memorial Hospital, Inc. v. Burwell, 263 F. Supp. 3d 1083, 1164–66 (D.N.M. 2016) ("*Sage Memorial*").

A. The *Pyramid Lake* decision is directly on point.

Pyramid Lake stands for the proposition that the Secretarial amount can, and does, include third-party revenues the Secretary would otherwise have used to carry out a program. *Pyramid Lake*, 70 F. Supp. 3d at 544. As such, these amounts generate CSC, and in *Pyramid Lake* the court ordered the parties to negotiate not only what IHS would otherwise have spent but also "the administrative and start-up cost[s] authorized under the [ISDEAA]." *Id*. at 545. In determining the Secretarial amount, the court held, the applicable funding level "is determined based on what the Secretary otherwise would have spent, not on the source of the funds the Secretary uses." *Id*. at 544. Since the Secretary would have spent third-party funds as well as IHS-appropriated funds, both must be included in the Secretarial amount.[4]

In *Pyramid Lake*, the tribe was newly assuming a program IHS had run primarily with third-party revenues, while in this case the Tribe has run the program for many years. But that is a distinction without a difference. If IHS were currently providing direct service to Swinomish, it would be required by law to expend 100% of its Medicare and Medicaid collections from the Tribe's service unit on that service unit. 25 U.S.C. § 1641(c)(1). Therefore these funds are part of what IHS "would have otherwise provided" had the Tribe not contracted the program.

Defendants try to distinguish *Pyramid Lake* by stating that the decision does not "address" all of the statutory provisions at issue in this case, including the CSC provisions at Sections 5325(a)(2) and (3). But there was no dispute in *Pyramid Lake*—nor is there here—that CSC "shall be added" to the Secretarial amount. The contested issue was the same as it is here:

[4] Section 5325(a)(1) was then codified at 25 U.S.C. § 450j-1(a)(1).

the size and composition of the Secretarial amount. *Pyramid Lake* instructs, as does *Sage Memorial*, that the Secretarial amount includes third-party revenues, even if, as Defendants insist, these are "non-IHS" funds. The *source* of the funds is irrelevant; it is the *use* of those funds that is decisive. *Pyramid Lake*, 70 F. Supp. 3d at 544. Defendants' efforts to avoid both cases are unavailing.

B. The *Sage Memorial* decision is sound and should be followed by this Court.

Like *Pyramid Lake*, the *Sage Memorial* decision is well-reasoned and directly on point here. *See* Pl. Mem. at 24-26. That case presented the question "whether funding that third parties such as Medicare, Medicaid, and private insurers provide is considered part of federal programming for the purposes of reimbursement [through CSC] under the ISDEAA." The court held that it is. *Sage Memorial*, 263 F. Supp. 3d at 1164, *appeal voluntarily dismissed* 2018 WL 4520349 (10th Cir 2018).

Defendants take issue with several aspects of *Sage Memorial*, Def. Opp. at 32, but none of their criticisms are valid. First, Defendants assert that the court did not address "the meaning of § 5326." *Id.* But in fact the *Sage* court carefully summarized the Government's argument, which relied heavily on § 5326 (the court uses the old cite, § 450j-2) and the *Tunica-Biloxi Tribe of Louisiana v. United States*, 577 F. Supp. 2d 382 (D.D.C. 2008) decision. *See, e.g.*, *Sage Memorial*, 263 F. Supp. 3d at 1095; *id*. at 1097–98. Since the court held that program income is part of the federal program carried out under the IHS contract, § 5326 simply did not apply (as discussed in Part II.A below).

Second, Defendants say that the *Sage* court "did not address the fact that Medicare, Medicaid and other third party payments are non-IHS funds." Def. Opp. at 32. But the court held that these funds are part of the "federal programming" under contract with IHS, so whether

they are "IHS" or "non-IHS" funds was not relevant to the court's decision, nor should it have been given the plain language of § 5325(a), which does not distinguish funds on the basis of their source.

Third, Defendants say the court did not address the fact that the contract "did not provide for IHS to turn over those third-party funds to the plaintiff." Def. Opp. at 32. This criticism appears to derive from Defendants' preferred interpretation of § 5325(a)(1), which would limit the Secretarial amount to the amount of *appropriated* funds the Secretary *turns over* to the Tribe. But as explained above and in *Pyramid Lake*, that is not the statute Congress wrote.

Finally, Defendants note that *Sage* did not address their argument that Medicare and Medicaid payments reimburse providers for direct and indirect costs. But it does not appear that in *Sage* the Government made this argument, which, as explained below in Part II.B, is off-target in any event.[5]

In the recent *Seminole* decision, Judge Contreras of this Court discussed the *Sage Memorial* decision. Without explicitly endorsing the decision, Judge Contreras adopted its core reasoning in explaining why the tribe was not entitled to summary judgment. *Seminole*, 2019 WL 1359478 at *9–10. A question of material fact remained as to the nature of the supplemental funding for which the tribe sought CSC. If it was tribal funding, then the tribe would not be able to include it in the CSC calculation. But if it was third-party revenue earned in the course of carrying out its ISDEAA agreement with IHS, then § 5326 would pose no problem and the tribe

[5] Defendants also criticize the *Sage* court's "philosophical analysis of 'form and individuation,'" (Def. Opp. at 32) but that discussion was part of the ruling on "duplication," not the ruling on "allocation" that contained the holdings on CSC for third-party funding.

would be able to include this funding in the CSC calculation. The *Sage* decision is well-reasoned and should guide the Court in this case as it did in the *Seminole* case.[6]

II. Defendants' arguments do not cast doubt on the plain meaning of the statute.

Defendants' Opposition makes several complex arguments that dance around the periphery of the issue, but fail to address the plain language of the ISDEAA. Instead, Defendants invite the court to re-write the statute so that the Secretarial amount consists only of funds *appropriated by Congress* that the Secretary would otherwise have used but were *transferred* to the Tribe by IHS. The Court should decline this invitation.

A. Section 5326 does not prohibit the payment of CSC to support expenditures of third party funds.

Defendants argue that 25 U.S.C. § 5326 prohibits IHS from paying CSC on "non-IHS funds." Def. Opp. at 17-21. While that section prohibits payment of CSC to cover indirect costs associated with contracts with any entity *other than IHS*, it does not prevent paying CSC on the Tribe's third-party revenues, which are directly attributable to its IHS contract.

Section 5326 was a response to the *Ramah Navajo* case, where the tribal plaintiff sought to recover CSC for indirect costs arguably allocable to *other federal—and even state—agencies*. *See Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997); Def. Opp. at 18 (explaining that effect of *Ramah* decision was to require Bureau of Indian Affairs to increase CSC to make up for failure of other federal and state agencies to pay their full share of indirect

[6] Defendants go to great lengths to distinguish *Cook Inlet Tribal Council, Inc. v. Mandregan*, 348 F. Supp. 3d 1 (D.D.C. 2018), in which the court rejected IHS's interpretation of the ISDEAA non-duplication provision at 25 U.S.C. § 5325(a)(3)(A)(ii). Def. Opp. at 26-28. But the Tribe cited *Cook Inlet* only to illustrate that this court has employed the Indian canons of construction, as incorporated into the ISDEAA, to guide interpretation of the statute in a recent CSC case. The substantive issue in this case is different, but the same interpretive principles apply. See 25 U.S.C. § 5392(f) ("Each provision of this subchapter 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.").

costs). In 1999, Congress responded by enacting a new provision prohibiting CSC from being paid to cover costs attributable to any contract other than one with IHS:[7]

> [N]otwithstanding 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 [ISDEAA] 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. § 5326.

The question posed by § 5326 is not whether third-party revenues are "IHS" or "non-IHS" funds. It is whether third-party revenues (*i.e.*, program income generated by services provided under the IHS compact and funding agreement and spent in accordance with those agreements) are "directly attributable" to the ISDEAA agreement with IHS, or to an agreement with "any entity *other than* the [IHS]" (emphasis added). The answer is obvious. The IHS contract requires the Tribe to bill third-parties, to collect those billings, and to expend those revenues on further services within the scope of the contract. Pl. Ex. B, Funding Agreement Between the Swinomish Indian Tribal Community and the United States of America for Calendar Year 2010-2014, § 2.B.ix ("Obligations of the Tribe" include "maintain[ing] a system of third party payment collection for services provided to patients of the Swinomish Tribal Health Program"); Pl. Ex. A, Compact of Self-Governance Between the Swinomish Indian Community and the United States of America, Art. III, § 5 (program income to be treated as "supplemental funding to that negotiated in the [funding agreement]"). The third-party funds at issue here, collected and spent pursuant to the IHS compact and funding agreement, are "directly

[7] An analogous provision, at 25 U.S.C. § 5327, covers the Bureau of Indian Affairs.

attributable" to those IHS agreements. Indirect costs incurred in expending these funds for health care services under the contract are not "associated with any contract, grant, [etc.]" with "any entity other than the Indian Health Service." Therefore, section 5326 in no way prevents the payment of CSC in support of these funds.

The Tribe's interpretation of § 5325(a) does not "render § 5326 effectively meaningless," as Defendants argue, Def. Opp. at 22. Section 5326 prohibits the payment of CSC to cover indirect costs associated with contracts with any non-IHS agency or entity. That prohibition simply does not apply where, as here, the costs are directly attributable to a contract with IHS.

Since § 5326 does not help Defendants, neither does the *Tunica-Biloxi* decision interpreting that section. Like *Ramah Navajo*, the *Tunica* case involved claims of indirect cost rate "dilution" due to inclusion in the direct cost base of direct funding from other agencies that did not pay add-on CSC. *Tunica*, 577 F. Supp. 2d at 414. The issue was how to allocate indirect costs among IHS and other agencies. The court held that the statute currently codified at § 5326 prevents IHS from paying any indirect costs allocable to another agency; IHS need only pay the indirect costs "associated with"—that is, allocable on a pro rata basis to—the IHS agreement. *Id*. at 419–23. Here, the CSC in question arise directly from the performance of the IHS contract, as third-party revenues must be collected and spent in accordance with the IHS contract. There are no other agencies and no other contracts to which these costs could be allocated.

This Court's recent decision in the *Seminole* case underscores this point. In that decision, the Court remarked that the tribe's attribution of expenditures of its own tribal funds to IHS would be a "problem" in light of § 5326. *Seminole*, 2019 WL 1359478, at *10. Defendants cite this remark out of context, Def. Opp. at 20, obscuring the fact that the Court said if the additional expenditures were of third-party revenues or program income there would be *no* problem:

"unless those other resources turn out to be 'program income' within the meaning of the ISDEAA, there is a problem, as the Tribe's estimate would be based on costs that are not actually 'attributable to' or 'associated with' the Tribe's self-determination contract. 25 U.S.C. § 5326." *Seminole,* at *10. In *Seminole*, the Court could not tell what the additional funds were, precluding summary judgment on the issue, but repeated to be clear: "If the Tribe can show that its other money is program income, *Sage Memorial* may ultimately govern." *Id*. Here, the third-party revenues at issue clearly *are* program income, so they are "attributable to" and "associated with" the ISDEAA contract, and § 5326 does not prevent IHS paying CSC on those amounts. Defendants' misleading characterization notwithstanding, the *Seminole* decision supports the Tribe, not Defendants.

B. Defendants' argument that Medicare and Medicaid payments include reimbursement for both direct and indirect costs is irrelevant and ignores Congressional intent.

The legal issue in this case is simple: does the ISDEAA require payment of CSC in support of services provided within the scope of the contract and paid for with program income earned through carrying out the contract? Defendants seek to obfuscate the issue with a complicated and entirely irrelevant argument about the components of various third-party reimbursement systems. Def. Opp. at 15-17. Defendants argue that Medicare and Medicaid payments include reimbursement for both direct and indirect costs. Even if this is true, it is not relevant to a central issue in this case, which is the use of these revenues to provide *additional* services. Moreover, Congress specifically intended that Medicare and Medicaid payments supplement, and not supplant IHS funding, including for CSC.

1. Whether Medicare, Medicaid, and other third-party payments include reimbursement for both direct and indirect costs is irrelevant.

Even if Medicare and Medicaid do fully reimburse direct and indirect costs, these reimbursements are for past services already provided. Once the third-party payments become part of the Secretarial amount (and the "Federal program"), and are expended to provide *additional* health care services under the contract, they generate *new* direct and indirect expenses eligible for payment as CSC.

For example, in *Pyramid Lake*, the Secretarial amount awarded the tribe to carry out an Emergency Medical Services (EMS) program was composed overwhelmingly of third-party revenues, yet the tribe also received CSC in support of that amount without any duplication analysis, and properly so. Even if Medicaid and other third parties fully reimbursed IHS for its previous services, those funds were transferred to the tribe to operate an EMS program that would generate CSC needs. Thus the Court ordered the parties to negotiate how much the Secretary would have otherwise provided—including third-party revenues—"plus the administrative and start-up costs authorized under the Act." *Pyramid Lake*, 70 F. Supp. 3d at 545.

The Secretarial amount alone is not sufficient to allow tribes to provide the same level of services that IHS would have delivered directly, because tribes incur costs that IHS either does not incur at all (such as unemployment insurance or the costs of annual audits) or that are covered by other agencies within the Department of Health and Human Services (HHS) (*e.g.* legal services from the Office of General Counsel) or outside of HHS (e.g. the Office of Personnel Management and the General Services Administration). *See* S. Rep. No. 100-274 at 8-9 (1987); Pl. Mem. at 19-20. CSC provides the funding needed to pay these tribally incurred costs.

Similarly, when IHS expended its $1.194 billion in third-party collections in FY 2016,[8] it continued to benefit from all of the services provided by these other agencies, just as it did when expending appropriated funds. By the same token, when the Tribe expends its third-party revenues, it incurs all of the costs that IHS avoids and for which CSC compensates. In short, unless CSC are added to support the third-party-funded portion of the program, tribes are, unlike the IHS when it receives additional third party revenues, forced to use such third party funds to pay for administrative costs, a result that violates the spirit and letter of the statute.

Thus, Defendants' assertion that "Plaintiff recovered direct and indirect costs for the care it provided to Medicaid-eligible patients" (Def. Mem. at 17) misses the mark. This case is about what the Tribe must, by law and contract, do with the funds received from Medicaid (and other third parties): use them to provide additional health care services within the scope of the contract with IHS—services that generate CSC needs. 25 U.S.C. § 5388(j); *id*. § 5325(m). The possibility that Medicaid or another third-party may have fully paid direct and indirect costs *for past services* has no bearing on the issue presented in this case.

2. Congress intended Medicare and Medicaid payments to supplement and not supplant IHS funding, so duplication is not an issue.

Defendants argue that Medicare, Medicaid, and other third-party payers cover Plaintiff's direct and indirect costs in their reimbursements and that the ISDEAA does not authorize IHS to pay these same expenses again as CSC. Def. Opp. at 15-17. As discussed in the previous section, there is no duplication because any indirect costs reimbursed by third-party payments were incurred for *past* services, but the CSC sought by the Tribe in this case is for indirect costs incurred when providing new *additional* services made possible by the third-party revenues.

[8] Dep't of Health & Human Servs., *Indian Health Service FY 2018 Justification of Estimates for Appropriations Committees*, at CJ-143 (reporting that in FY 2016, IHS collected $1.194 billion from third-party insurers).

Further, this argument reflects a mistaken understanding of Congress's intent in providing for Medicare and Medicaid reimbursement to IHS facilities, whether operated by the IHS or Indian tribes and tribal organizations under ISDEAA agreements.

Congress authorized Medicare and Medicaid reimbursement in Title IV of the Indian Health Care Improvement Act (IHCIA), Pub. L. 94-437 (September 30, 1976), 25 U.S.C. § 1641—1647d, by adding sections 1880 and 1911 to the Social Security Act, 42 U.S.C. §§ 1395qq and 1396j. The legislative history shows that Congress did this to allow Indians living in remote areas served by IHS/Tribal facilities to take advantage of Medicare and Medicaid benefits, and, critically, to enhance funding for the IHS program under the Federal trust responsibility for Indian health care, acknowledged in the IHCIA at 25 U.S.C. § 1602. The legislative history is very clear that Congress intended Medicare and Medicaid reimbursement to "supplement -- and not supplant" IHS appropriations.[9] Subsection 401(a) of the IHCIA, 25 U.S.C. § 1641(a), currently provides:

> DISREGARD OF MEDICARE, MEDICAID, AND CHIP PAYMENTS IN DETERMINING APPROPRIATIONS.—Any payments received by an Indian health program or by an urban Indian organization under title XVIII, XIX, or XXI of the Social Security Act for services provided to Indians eligible for benefits under such respective titles shall not be considered in determining appropriations for the provision of health care and services to Indians.

Congress's intent that Medicare, Medicaid, and other third-party revenues supplement funding that the ISDEAA requires is also stated explicitly in the ISDEAA at 25 U.S.C. § 5388(j), which provides: "All Medicare, Medicaid, and other program income earned by an Indian tribe shall be treated as supplemental funding to that negotiated in the funding agreement."

[9] H.R. Rept. 94-1026—Part I (Interior and Insular Affairs Committee) April 9, 1976 at 26-27, 107-108; reprinted in 1976 U.S. Code Cong. & Admin. News 2652 at 2665-2666, 2745-2746. H.R. Rept. 94-1026—Part III (Interstate and Foreign Commerce Committee) May 12, 1976 at 19-21, reprinted in 1976 U.S. Code Cong. & Admin. News 2782 at 2794-2796.

In sum, Defendants' argument that Medicare, Medicaid, and other third-party revenues should supplant ISDEAA funding for contract support costs clearly conflicts with the ISDEAA and the IHCIA.

C. The ISDEAA's non-duplication provision does not prevent third-party payments from generating CSC.

The ISDEAA prohibits IHS from paying the same cost twice, once in the Secretarial amount and once as CSC. 25 U.S.C. 5325(a)(3)(A). Defendants argue, implausibly, that this straightforward provision also prevents payment of CSC incurred in connection with the provision of services funded by third-party revenues. Def. Opp. at 24-25.

The argument seems to be that the Tribe must exclude third-party funding from the direct cost base because of procedural requirements imposed on IHS in the IHCIA when IHS itself receives third-party payments for services directly provided by IHS. Under the statute, IHS must place its Medicare and Medicaid collections in a "special fund" held by the Secretary, who must "ensure that each Service unit of the [IHS] receives 100 percent of the amount to which the facilities of the Service, for which such Service unit makes collections, are entitled." 25 U.S.C. § 1641(c)(1)(A). In other words, the third-party revenues generated by the IHS must be expended locally by IHS on facilities or services at the same service unit in which they were earned. Oddly, IHS reads this provision to mean that the Tribe must treat all third-party payments as passthrough funds "because IHS is required to 'ensure' that each IHS service unit (including that operated under Plaintiff's ISDEAA contract) 'receives 100 percent of the amount collected.'" Def. Opp. at 25. This argument makes no sense.

In fact, this requirement, imposed *on IHS and not tribes* by the IHCIA when collecting payments for direct IHS services IHS has provided, is fully consistent with the Tribe's collection of third-party payments for services the Tribe has provided, and the Tribe's subsequent use of

those payments to provide additional healthcare services. Like IHS, the Tribe is expending funds generated from its programs to provide additional services where the funds were generated. In this, it makes perfect sense for the Tribe to receive CSC for costs incurred in providing those additional services, just as IHS receives the benefit of the federal government infrastructure when it spends third-party funds generated by the program to expand services at the program that generated them.[10]

D. The "program income" and CSC provisions of the ISDEAA do not "override" each other.

In their Opposition, Defendants manufacture a conflict between harmonious statutory provisions, arguing that "Contrary to Plaintiff's contention, §§ 5325(m) and 5388(j) cannot be reasonably construed to override the clear terms of §§ 5325(a)(2), (a)(3)(A), and 5326." Def. Opp. at 28. But the Tribe has never argued that the program income provisions "override" the CSC provisions (and Defendants do not cite any instance where it thinks the Tribe argues this). Sections 5325(m) and 5388(j) define program income and its uses, and prohibit IHS from reducing the funding otherwise obligated to the contract on the basis that additional program income might be generated by the tribe. ("The program income earned by a tribal organization in the course of carrying out a self-determination contract . . . shall not be a basis for reducing the amount of funds otherwise obligated to the contract." 25 U.S.C. § 5325(m)).[11]

[10] Defendants' argument culminates with a reference to *Samish Indian Nation v. United States*, 419 F.3d 1355 (Fed. Cir. 2005), where the court rejected claims for CSC when the Nation had no ISDEAA contract and thus incurred no administrative costs. This reference to the *Samish* case is curious since here Defendants do not dispute that the Tribe had an ISDEAA compact with IHS in 2010. Complaint, ¶ 10; Amended Answer, ¶ 10.

[11] A similar statute prohibits Congress from penalizing IHS for collecting Medicare and Medicaid. *See* 25 U.S.C. § 1641(a).

In fact, all these provisions work harmoniously together. Section 5325(a) governs the funding that IHS must provide: the Secretarial amount, § 5325(a)(1); and the CSC that "shall be added" to the Secretarial amount, § 5325(a)(2). The statute then goes on to define CSC as the non-duplicative direct and indirect costs incurred "in connection with the operation of the Federal program," § 5325(a)(3)(A)(ii). Read together, these provisions make clear that IHS must pay CSC on program income derived from third-party reimbursements, because such program income is part of the Secretarial amount—since IHS itself uses program income in providing direct services—and because they are (and must be, by law) expended on the Federal program under contract.

There was no reason for Congress to redundantly write CSC into the program income provisions, or program income into the CSC provisions. Defendants' admonition that "this Court cannot reasonably read §§ 5325(m) or 5388(j) as overriding §§ 5325(a)(2), (a)(3)(A), and 5326," Def. Mem. at 31, disregards this harmonious and coherent structure and attempts to create statutory conflict where none exists.[12] Defendants also argue that program income cannot increase the Secretarial amount because § 5388(j) does not use the word "Secretarial" and § 5325(a) does not mention "program income." Def. Opp. at 29-30. Focusing on what the statute does not say, Defendants ignore what it says very clearly: program income meets the definition of the Secretarial amount to which CSC must be added because had the Tribe not contracted the

[12] Even if there was a statutory conflict, the question is not which statute "overrides" another. "When two federal statutes address the same subject in different ways, the right question is whether one implicitly repeals the other—and repeal by implication is a rare bird indeed." *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004) (Easterbrook, J). "Repeal is to be regarded as implied only if necessary to make the (later enacted law) work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007). Here, where there is no conflict, there can be no implied repeal.

program from the IHS, the "Secretary would have otherwise provided for the operation of the programs" using program income as well as appropriated funds. 25 U.S.C. § 5325(a)(1).

Finally, § 5388(j) refers to program income as "supplemental funding to that negotiated in the funding agreement." The use of the term "supplemental" makes clear that Congress intended program income to be in addition to the funding transferred by IHS in the funding agreement. There is no reason in the language or logic of the ISDEAA for program income to be treated any differently than the other Secretarial funds it supplements.

III. The Tribe Has Met its Burden to Prove Jurisdiction and Damages.

A. All the claims alleged by Plaintiff are within the jurisdiction of this Court.

Defendants half-heartedly question this Court's jurisdiction. Def. Opp. at 33 ("it is unclear whether Plaintiff has met its burden of establishing that this Court has jurisdiction…"). Defendants did not raise lack of jurisdiction as an affirmative defense, Amended Answer at 1-2, or move for dismissal for lack of jurisdiction. Instead, Defendants now argue that "Services the tribe provided before December 20, 2010, occurred more than six years before Plaintiff presented its claim…. This Court would seem to lack jurisdiction over that portion of Plaintiff's claim." Def. Opp. at 33. While making this argument Defendants produce no evidence that the Tribe's claims are time-barred. Moreover, this argument confuses partial performance of the contract with accrual of a claim. The Court has jurisdiction over all of the Tribe's claims asserted in its Complaint, because the Tribe's claim for its 2010 CSC attributable to third-party revenues accrued, at the earliest, when the 2010 contract term expired, and the Tribe presented its claim within the six-year statute of limitations.

The claims asserted by the Tribe arise from Defendants' breach of the Tribe's ISDEAA Title V Compact and 2010 Funding Agreement. Under the CDA, "Each claim by a contractor

against the Federal Government relating to a contract… shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A). The Court's determination of the accrual of a claim must be based on an examination of the contract at issue and the facts of the particular case. *CB & I AREVA MOX Servs., LLC v. U.S.*, 138 Fed. Cl. 292, 302 (2018).

The Tribe's 2010 Annual Funding Agreement is a multi-year funding agreement covering the years of 2010-2014. Pl. Ex. B at 2. The facts of this case indicate that, at the earliest, the Tribe's claim accrued at the end of the 2010 contract performance period on January 1, 2011. "[W]here a claim is based upon a contractual obligation of the Government to pay money, the claim first accrues on the date when the payment becomes due and is wrongfully withheld in breach of the contract." *Kinsey v. U.S.*, 852 F.2d 556 (Fed. Cir.1988) (quoting *Oceanic Steamship Co. v. United States*, 165 Ct.Cl., 217, 225 (1964)); *see also Brighton Vill. Assocs. v. U.S.*, 52 F.3d 1056, 1060 (Fed. Cir.1995) (claims for breach of contract generally accrue at the time of the breach.). In *Bristol Bay Area Health Corp. v. United States*, 110 Fed. Cl. 251 (2013), the court accepted the federal defendants' argument that a "cause of action for breach of an ISDEAA contract accrues on the last day of the applicable contract year." *Id*. at 260. Precedent clearly dictates that the claims here accrued, at the earliest, upon the expiration of the 2010 performance period.

Ample precedent from courts interpreting the CDA confirms that contractors' CDA claims do not accrue until the contractor became aware of the breach and completed all mandatory pre-claim procedures. *Ariadne Fin. Servs. Pty. Ltd. v. U.S.*, 133 F.3d 874, 878 (Fed. Cir. 1998) ("[A] breach of contract claim accrued when [the plaintiff] should have known that it had been damaged by the government's breach."); *CB & I AREVA MOX Services,* 138 Fed. Cl. 292 (CDA claim accrued upon contractor's learning that Department of Energy would not pay

certain of contractor's costs in mandatory adjustment process); *Kellogg Brown & Root Servs., Inc. v. Murphy*, 823 F.3d 622, 628 (Fed. Cir. 2016) ("The [CDA] limitations period does not begin to run if a claim cannot be filed because mandatory pre-claim procedures have not been completed."); *Oceanic S.S. Co.*, 165 Ct. Cl. at 231 (Claim first accrued upon contractual "final accounting procedure" and therefore within 6-year period statute of limitations.)

The Tribe's 2010 Funding Agreement (FA) specifically provides that CSC costs will be paid in accordance with the ISDEAA and the Indian Health Manual. *See* Pl. Ex. B at § 6 ("Contract Support Costs"). The FA provides for specific CSC amounts, but also provides for adjustments throughout the contract period: "Any adjustments to these amounts will be reflected in future modifications to this FA." *Id.* The FA also states that "Nothing in this provision shall be construed to waive any statutory claim that the compactor may assert it is entitled to under the ISDEAA, as amended." *Id*. The contract provides that IHS may amend the FA and add funds and thereby avoid a breach during the contract period, so the Tribe could not have become aware of Defendant's breach related to the Tribe's 2010 claims before the end of the performance period on January 1, 2011.

Further, IHS routinely adds funding to a contract even after the close of the contract period, but before the funds lapse and revert to Treasury. *See* 31 U.S.C. §§ 1552(a), 1553(a) (appropriations legally available for up to five years after expiration of the fiscal year to adjust and liquidate existing obligations made during fiscal year for which funds were appropriated). So the Tribe could not be sure its CSC would be underpaid until the contract was closed out and underpayment ensured. Because tribal contractors cannot know that the federal government refuses to pay these costs until the completion of the "final reconciliation" phase, any related

claims do not accrue until the end of that process – when the tribe becomes aware of the breach. *See Ariadne Fin. Servs. Pty. Ltd.,* 133 F.3d at 878.

Even if the accrual period was tied to the 2010 funding year, only after the 2010 performance period could the Tribe have become aware that it had suffered damages in unpaid CSC. *Terteling v. United States*, 334 F.2d 250, 254 (Ct. Cl. 1964) ("It is too well established to require citation of authority that a claim does not accrue until the claimant has suffered damages.").

Accordingly, there is no question that the Tribe's 2010 claims, filed on December 20, 2016, were filed within the six-year statute of limitations, because they accrued, at the earliest, when the contract term expired on January 1, 2011.

B. Plaintiff has met its minimal burden to prove damages.

Defendants correctly identified the minimal burden that Plaintiff must carry to prove damages: "The contractor bears the burden of proving the amount of its damages with sufficient certainty so that the determination of damages will be more than mere speculation." *Haehn Mgmt. Co. v. United States*, 15 Cl. Ct. 50, 60 (1988), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989) (internal citation removed). However, Defendant's assertion that the Tribe has failed to meet that burden is incorrect.

The Tribe has in fact established that it incurred actual, non-speculative costs in the course of providing health care services for which Defendants have refused to pay CSC. In particular, the Tribe alleged in its Complaint, and Defendants did not claim otherwise, that the Tribe spent $664,151 on health care services and that IHS paid no CSC in support of those services. Complaint, ¶ 23 ("As documented in the Tribe's CY 2010 audit, the Tribe expended $664,151 in third-party revenues in CY 2010 on health care services provided under the IHS

Compact and Funding Agreement. IHS paid no CSC in support of those funds, giving rise to the damages described next."); Amended Answer, ¶ 23 (admitting that the Tribe identified $636,421 in "program income" and "$27,730" in "[o]ther income," for a total of $664,151 in income that, along with IHS' funding, Plaintiff used to fund "[s]ocial and health services" and "[c]apital outlay", but denying that such income was "in connection with" the Tribe's ISDEAA agreements). Since Defendants dispute any obligation to pay CSC on third-party revenues, Defendants have provided no evidence that they have done so.[13]

The Tribe's 2010 Audit fully supports the Tribe's motion. The Compact requires the Tribe to prepare and submit an annual third-party financial audit to IHS,[14] and Defendants did not dispute or raise any questions or concerns about its content. Exhibit D at 1; Declaration of John Stephens ¶ 7; Declaration of Sarah Holmstrom ¶ 8(A). Further, the parties agree that they negotiated an indirect cost rate of 31.91% for 2010. Exhibit C; Defendants' Response to Plaintiff's Statement of Material Facts ¶ 10. Straight-forward mathematics—the application of this negotiated indirect cost rate to the uncontradicted amount of revenues—supplies a measure of damages "with sufficient certainty" and well beyond "mere speculation." Specifically, the Tribe determined that its 2010 direct cost base included $664,151 in third-party revenues spent

[13] Defendants have questioned whether interest income, contract reimbursement for health services to the Upper Skagit Tribe, and revenue for a book sold at the health clinic should be included as program income. Defs.' Opp. at 24. Questioning these revenues, which are modest amounts that at most raise issues of fact as to the precise damages, which should be resolved at trial, does not serve as a basis to sustain an argument that the Tribe's motion should be denied. See also footnote 15 below pointing out that there is no legal basis for arguing that interest is not program income.

[14] "The Tribe shall provide to the Designated Official an annual single organization-wide audit as prescribed by the Single Audit Act of 1984, 31 U.S.C. 7501, *et seq.*, and shall adhere to generally accepted accounting principles and Circular A-128 of the Office of Management and Budget. A copy of the audit will be sent simultaneously to the IHS Audit Resolution Branch and the cognizant agency." Pl. MSJ, Exhibit A (Compact).

on the PFSAs within the scope of its Funding Agreement, and subtracted a proportionate share of passthroughs and exclusions based on the 2010 Audit, to arrive at a direct cost base for the third-party revenues of $631,446. Compl. ¶ 26. The Tribe then applied its negotiated indirect cost rate of 31.91% to those revenues to arrive at its claim for unpaid indirect CSC in the amount of $201,494. *Id*. ¶ 26. Defendants reject the legal basis for including third-party expenditures in the direct cost base—which is the legal issue before this court—but the Tribe has clearly demonstrated the factual basis for its claimed damages.

Not only has Plaintiff established that it incurred measurable damages through its calculations based on the uncontradicted data in the pleadings and 2010 Audit, but these figures are supported by hundreds of pages of documents provided to Defendants during the informal discovery process that occurred in this litigation between September 21 and December 14, 2018 pursuant to this Court's orders (*See* Scheduling Order, Dkt. No. 16; Minute Order (Nov. 20, 2018)).

For example, Defendants assert that aside from the audit, "Plaintiff has not come forth with any other documentation showing the source of funds its [sic] claims as program income and other income." Def. Opp. at 34. But the Tribe has produced documentation for all of the numbers in the audit, and tied these to the IHS contract. The Tribe claimed $664,151 in total third-party revenues. Compl. ¶ 26. As the audit shows, this amount was comprised of $636,421 in "Program income" and $27,730 in "Other income" (interest). Pl. Ex. D at 14. During informal discovery, the Tribe provided a more detailed breakdown in its Statement of Revenues and Expenditures associated with the 2010 IHS contract. Holmstrom Decl., Ex. A. This Revenue Statement shows that, in addition to $3,172,054 from IHS, the Tribe generated $664,151 in additional income: $79,991 from Contract Reimbursement (for health care services

provided to the Upper Skagit Tribe), $553,888 from Clinic Revenue (third-party payments), $2,542 from Program Income (book sales), and $27,730 from Interest Income.[15] All of these funds were expended on the IHS health program, because the Total Operating Revenue of $3,836,206 was exceeded by the Total Expenditures of $4,324,958, requiring the Tribe to transfer $488,751 from the General Fund. Holmstrom Decl., Ex. A.

In response to Defendants' request for further details on the type and amounts of third-party revenues generated by the Tribe, the Tribe provided a detailed General Ledger Report for account 44100 (clinic revenue). *See* Holmstrom Decl., Ex. B. This report identifies the dates, amounts, payors, and types (Medicaid, private insurance, etc.) for all $553,888 of third-party clinic revenue. Defendants' assertion that the Tribe has not documented the source of funds it claims as program income is simply wrong.

Thus the audit figures on which the Tribe based its claims are accurate and well-documented. The 2010 audit, prepared in compliance with the ISDEAA and the Compact, See Pl. Ex. A, Art. II, § 6 (Audits), was submitted to IHS in 2011. The Department of Health and Human Services completed its review of the 2010 audit in October 2011. *See* Pl. Ex. G (letter from Patrick J. Cogley to Swinomish Tribal Senate). The Department raised no issues with the audit figures at that time, nor has it done so since. Holmstrom Decl., ¶ 8(A). Defendants have produced no evidence contradicting the Tribe's 2010 Audit, the documents previously produced

[15] Defendants cite Office of Management and Budget regulations for the proposition that income from interest "is not program income under the ISDEAA." Def. Opp. at 35 (citing 2 C.F.R. § 200.80. But the ISDEAA itself does not exclude interest from program income, stating that a 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." 25 U.S.C. § 5388(h). The Tribe used interest income from IHS funding for health purposes under its IHS contract, so that income is clearly program income under the ISDEAA.

to Defendants, or the financial data set out in the pleadings. In fact, Defendants have produced no evidence *at all* in support of their motion for summary judgment, or in opposition to the Tribe's motion. Instead, Defendants criticize the Tribe for relying on its 2010 Audit, Def. Opp. at 34, and then critique the precision of descriptive language in the Audit, *id.* at 34-35. While these points might be appropriate for closing argument at trial, in the present context of cross-motions for summary judgment, Defendants have neither brought forth evidence to identify specific disputed facts that could preclude summary judgment for the Tribe, nor set forth allegedly undisputed facts – let alone undisputed facts supported by evidence – that could entitle Defendants to summary judgment.

Summary judgment should, therefore, be entered for the Tribe, and Defendants' motion for summary judgment should be denied. Even under a reading of Defendants' argument most favorable to Defendants on the current record, there is no basis for granting summary judgment for Defendants. If the Court determines that summary judgment as to the specific measure of damages cannot be entered for the Tribe, then the Court should rule that there are issues of material fact as to the amount of damages sustained by the Tribe that will be determined by the Court after trial.

C. The Tribe's methods of calculating damages from unpaid CSC are appropriate and well established.

The Tribe's calculation of its damages in this case follows the same methods that IHS and the Tribe use to determine CSC costs in the ordinary course of business. The Tribe calculates indirect costs using the simple and well-established "rate-times-base" method codified in the IHS's Indian Health Manual at 6-3.2(E)(1)(b)(iv)("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."). The Tribe simply applied its indirect cost rate to the direct costs attributable to third-party revenues to arrive at its indirect CSC claim.

With regard to the calculation of the direct CSC attributable to third-party-funded services, Defendants complain that "Plaintiff just makes up its own cost-ratio formula to support its claimed amount." Def. Opp. at 35. But, because IHS does not now reimburse for CSC on third-party revenues, no IHS guidance or regulations specify any particular method for calculating those claims. The Tribe's use of a ratio informed by its other direct costs is reasonable and equitable, is consistent with current IHS policy on the funds IHS transferred in the funding agreement, and is the only practicable method available. Common sense dictates that the additional services made possible by third-party revenues increased the amount of fringe benefits and other eligible direct CSC ("DCSC") at the same rate that IHS paid DCSC on the funds it transferred in the funding agreement. IHS paid $153,374 for direct CSC out of a total IHS award of $3,028,213, a ratio of 5.065%. Compl. ¶ 27. These figures are not "made up"; they are drawn from audited financial statements that were submitted to IHS as required by the Compact. Applying this ratio to the total third-party expenditures of $664,151 yields the Tribe's claim for $33,639 in unpaid direct CSC. *Id*.

Defendants suggest that the Tribe instead "show[] the additional salaries or the costs associated with the increased fringe benefits." Def. Opp. at 35. But, of course, personnel are not assigned on the basis of funding source, with some providing only services funded by third-party revenues. Declaration of John Stephens ¶ 14. The Tribe runs a single, unified health program. *Id.* The use of ratios—both in the indirect cost rate and the DCSC rate—is appropriate to calculate the increased burden of the additional services.

Ironically, while Defendants disparage the Tribe's "shorthand calculations," IHS routinely relies on ratios in its own policies to estimate amounts of CSC due. For example, the IHS allows the calculation of indirect costs associated with Tribal shares[16] using the "80/20 Method," in "which 80% of the Tribal shares amounts will be considered as part of the awardee's direct cost base" and "20% of the Tribal shares amounts will be considered as [indirect cost] funding." IHM § 6-3.2(E)(4)(b). The current IHS policy also allows the calculation of indirect costs associated with Service Unit Shares[17] based on the "97/3 Method," a similar calculation in which 97% of Service Unit funding is deemed to be direct cost funding and 3% indirect cost funding. IHM § 6-3.2(E)(3)(b).[18] The Tribe's CSC calculation, which is based on actual data rather than the assumptions that IHS uses in its own ratios, is at least as accurate as the IHS's methodology for calculating CSC. Certainly, the Tribe's damages evidence and analysis proves "the amount of its damages with sufficient certainty so that the determination of damages will be more than mere speculation." *Haehn Mgmt. Co.*, 15 Cl. Ct. at 60 (internal citation removed).

Conclusion

The plain language of the ISDEAA, as applied by this Court in *Pyramid Lake* and *Seminole*—as well as the court in *Sage Memorial*—dictates a ruling in favor of the Tribe here. With no material facts in dispute, the Tribe respectfully requests that this Court grant its Motion for Summary Judgment and deny Defendants' cross-motion.

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[16] "Tribal Shares" are "an awardee's equitable share of [programs, functions, services and activities] associated with [IHS] Area Office or Headquarters resources." IHM 6-3.1G(35).

[17] "Service Unit Shares" are "an awardee's equitable share of PFSA associated with Service Unit resources." IHM 6-3.1G(31). IHS services are administered through a system of 12 Area offices and 170 IHS and tribally managed service units. IHS website (https://www.ihs.gov/newsroom/factsheets/ihsprofile/, last accessed April 17, 2019).

[18] IHS suspended the use of the 97/3 method over a year ago, but has not formally decided whether to retain it, revise it, or permanently revoke it.

Respectfully submitted,

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