No. 23-250

# In the Supreme Court of the United States

XAVIER BECERRA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

*v.*

SAN CARLOS APACHE TRIBE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

The Indian Self-Determination and Education Assistance Act, 25 U.S.C. 5301 *et seq.*, permits eligible Indian tribes to contract with the federal government to assume responsibility for federal health care programs administered for the benefit of Indians. Upon entering into the contract, a tribe is entitled to the appropriated funds that the Indian Health Service (IHS) would have otherwise allocated to the federal program. 25 U.S.C. 5325(a)(1). The Act also requires IHS to pay "contract support costs"—funds "added to" that appropriated amount to cover the costs of activities the tribe must undertake to operate the transferred program, but which either "normally are not carried on" by IHS when acting as program operator, or which IHS would have "provided * * * from resources other than" the appropriated funds transferred under the contract. 25 U.S.C. 5325(a)(2). Separately, contracting tribes are permitted to collect payment from third-party payors—like private insurers, Medicare, and Medicaid—when they provide health care services to covered individuals. The question presented is as follows:

Whether IHS must pay "contract support costs" not only to support IHS-funded activities, but also to support the tribe's expenditure of income collected from third parties.

## PARTIES TO THE PROCEEDING

Petitioners (defendants-appellees below) are Xavier Becerra, Secretary of Health and Human Services; Roselyn Tso, Director of the Indian Health Service*; and the United States.

Respondent (plaintiff-appellant below) is the San Carlos Apache Tribe.

* Roselyn Tso has been automatically substituted for Benjamin Smith under Rule 35.3 of the Rules of this Court.

**RELATED PROCEEDINGS**

United States District Court (D. Ariz.):

*San Carlos Apache Tribe* v. *Becerra*, No. 19-cv-5624 (Feb. 12, 2021)

United States Court of Appeals (9th Cir.):

*San Carlos Apache Tribe* v. *Becerra*, No. 21-15641 (Nov. 21, 2022)

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## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Xavier Becerra, Secretary of Health and Human Services; Roselyn Tso, Director of the Indian Health Service; and the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 53 F.4th 1236. The opinion of the district court (App., *infra*, 19a-35a) is reported at 482 F. Supp. 3d 932.

### JURISDICTION

The judgment of the court of appeals was entered on November 21, 2022. A petition for rehearing was denied on May 16, 2023 (App., *infra*, 36a). On August 4, 2023, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including

September 13, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this petition. App., *infra*, 37a-50a.

## STATEMENT

### A. Legal Background

1. Congress enacted the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 5301 *et seq.*, in 1975 to promote "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of federal programs and services for Indians. 25 U.S.C. 5302(b). ISDA allows eligible Indian tribes to assume responsibility for operating federal programs administered by the Secretary of the Interior or the Secretary of Health and Human Services for the benefit of tribal members. 25 U.S.C. 5321[1]; see *Menominee Indian Tribe of Wisconsin* v. *United States*, 577 U.S. 250, 252 (2016). Tribes may assume that responsibility by entering into a "self-determination contract" with the relevant federal agency, in which the tribe agrees to undertake the programs and services enumerated in the contract. 25 U.S.C. 5321(a); see 25 U.S.C. 5304(j). Certain tribes may also enter into "self-governance compacts," which function like self-determination contracts but generally offer those tribes greater operational flexibility. See 25 U.S.C. 5381-5399. This case involves a self-determination contract between respondent San Carlos Apache Tribe and the Indian Health Service (IHS), to which the Secretary of

[1] Any references in this petition to provisions of the United States Code are to the current version unless otherwise noted.

Health and Human Services has delegated his ISDA contracting authority.

Upon entering into a self-determination contract, a tribe receives federal funding to operate the transferred agency program. As set forth in a provision of ISDA, 25 U.S.C. 5325, that contract funding has two components. Section 5325(a)(1) provides that the tribe shall receive the amount of appropriated funds that the "Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract." 25 U.S.C. 5325(a)(1). This is commonly known as the "Secretarial amount." See *Salazar* v. *Ramah Navajo Chapter*, 567 U.S. 182, 186 (2012).

Section 5325(a)(2) then requires the government to provide specified additional funds. It states:

> There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—
>
> (A) normally are not carried on by the respective Secretary in his direct operation of the program; or
>
> (B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

25 U.S.C. 5325(a)(2). Congress added this obligation to pay "contract support costs" in 1988, see Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, Tit. II, § 205, 102 Stat. 2292, after determining that contracting tribes

often incurred costs necessary to carry out transferred programs that the federal agencies had not previously paid out of their appropriated funding for the programs, which could result in tribes reducing program services. See S. Rep. No. 274, 100th Cong., 1st Sess. 9 (1987) (1987 Senate Report) (noting that "[i]n practice," tribes have less funding vis-à-vis agencies because of additional compliance costs); see also S. Rep. No. 374, 103d Cong., 2d Sess. 9 (1994) (1994 Senate Report) (referring to the problem of "diminution in program resources when [federal] programs * * * are transferred to tribal operation"). As the text of Section 5325(a)(2) indicates, this issue arises when the agency would not "normally" have "carried on" the relevant compliance activity—such as making contributions to state workers' compensation programs for health care employees, which the federal government does not do. See 25 U.S.C. 5325(a)(2)(A). It also arises when the agency would have covered the cost using "resources other than" the Secretarial amount—such as paying for auditing infrastructure that benefits multiple agency programs out of general agency appropriations. 25 U.S.C. 5325(a)(2)(B).

In 1994 amendments to ISDA, Congress added another subsection to Section 5325(a) clarifying which contract support costs are reimbursable. See Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, Tit. I, § 102(14)(C), 108 Stat. 4257. In subsection (3)(A) of Section 5325(a), Congress broke down such costs into two categories and explained that both are compensable, so long as the activities are not already funded by the Secretarial amount. The current version of that provision reads:

> The contract support costs that are eligible costs for the purposes of receiving funding under this chapter

> shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—
>
> > (i) direct program expenses for the operation of the Federal program that is the subject of the contract; and
> >
> > (ii) any additional administrative or other expense incurred by the governing body of the Indian Tribe or Tribal organization and any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,
>
> except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

25 U.S.C. 5325(a)(3)(A). "Direct" contract support costs, described in subsection (a)(3)(A)(i), include necessary expenses like the workers' compensation payments described above. See *Cherokee Nation* v. *Leavitt*, 543 U.S. 631, 635 (2005). "Indirect" contract support costs, described in subsection (a)(3)(A)(ii), typically include the ISDA-funded program's share of pooled overhead or administrative costs that benefit the ISDA program as well as other endeavors of the tribe. See *ibid.*

ISDA does not specify a formula for calculating direct and indirect contract support costs. IHS has published a chapter in the Indian Health Manual that specifies a methodology for computing such costs, which is often incorporated by reference into ISDA contracts. IHS, Department of Health & Human Servs., *Indian Health Manual, Pt. 6, Ch. 3 - Contract Support Costs* (Aug. 6, 2019) (Manual). The Manual provides for the

negotiation of direct contract support costs based on the tribe's enumeration of eligible costs. See Manual § 6-3.2D. Although indirect contract support costs may also be negotiated on a cost-by-cost basis, IHS and contracting tribes most often agree to calculate such costs (subject to adjustments not at issue here) by applying a negotiated rate to the "direct cost base." Manual §§ 6-3.2E(1)a(i)(a), 6-3.2E(1)a(iv). The Manual provides that the "direct cost base" is (roughly speaking) the eligible funding in the Secretarial amount plus the eligible funding in the direct contract support cost amount, unless an alternative calculation not relevant here yields a lower figure. *Ibid.*

In 1998, Congress enacted provisions expressly limiting agencies' payment of contract support costs in certain respects. See Department of the Interior and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, § 101(e), 112 Stat. 2681-280. The provision relevant here is titled "Indian Health Service: availability of funds for Indian self-determination or self-governance contract or grant support costs" and states:

> Before, on, and after October 21, 1998, and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act or any other Act for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act [25 U.S.C. 5321 et seq.] 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 (brackets in original); see 25 U.S.C. 5327 (materially similar provision applicable to the Department of the Interior). Congress enacted these limits following the Tenth Circuit's decision in *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455 (1997), which had required the Department of the Interior to pay contract support costs to support programs funded with grants from another federal department, on the theory that expenses partially benefitting the tribe's ISDA programs could not go unfunded. *Id.* at 1458-1459, 1461-1463. In the House Report accompanying the 1998 legislation, the Committee on Appropriations characterized *Ramah Navajo* as "erroneous," H.R. Rep. No. 609, 105th Cong., 2d Sess. 57 (1998), and recommended enactment of statutory language "specifying that IHS funding may not be used to pay for non-IHS contract support costs," *id.* at 108; see *id.* at 110. The accompanying bill included the language of Section 5326 as enacted. See H.R. 4193, 105th Cong., 2d Sess. (July 8, 1998) (as reported).

2. In addition to ISDA funding, tribal health care programs may receive income pursuant to the Indian Health Care Improvement Act, 25 U.S.C. 1601 *et seq.* That Act affords both IHS and tribally contracted programs the ability to collect payment for services from private insurers, tortfeasors, and workers' compensation programs. 25 U.S.C. 1621e, 1621f, 1641. That Act also governs their ability to collect payment for services from Medicare and Medicaid. 25 U.S.C. 1641; 42 U.S.C. 1395qq, 1396j. In addition, the Act regulates the use of this third-party revenue and generally subjects IHS to

more restrictive conditions than contracting tribes. See 25 U.S.C. 1621f(a), 1641(c)(1)(B) and (d)(2)(A).

Congress also addressed third-party income in ISDA. In the 1994 amendments, Congress added Section 5325(m), which states that "[t]he program income earned by a tribal organization in the course of carrying out a self-determination contract * * * shall be used by the tribal organization to further the general purposes of the contract," and "shall not be a basis for reducing the amount of funds otherwise obligated to the contract." 25 U.S.C. 5325(m)(1)-(2). Congress enacted a similar provision in 2000 when it enabled eligible tribes to enter into self-governance compacts with IHS; that provision instructs that "[a]ll Medicare, Medicaid, or other program income earned by an Indian tribe shall be treated as supplemental funding to that negotiated in the funding agreement," without "any offset or reduction in the amount of funds the Indian tribe is authorized to receive under its funding agreement." 25 U.S.C. 5388(j).

3. Finally, as of 2020, a section of ISDA instructs that the Act's provisions should "be liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe." 25 U.S.C. 5321(g); see 25 U.S.C. 5329(c) (model agreement providing that "[e]ach provision of the Indian Self-Determination and Education Assistance Act * * * and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs"); *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) (describing the interpretive canon related to the construction of laws affecting Indian tribes).

**B. Proceedings Below**

1. In this case, the San Carlos Apache Tribe entered into a self-determination contract to assume operation of specific IHS programs under ISDA, including, for example, an emergency medical services program and an alcohol and substance abuse program. C.A. E.R. 70. In 2011, the Tribe contracted with IHS to receive roughly $2.7 million in annual Secretarial amount funding and $559,000 in annual contract support costs, though those amounts changed over the years through subsequent contract modifications. *Id.* at 56, 71-73; see *id.* at 21-23.

In 2019, the Tribe filed this suit under 25 U.S.C. 5331(a), arguing (as relevant here) that it was entitled to additional contract support costs for fiscal years 2011 to 2013. C.A. E.R. 18-19. The Tribe argued that IHS was statutorily required to pay indirect contract support costs to support the Tribe's expenditure of income received from third-party payors during those years; specifically, it claimed that the "direct cost base" used to calculate indirect contract support costs should have included not only the funds the Tribe received from IHS, but also the funds it received from third parties. *Id.* at 26-27; see *id.* at 32-33. The Tribe sought almost $3 million in additional contract support costs for that three-year period, as well as damages exceeding $5.2 million—purportedly to make up for additional third-party income that the Tribe would have earned if IHS had paid those contract support costs. *Id.* at 33-35.

2. The government filed a motion to dismiss the Tribe's claim, adhering to IHS's longstanding position that costs associated with activities funded by third-party income are not contract support costs eligible for payment by IHS under ISDA. The district court agreed and dismissed the claim. App., *infra*, 19a-35a. The

court based its conclusion on the text of Section 5325(a), observing that the statute's provisions defining and delineating contract support costs do not refer to third-party revenue. *Id.* at 21a-23a. The court additionally found that ISDA's separate treatment of "program income earned by" the tribal contractor in Section 5325(m)(2) bolstered the court's reading that such income does not give rise to a contract-support-cost obligation under Section 5325(a). *Id.* at 23a; see *id.* at 24a-25a. And the court concluded that Section 5326 also "doom[ed]" the Tribe's argument, *id.* at 25a, because costs the Tribe incurs in spending income received from third parties do not satisfy that provision's requirement that costs eligible for payment by IHS be "*directly* attributable" to the Tribe's contract with IHS, *id.* at 27a; see *id.* at 27a-31a.

The parties then resolved another unrelated claim, and the district court entered final judgment. App., *infra*, 16a-18a.

3. The court of appeals reversed the dismissal of the Tribe's claim for the contract support costs at issue and remanded for further proceedings. App., *infra*, 1a-15a.

The court of appeals first concluded that Section 5325(a)(2)'s definition of contract support costs "appears to apply" to costs associated with spending income from third parties. App., *infra*, 9a; see *id.* at 8a-9a. Observing that the Tribe's self-determination contract incorporates the text of ISDA by reference—and citing the statutory conditions applicable to the Tribe's expenditure of reimbursement income under 25 U.S.C. 1641(d)(2)(A), which is not part of ISDA—the court concluded that "ISDA requires the Tribe to spend those [third-party] monies on health care." App., *infra*, 8a. On that basis, the court reasoned that the Tribe's

expenditure of third-party income could qualify as an "activit[y] which must be carried on * * * to ensure compliance with the terms of the contract" within the meaning of the Section 5325(a)(2). *Id.* at 8a-9a.

The court of appeals next concluded that the Tribe's costs associated with spending third-party income could qualify as indirect contract support costs under Section 5325(a)(3)(A)(ii). App., *infra*, 9a. Relying again on its determination that "the Contract requires the Tribe to provide third-party-funded health care," the court reasoned that the contract "causes the Tribe to carry out" its expenditures of third-party income, giving rise to a "connection" to the ISDA program. *Ibid.* In the court's view, that satisfied the requirement in Section 5325(a)(3)(A)(ii) that the administrative or overhead cost be incurred "in connection with" the federal program. *Ibid.*; see 25 U.S.C. 5325(a)(3)(A)(ii). As a result, the court explained, it could not find "that § 5325(a) *unambiguously* excludes those third-party-revenue-funded portions of the Tribe's healthcare program from [contract-support-cost] reimbursement." *Id.* at 12a.

The court of appeals then determined that other ISDA provisions did not "erase[]" the ambiguity it perceived. App., *infra*, 12a. Although the district court had relied on Section 5325(m)(2)'s separate treatment of third-party income, the court of appeals believed that the provision "cannot clearly be read as taking a position" on whether such income can give rise to contract support costs. *Id.* at 13a. The court reached the same conclusion about Section 5326's prohibition on IHS funding for costs that are not "directly attributable" to the ISDA contract or that are "associated with" non-IHS contracts. See *id.* at 13a-15a. The court first suggested that Section 5326 may not be "relevant" at all,

given its legislative origins as a response to a different contract-support-cost dispute. *Id.* at 13a; see *id.* at 13a-14a. And the court deemed the provision "not clear" in any event. *Id.* at 15a.

Because the court of appeals found the statutory language "ambiguous," it concluded that "the Indian canon applies, and the language must be construed in favor of the Tribe." App., *infra*, 15a. The court thus ruled that IHS must pay contract support costs "for third-party-funded portions" of the tribe's health care programs. *Ibid.*

In so holding, the court of appeals expressly "depart[ed]" from the D.C. Circuit's decision in *Swinomish Indian Tribal Community* v. *Becerra*, 993 F.3d 917 (2021), which had rejected a tribe's materially identical request for contract support costs associated with income from third-party payors. App., *infra*, 9a; see *id.* at 9a-10a. In *Swinomish*—which was decided after the district court's decision in this case—the D.C. Circuit interpreted Section 5325's "text and structure" to unambiguously limit contract support costs to those associated with the programs transferred from IHS and funded with the amounts provided by IHS under the ISDA contract. 993 F.3d at 920; see *id.* at 920-922. The Ninth Circuit rejected the D.C. Circuit's statutory analysis, which it believed gave insufficient weight to contracting tribes' obligation to "spend their third-party revenue on health-care services." App., *infra*, 10a.

4. A few months after the court of appeals' decision, the Tenth Circuit also addressed the question presented and ruled in the plaintiff tribe's favor, albeit in a fractured decision with no majority rationale and a

dissenting opinion. See *Northern Arapaho Tribe* v. *Becerra*, 61 F.4th 810, 812 (2023).[2]

5. The court of appeals subsequently denied the government's petition for rehearing en banc. App., *infra*, 36a.

**REASONS FOR GRANTING THE PETITION**

Under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 5301 *et seq.*, Indian tribes may enter into a contract with the Indian Health Service to operate a health care program that IHS would otherwise have operated for the tribe's benefit, using the appropriated funds that IHS would otherwise have allocated for the program. Because those funds may not be sufficient for the tribe to fully replicate the transferred program—either because the tribe is required to incur certain costs that IHS would not have incurred, or because IHS would have drawn on other federal resources to cover administrative costs—ISDA also obligates IHS to provide "contract support costs" to bridge those gaps. But contract support costs are available only for that purpose: to *support* the IHS-transferred activities that the tribe assumes under the contract and for which IHS transfers its appropriated funds. The decision below —and a splintered Tenth Circuit decision that reached the same result—extend the federal government's funding obligation in a sweeping fashion to additionally subsidize activities that tribes carry out using funds they receive from non-IHS health care payors. The statutory scheme forecloses that counterintuitive result.

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[2] On August 21, 2023, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari in *Northern Arapaho* to and including September 20, 2023. The Solicitor General intends to file a petition in that case suggesting that the Court hold *Northern Arapaho* pending its disposition of the petition in this case.

This Court's review is warranted. The Ninth Circuit's decision creates a square and acknowledged conflict with the D.C. Circuit, which the Tenth Circuit's decision deepened. And the question presented has substantial importance for the federal government and contracting and non-contracting Indian tribes. The decision below upsets three decades of practice under ISDA and would greatly increase the amount that IHS must pay as contract support costs—both on a forward-looking basis and in the form of damages awards for past contract years. That dramatic expansion of IHS's funding obligation under ISDA would likely lead to cuts in IHS's own health care programs, which serve some of the most underserved tribal communities in the country. The Court should grant the petition and reverse.

**A. The Court Of Appeals Erred In Holding That The Government Must Pay Contract Support Costs To Support An Indian Tribe's Expenditure Of Income Received From Third-Party Payors**

1. ISDA allows eligible Indian tribes to enter into a self-determination contract with IHS to assume responsibility for operating federal health care programs that IHS would otherwise administer for the benefit of tribal members. To enable tribes to operate such programs in IHS's stead, the Act sets forth two components of funding in 25 U.S.C. 5325. Section 5325(a)(1) provides the Secretarial amount, which is the appropriated funding that the "Secretary," through IHS, "would have otherwise provided" to the program or service for the tribe. 25 U.S.C. 5325(a)(1). And Section 5325(a)(2) provides "contract support costs" to cover the "reasonable costs" of "activities" necessary to comply with the "contract" that are not covered by the Secretarial amount—either because the activity is not "normally" carried out by

IHS or because IHS would have funded the activity through "resources other than" the Secretarial amount. 25 U.S.C. 5325(a)(2).

For over three decades, IHS has paid tribes contract support costs to enable them to carry out IHS-funded contract activities, as contemplated by ISDA. The question here is whether IHS must also pay additional funds to subsidize activities that tribes carry out using income received from third-party health care payors. The text, context, and history of the relevant statutory provisions answer that question in the negative.

a. The text and structure of Section 5325 establish that IHS owes contract support costs to "support" the program transferred under the contract and funded by the Secretarial amount, not to cover costs associated with the tribe's expenditure of funds from other sources. See *Swinomish Indian Tribal Cmty.* v. *Becerra*, 993 F.3d 917, 920 (D.C. Cir. 2021). The category of eligible "contract support costs," 25 U.S.C. 5325(a)(2), is identified specifically in relation to the tribe's role as a contractor for IHS and is tied to the funding it receives pursuant to its contract with IHS. The provisions for contract support costs in subsection (a)(2) immediately follow the Secretarial amount provision in (a)(1); expressly state that those "support" costs are "added to" the Secretarial amount in "paragraph (1)"; and define those added costs to cover "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. 5325(a)(2) (emphasis added).

These provisions demonstrate that Section 5325(a)(2)'s reference to "activities" required by "the contract" encompasses only those activities necessary to operate the programs and services transferred under the contract

and funded by the Secretarial amount, but which, for one of the two statutorily enumerated reasons, the Secretarial amount does not fund. See App., *infra*, 21a-23a; see also 1994 Senate Report 8-9 (noting that "[i]n the event the Secretarial amount * * * 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"). But Section 5325(a)(2)'s text does not suggest that IHS is required to pay costs to "support" activities that the tribe undertakes not "as a contractor" with and for IHS in operating the transferred program, but with funding received from third parties.

b. The provisions addressing a contracting tribe's receipt of payments from third-party payors confirm that such revenue serves as a supplemental source of income for the tribe, independent of IHS's funding obligation under ISDA. To begin with, Congress dealt with third-party payments separately from ISDA's agency-funding provisions. A tribe's authorization to collect payment from third parties for services does not come from ISDA at all; it was the Indian Health Care Improvement Act that gave both IHS and tribal contractors that ability in 1976. See pp. 7-8, *supra*; see also 25 U.S.C. 1621e, 1621f, 1641. The Indian Health Care Improvement Act also established requirements for the tribe's use of such funds. See 25 U.S.C. 1621f, 1641(d)(2)(A), 1680c(c)(3). And that Act states that such income should not be considered in determining appropriations for IHS and IHS funding for tribal contractors. 25 U.S.C. 1621f(b), 1641(a).

Congress continued to treat third-party reimbursement revenue as supplemental to the tribe's ISDA contract funding when it addressed third-party income in

ISDA itself. In the 1994 ISDA amendments, Congress added a standalone subsection stating that such third-party "program income" "shall be used by the tribal organization to further the general purposes of the contract," but "shall not be a basis for reducing the amount of funds otherwise obligated to the contract." 25 U.S.C. 5325(m)(1)-(2). Congress reflected that understanding again when it amended ISDA in 2000 to provide for self-governance compacts with IHS. Congress subjected such compacts to the same funding mechanisms as self-determination contracts, "including" the Secretarial amount "specified under section 5325(a)(1)" and "contract support costs specified under section 5325(a)(2) [and] (3)." 25 U.S.C. 5388(c). And Congress likewise added a standalone provision addressing third-party income in terms similar to Section 5325(m), stating that "[a]ll Medicare, Medicaid, or other program income earned by an Indian tribe shall be treated as *supplemental funding* to that negotiated in the funding agreement," without "any offset or reduction in the amount of funds the Indian tribe is authorized to receive under its funding agreement." 25 U.S.C. 5388(j) (emphasis added).

Thus, "just as the [ISDA] speaks of contract support costs without any mention of insurance money, it elsewhere speaks of insurance money without any mention of contract support costs." *Swinomish*, 993 F.3d at 920; see App., *infra*, 24a-25a. These textual and structural features of the legislative scheme reinforce the conclusion that Congress viewed third-party revenue as distinct income on top of funding under the ISDA contract (or compact), which has no effect on the amounts the tribe receives under the ISDA contract (or compact) one way or another. The court of appeals' view that the

tribe's expenditure of that separate revenue can dramatically *increase* IHS's contract-support-cost obligation is fundamentally inconsistent with Congress's treatment of third-party funding as "supplemental" and its evident intent that such funding not alter the amount of funds otherwise available to a tribe from IHS.

c. If there were any remaining doubt, Congress's enactment of Section 5326 in 1998 confirms that contract support costs are intended to support only the IHS-funded activities transferred under the ISDA contract, not to subsidize additional activities that tribes carry out with other funding streams. That section first states that "notwithstanding any other provision of law," IHS funds "may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act." 25 U.S.C. 5326. Any costs a tribe incurs in spending its income from third-party health care payors are not "*directly* attributable" to the tribe's self-determination contract with IHS. While the word "attributable" suggests a causal requirement, the modifying adverb "'directly'" requires that connection to be "close," *Bowsher* v. *Merck & Co.*, 460 U.S. 824, 831 (1983) (citation omitted), and "immediate," *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 618 (1992) (citation omitted). A tribe's expenditure of income received from third parties does not come about as an immediate result of its contract with IHS; instead, the tribe has to perform the health care services in question and receive the reimbursement amounts by operation of other law or other contracts.

Section 5326 further directs that no IHS funds "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. Activities funded with third-party revenue are "associated with" funds the tribe receives pursuant to "contract[s]" with entities "other than the Indian Health Service," *ibid.*, such as agreements with private insurers, Medicaid, and Medicare. See App., *infra*, 30a (explaining that tribes enter into certain agreements in order to receive Medicare and Medicaid reimbursements). In this respect too, Section 5326's "plain and unambiguous" language bars contract support costs for third-party-funded activities. *Northern Arapaho Tribe* v. *Becerra*, 61 F.4th 810, 830 (10th Cir. 2023) (Baldock, J., dissenting in part).

d. The statutory rationale for IHS's payment of contract support costs also has no application in the context of a tribe's supplemental revenue streams. Section 5325(a)(2)'s text makes clear that Congress designed the payment of those additional funds to cover activities that are necessary for compliance with IHS program requirements but were left systematically unfunded. The concern was that, without this "added" amount, 25 U.S.C. 5325(a)(2), those unfunded costs would either result in "diminution" in the services that the tribe contracted to provide, 1994 Senate Report 9, or would "force[]" tribes "to use their own financial resources to subsidize federal programs," 1987 Senate Report 9.

A tribe's receipt of supplemental revenue from third parties, in contrast, does not give rise to activities that "must be carried on by the tribal organization as a contractor" to operate the transferred program but are left unfunded. 25 U.S.C. 5325(a)(2). While federal law obligates tribes to use reimbursement income for health-

related purposes, see 25 U.S.C. 1641(d)(2)(A), 5325(m)(1), those statutory mandates are not unfunded —the third-party revenue itself is the funding.

Nor is there a need for IHS to subsidize contracting tribes' expenditures of income from third parties to ensure parity between IHS-operated and tribally operated programs. To the contrary, Congress placed IHS under greater restrictions than contracting tribes—allowing tribes to collect more revenue than IHS in the ordinary course and giving tribes more flexibility in spending it. For example, a contracting tribe may unilaterally decide to offer health care services to non-Indians (and thereby increase its operations and income), but IHS cannot do so without a request from the tribe it serves. See 25 U.S.C. 1680c(c)(1) and (2). While a contracting tribe may use Medicaid and Medicare proceeds it collects on "any health care-related purpose," 25 U.S.C. 1641(d)(2)(A), IHS must first use such proceeds to ensure compliance with relevant Medicaid and Medicare authorities, see 25 U.S.C. 1641(c)(1)(B). And for many years Congress has prohibited IHS, but not contracting tribes, from using Medicare and Medicaid funds to construct new facilities. See, *e.g.*, Department of the Interior, Environment, and Related Agencies Appropriations Act, 2012, Pub. L. No. 112-74, Div. E, Tit. III, 125 Stat. 1028; Department of the Interior, Environment, and Related Agencies Appropriations Act, 2023, Pub. L. No. 117-328, Div. G, Tit. III, 136 Stat. 4809.

Because IHS and contracting tribes are thus differently situated, payment of contract support costs with respect to a tribe's third-party income would distort ISDA's operation. It would allow tribes to operate much larger programs than IHS would have operated

directly, at a far greater cost to IHS. Indeed, because there is no limit on third-party income contracting tribes may earn, a corresponding contract-support-cost obligation would have the potential to exceed the Secretarial amount—a result at odds with the role of contract support costs as mere "support" to bridge specified gaps. 25 U.S.C. 5325(a)(2). For example, as noted above, a contracting tribe could build new hospital facilities using Medicare and Medicaid proceeds. Under the Ninth and Tenth Circuit's reading, the tribe could collect contract support costs from IHS to subsidize those expenditures, then use those new hospital facilities to generate even *more* third-party income, then obtain more contract support costs from IHS to spend *that* income—continuing the cycle of ever-expanding federal outlays. By contrast, when operating its own program for a non-contracting tribe's benefit, IHS would not be authorized to engage in such expansion of facilities using Medicare and Medicaid funds in the first place.

2. The court of appeals' contrary conclusion was premised on its view that costs associated with activities funded by revenue from third parties "appear[]" to be necessary to comply with the Tribe's ISDA contract—because "[t]he Contract incorporates the ISDA" and "the ISDA requires the Tribe to spend those monies on health care." App., *infra*, 8a-9a; see *id.* at 11a-12a, 15a. But that view is mistaken. ISDA's requirement that tribes spend third-party program income in a way that "further[s]" the contract's "general purposes," 25 U.S.C. 5325(m)(1), is not a mandate that any particular activities "be carried on" under the "terms of the contract" "as a contractor." 25 U.S.C. 5325(a)(2). The requirement has the much more modest purpose of ensuring that tribes do not spend that supplemental income

on matters entirely unrelated to health care for Indians. Had Congress intended to obligate tribes to use that income to perform services under the contract, it would have said so explicitly—as it did in a neighboring subsection. See 25 U.S.C. 5325(a)(4)(A) (requiring tribes to use certain savings "to provide additional services or benefits under the contract").

The court of appeals cited 25 U.S.C. 1641(d)(2)(A) in support of its reasoning that the contract "require[s] the Tribe to carry on those portions of its healthcare program funded by third-party revenues." App., *infra*, 8a. That provision appears in the Indian Health Care Improvement Act, not ISDA, and it is not directly incorporated into the contract in the manner that the court suggested. See *ibid.* But in any event, that provision likewise imposes no mandate to conduct any particular activities. Instead, Section 1641(d)(2)(A) lists a variety of acceptable uses of reimbursement revenue from third parties, with a catch-all that tribes may use such revenue for "any health care-related purpose" "or otherwise to achieve the objectives" of the Indian Health Care Improvement Act. 25 U.S.C. 1641(d)(2)(A). Again, that provision does not obligate a tribal contractor to spend third-party income on particular activities in order to fulfill an ISDA contract.

The court of appeals further erred in giving only cursory consideration to Section 5325(m)(2). App., *infra*, 12a-13a. The fact that Congress saw a need to clarify that third-party income should not serve as a basis to *decrease* the Secretarial amount makes it exceedingly unlikely that Congress implicitly meant for such revenue to *increase* the Secretary's obligation to pay contract support costs. See *Swinomish*, 993 F.3d at 920. That statutory context should have informed the court's

reading of Section 5325(a), but the court merely dismissed Section 5325(m)(2) as "ambiguous." App., *infra*, 13a.

The court of appeals also gave short shrift to the prohibition in Section 5326. The court first suggested that Section 5326 was not clearly "relevant" because the specific dispute that gave rise to its enactment is not the same as the one in this case. App., *infra*, 13a. But the court's role is to give effect to the text that Congress enacted, not to cabin the text to address only its primary catalyst. See *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."). In any event, this dispute presents the same kind of problem that led to the enactment of Section 5326. Congress enacted the prohibition in response to a judicial decision that extended an agency's contract-support-cost obligation to activities funded by other sources, based in part on supposed ambiguity in (what is now codified as) Section 5325(a). See *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1460-1461 (10th Cir. 1997); see also p. 7, *supra*. The decision below reaches the same erroneous result that Section 5326 was designed to prevent.

The court of appeals further reasoned that the costs at issue here could be plausibly understood as "directly attributable" to the Tribe's ISDA contract, and therefore not barred by Section 5326, because that contract is, in a sense, a but-for cause of the Tribe's later receipt of third-party reimbursements. App., *infra*, 14a-15a. But that writes the word "directly" out of the express statutory prohibition on payment of contract support

costs if they are not "directly attributable" to the ISDA contract. See App., *infra*, 27a-29a. Indeed, as the district court observed below, the inclusion of "directly" in Section 5326 reflects a deliberate choice by Congress, because several other ISDA provisions use "attributable" without the modifying adverb. See *id.* at 28a-29a; see also 25 U.S.C. 5325(a)(4), (e), and (k)(11).

Ultimately, the court of appeals' conclusion rested not on a determination that the Tribe's position represents the best reading of the individual operative provisions of ISDA or of the statute as a whole, but instead on the Indian canon. App., *infra*, 7a, 9a, 11a-12a, 14a-15a. Examining each relevant provision largely in isolation, the court believed the statutory text could be viewed as sufficiently "ambiguous" to permit a reading of the provision in the Tribe's favor. See *id.* at 15a. But even if the court's identification of ambiguity in one or another of the individual provisions were plausible, but see pp. 15-19, 21-24, *supra*, the "ambiguity of statutory language is determined" not only "by reference to the language itself," but by "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997).

The court of appeals therefore should have applied ordinary tools of statutory interpretation to consider the statutory scheme comprehensively. When the interlocking and mutually reinforcing provisions of the statute are properly read in that manner, ISDA conclusively demonstrates that contract support costs are available only to support the tribe's use of funds received from IHS pursuant to the contract, to carry out the programs transferred under that contract. The Indian canon therefore should not come into play, as it

"does not permit reliance on ambiguities that do not exist," *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986), and cannot be used to "produce an interpretation that * * * would conflict with the intent embodied in the statute Congress wrote," *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001).

**B. The Decision Below Warrants Further Review**

Given the importance of self-determination contracts for the federal government and Indian tribes, this Court has granted review on a number of occasions to resolve disputes arising under ISDA, including in cases involving contract support costs. See *Menominee Indian Tribe of Wisconsin* v. *United States*, 577 U.S. 250 (2016); *Salazar* v. *Ramah Navajo Chapter*, 567 U.S. 182 (2012); *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005). In this instance, the Court's review is necessary to resolve a clear disagreement among the courts of appeals regarding a statutory-interpretation issue of substantial financial significance.

1. As the Ninth Circuit acknowledged (App., *infra*, 9a-10a), its decision below conflicts with the D.C. Circuit's decision in *Swinomish* addressing the same dispute. There, consistent with the analysis above, the D.C. Circuit unanimously held that ISDA's "text and structure do not require payment of contract support costs when a tribe spends money received from sources other than Indian Health Service, like insurance providers." *Swinomish*, 993 F.3d at 920. As the D.C. Circuit explained, "[t]he scope of contract support costs" is "limited" to the contract between the tribe and IHS and the services that the tribe "promises to provide" using the Secretarial amount. *Ibid.*

The Tenth Circuit's fractured decision in *Northern Arapaho* deepened that stark conflict. Although the

reasoning of the two judges in the *Northern Arapaho* majority differed, they both relied on the Ninth Circuit's analysis in the decision below and criticized the D.C. Circuit's contrary reading. See *Northern Arapaho*, 61 F.4th at 820-821 & nn.8-9, 823 (opinion of Moritz, J.); *id.* at 827 (Eid, J., concurring in the judgment); see also *id.* at 829 n.1 (Baldock, J., dissenting in part) (disagreeing with the Ninth Circuit's decision in this case).

The Ninth and Tenth Circuits' decisions have upended three decades of practice under ISDA. As a result, IHS is subject to different contract-support-cost obligations depending on the location of the contracting tribe. In the absence of a nationwide ruling from this Court, that divergence will create considerable administrative problems for current and future self-determination contracts and self-governance compacts, as well as inequities among tribes in different circuits.

2. The question presented is also important for the federal government and for tribes. The monetary impact of the Ninth and Tenth Circuit's rulings is likely to be quite significant. Although making a firm prediction is difficult—in part because tribes do not report their third-party income to IHS—IHS has informed this Office that it estimates the impact would fall somewhere between $800 million and $2 billion annually if applied to ISDA contracts and compacts nationwide, and that the amount would be expected to grow over time. That estimate does not include payouts in suits that (like the suit here) seek retroactive damages under the Contract Disputes Act, 41 U.S.C. 7101 *et seq.*, which has a six-year statute of limitations, 41 U.S.C. 7103(a)(4).

In this case, for example, the Tribe has sought additional contract support costs of nearly $3 million for

fiscal years 2011-2013, plus over $5 million in alleged lost revenue associated with the expenditure of those contract support costs. See p. 9, *supra*. That award would come close to doubling the original amount that IHS owed under the ISDA contract for that three-year period. Indeed, in another pending case, a tribe in the Ninth Circuit is seeking nearly $110 million in additional contract support costs and associated damages for a single fiscal year. See Compl. ¶ 46, *Gila River Indian Cmty.* v. *Becerra*, No. 22-cv-1993 (D. Ariz. Nov. 23, 2022). Another tribal organization in the Ninth Circuit is seeking over $40 million for a single fiscal year and over $90 million for another fiscal year based primarily on the same legal theory. See First Am. Compl. at 15-23, *Alaska Native Tribal Health Consortium* v. *Becerra*, No. 21-cv-260 (D. Alaska Aug. 18, 2023).

Without conceding the merit of those demands, any substantial increase in the government's contract-support-cost obligation under ISDA would have significant repercussions for IHS, contracting tribes, and the non-contracting tribes that IHS serves through its direct programs. If the Ninth and Tenth Circuits' decisions are allowed to stand, tribal programs that collect large amounts of reimbursement revenue from third parties (especially if the tribe chooses to serve non-Indians) would be able to significantly expand their IHS funding beyond the scope of the original IHS program that was the subject of the contract. Meanwhile, non-contracting tribes would likely face reduced programs or services. Although (following this Court's 2012 decision in *Ramah Navajo*) the annual appropriation for contract support costs is not itself capped, the amounts expended still count against the overall suballocation limit for discretionary spending under the provisions of

the Congressional Budget Act of 1974, 2 U.S.C. 601 *et seq.*, governing congressional budgeting.[3] An increase of this magnitude to IHS's expenditures could consume IHS's total annual funding increases under the suballocation, which are considerably less. And that fiscal pressure could lead to reductions in IHS-run services, which benefit some of the most underserved tribal communities in the country. This Court should grant review to resolve the circuit conflict and reverse the judgment below to prevent these adverse consequences.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2023

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[3] See 2 U.S.C. 633(b); see generally Drew C. Aherne, Congressional Research Service, *Enforceable Spending Allocations in the Congressional Budget Process: 302(a)s and 302(b)s* (Jan. 18, 2023).

# APPENDIX

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**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 21-15641

SAN CARLOS APACHE TRIBE, PLAINTIFF-APPELLANT

*v.*

XAVIER BECERRA, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; BENJAMIN SMITH,[*] PRINCIPAL DEPUTY DIRECTOR, INDIAN HEALTH SERVICE; UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES

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Argued and Submitted: Mar. 7, 2022
Phoenix, Arizona
Filed: Nov. 21, 2022

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**OPINION**

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Before: MICHAEL DALY HAWKINS, RICHARD A. PAEZ, and PAUL J. WATFORD, Circuit Judges.

PAEZ, Circuit Judge:

This case presents a question of Native sovereignty in the context of a healthcare dispute.

Indian Health Service ("IHS") administers health care programs for Native tribes. Those programs bill insurance like any other doctor's office: if a patient is covered by Medicare, Medicaid, or private insurance,

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[*] Substituted according to Federal Rule of Civil Procedure 25(d).

IHS bills that insurance for the cost of the procedure and retains that third-party revenue.

In an attempt to further tribal sovereignty, Congress in the Indian Self-Determination and Education Assistance Act ("ISDA") allowed tribes to run their own healthcare programs, funded by IHS in the amount IHS would have spent on a tribe's health care.[1] 25 U.S.C. § 5325(a)(1). This furthered the goal of "assuring maximum Indian participation in the direction of . . . Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities." 25 U.S.C. § 5302(a). But tribes quickly ran into a roadblock: absent the bureaucracy and legal protections the Federal government enjoys, it was too expensive for tribes to run those programs. Congress enacted a fix by requiring IHS to provide tribes with "contract support costs" ("CSC"), or the amount of money a tribe would need to administer its healthcare programs, so that the tribe could provide "at least the same amount of services" as IHS otherwise would. 25 U.S.C. § 5325(a)(2)-(3); S. Rep. No. 100-274, at 16 (1987).

This helped. But amici tribes explain that they still did not enjoy parity with IHS, because IHS billed outside insurers slowly, and only imperfectly remitted that money to tribes. Tribes were thus losing some of their third-party revenue. So Congress stepped in again and allowed tribes to bill outside insurers directly. 25 U.S.C. § 1641(d)(1). Congress additionally allowed the

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[1] *Navajo Health Found.-Sage Mem'l Hosp., Inc. v. Burwell*, 263 F. Supp. 3d 1083, 1119-46 (D.N.M. 2016), eloquently explains the legislative history of the ISDA. While this history accords with our holding here, we need not rely upon it to reach our conclusion.

tribes to *keep* the third-party revenue without diminishing their IHS grants, so long as tribes spent that revenue on health care. 25 U.S.C. §§ 1641(d)(2)(A), 5325(m).

A simplified example clarifies this scheme. Assume that a tribe administers a $3 million healthcare program for its members. It costs the tribe $500,000 in administrative costs to do so. IHS therefore will pay the tribe $3.5 million. Additionally, the tribe recovers $1 million for those procedures from outside insurers. It is statutorily required to spend that $1 million on health care as well.

But there is a hole in this statutory scheme. Who pays the CSC for that additional $1 million in health care that the tribe must provide with its third-party revenue? At the heart of this lawsuit is Plaintiff-Appellant San Carlos Apache Tribe's ("the Tribe") contention that IHS must cover those additional CSC.

The Tribe, a federally recognized Indian Tribe in Arizona, exercises its sovereignty by running its own healthcare programs and billing outside insurers directly. As required by contract and statute, it spends third-party revenue on additional health care for its members. But doing so is expensive, and the Tribe does not receive CSC from IHS to cover additional services. It filed suit to recover the CSC for program years 2011-2013. Defendant-Appellees Xavier Becerra, Secretary of the U.S. Department of Health & Human Services; Benjamin Smith, Principal Deputy Director of IHS; and the United States of America (collectively, "Defendants") contend that the Tribe must cover the additional CSC.

The parties settled all claims but Claim 2, which alleges that Defendants must cover CSC for the third-party-revenue-funded portions of the Tribe's healthcare program. The district court granted Defendants' motion to dismiss this claim. The Tribe timely appealed that dismissal.[2] We hold that the text of the governing statute, 25 U.S.C. § 5325(a), compels reversal and remand for additional proceedings.

I.

Defendants contend that the language of the contract under which the Tribe operated its healthcare programs ("the Contract") forecloses the Tribe's claim.

The section of the Contract concerning CSC reads:

> CONTRACT SUPPORT COSTS
>
> The parties agree that the CSC funding under this Funding Agreement (FA) will be calculated and paid in accordance with Section 106(a) of the [ISDA]; IHS CSC Policy (Indian Health Manual—Part 6, Chapter 3) or its successor; and any statutory restrictions imposed by Congress. In accordance with these authorities and available appropriations for CSC, the parties agree that under this FA the San Carlos Apache Tribe will receive direct CSC in the amount of **$135,203**, and indirect CSC in the amount of **$423,731**. These amounts were determined using the FY 2010 IHS CSC appropriation, and the San Carlos

[2] We have jurisdiction under 28 U.S.C. § 1291. When reviewing the dismissal of a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), we take all factual allegations set forth in the complaint as true, construed in the light most favorable the plaintiff, and we review de novo. *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001) (internal citations omitted).

> Apache direct cost base and indirect rate as of **December 7, 2010**, and may be adjusted as set forth in the IHS CSC Policy (IHM 6-3) as a result of changes in program bases, Tribal CSC need, and available CSC appropriations. Any adjustments to these amounts will be reflected in future modifications to this FA.

Here, the Contract sets out an agreed-upon CSC amount and provides for adjusting this amount, as set forth in the Indian Health Manual ("IHM").[3]

Defendants contend that the Tribe's claims are meritless because the Tribe received the amount of CSC specified by the Contract, a properly calculated amount that 25 U.S.C. § 5325(a) does not override. This argument ignores the flexibility written into the Contract, which allows those amounts to be adjusted in the event of changes to "program bases, Tribal CSC need, [or] available CSC appropriations." A determination that the Tribe is owed CSC by statute for third-party-revenue-funded portions of its health-care program would fall under this umbrella. Additionally, because the Contract incorporates the provisions of the ISDA, if that statute requires payment of the disputed funds, it controls. Thus, as the district court apparently concluded, we also conclude that the Contract is not dispositive and proceed to determine whether the Tribe is owed those additional CSC by statute.

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[3] The IHM calculates CSC by applying a negotiated rate to a direct cost base. The parties dispute the amount of the direct cost base, not the negotiated rate. It can be accessed at https://www.ihs.gov/ihm/pc/part-6/p6c3/#6-3.2E.

II.

The principles of statutory interpretation are familiar. "The starting point for our interpretation of a statute is always its language." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980)). "If the statutory language is plain, we must enforce it according to its terms." *King v. Burwell*, 576 U.S. 473, 486, 135 S. Ct. 2480, 192 L. Ed. 2d 483 (2015) (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 130 S. Ct. 2149, 176 L. Ed. 2d 998 (2010)). But when deciding whether language is plain, "we must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King*, 576 U.S. at 486, 135 S. Ct. 2480 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000)).

Statutory interpretation in this case has an additional wrinkle: the "Indian canon." Because "the canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians, . . . statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985) (internal citations and alterations omitted). And while the canon in some cases is a "guide[ ] that need not be conclusive," *Chickasaw Nation v. United States*, 534 U.S. 84, 85, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001), it is here incorporated into the Contract with binding language that reads: "[e]ach provision of the [ISDA] and each provision of this Contract

shall be liberally construed for the benefit of the contractor. . . . " Thus, we need not conclude that the statutory meaning is plain; rather, to find that the Tribe has plausibly alleged a claim for relief, we merely must conclude that the language is ambiguous to read it as the Tribe does.

A.

We start with the CSC provisions of the relevant statute, 25 U.S.C. § 5325(a), upon which the district court's order and the parties' arguments rely. Section 5325(a) reads:

> **(a) Amount of funds provided** . . .
>
> **(2)** There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—
>
> > **(A)** normally are not carried on by the respective Secretary in his direct operation of the program; or
> >
> > **(B)** are provided by the Secretary in support of the contracted program from resources other than those under contract.
>
> **(3)(A)** The contract support costs that are eligible costs for the purposes of receiving funding under this chapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—

> **(i)** direct program expenses for the operation of the Federal program that is the subject of the contract; and
>
> **(ii)** any additional administrative or other expense incurred by the governing body of the Indian Tribe or Tribal organization and any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,
>
> except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

25 U.S.C. § 5325(a).

Section (a)(2) requires that CSC be paid "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." This language appears straightforward: any activities that the Contract requires the Tribe to perform to comply with the Contract are eligible for CSC.

Does the Contract require the Tribe to carry on those portions of its healthcare program funded by third-party revenues? It does. The Contract incorporates the ISDA.[4] And the ISDA requires the Tribe to spend those monies on health care. 25 U.S.C. § 1641(d)(2)(A). The third-party-revenue-funded portions of the healthcare program are therefore "activities which must be carried on by a tribal organization as a contractor to en-

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[4] The Contract states that "The provisions of title 1 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) are incorporated into this agreement."

sure compliance with the terms of the contract." Put differently: if the Tribe did *not* spend third-party revenue on its healthcare program, as defined in 25 U.S.C. § 1641(d)(2)(A), it would fall out of compliance with the Contract. Section (a)(2) therefore appears to apply to the scenario at hand.

Section (a)(3)(A) narrows this reading by explicitly defining CSC. It identifies "direct" CSC, § (a)(3)(A)(i), as those expenses "for the operation of the Federal program that is the subject of the contract"; and "indirect" CSC, § (a)(3)(A)(ii), as those expenses "incurred by the tribal contractor in connection with the operation of the Federal program." The Tribe argues that the third-party-revenue-funded healthcare activities are part of the "Federal program." But we need not go that far; rather, to qualify for CSC, those healthcare activities need only be performed "in connection with" the operation of the Federal program. A connection is a "causal or logical relation or sequence." *Connection*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/connection. And here, there is a "causal" relationship between the Contract defining the Federal program and the third-party-revenue-funded activities: the Contract requires the Tribe to provide third-party-funded health care; it therefore causes the Tribe to carry out those activities. Sections (a)(2) and (a)(3)(A)(ii), together, point toward requiring Defendants to cover CSC for activities funded by third-party revenues.

This conclusion departs from the only other circuit court to have considered this issue. In *Swinomish Indian Tribal Cmty. v. Becerra*, the D.C. Circuit concluded that § 5325(a) does not comport with the reading

that the Tribe advocates because "reimbursements for contract support costs cover activities that 'ensure compliance with the terms of *the* contract' conducted by the tribe 'as a contractor.'" 993 F.3d 917, 920 (D.C. Cir. 2021) (citing 25 U.S.C. § 5325(a)(2)) (emphasis in original). And because the contract is between a tribe and IHS only, CSC are limited to "a tribe's cost of complying with the terms of *that* contract." *Swinomish*, 993 F.3d at 920 (emphasis in original).

This ignores the plain language of the statute. As explained above, the contract and the statute both require tribes to spend their third-party revenue on healthcare services. Thus, the "cost of complying" with a contract between IHS and a tribe *includes* the cost of conducting those additional activities, because but for conducting those activities, the Tribe would not be in compliance with the Contract. Put differently, § (a)(2) does not limit CSC to activities "described in the contract" or "funded by the signatories to the contract," each of which would favor *Swinomish*'s reading. Rather, it authorizes payment of CSC for *all* activities—regardless of funding source—that are required for compliance with the Contract. This includes the third-party-revenue-funded portions of the program.

*Swinomish* additionally rejected the reading of § (a)(3)(A) that the Tribe here advocates. It found that "the Federal program" did not cover the third-party-funded activities, and therefore that § (a)(3)(A) does not authorize CSC. 993 F.3d at 921. That, too, misreads the statute.

First, it is entirely possible to read "the Federal program" as encompassing those portions of the Tribe's healthcare program funded by third-party revenue.

This is the program that the Tribe operates under Federal directive, via Federal contract, in the Federal government's stead; it is therefore possible that all activities required by the Contract, regardless of funding source, comprise one "Federal program." At oral argument, Defendants' attorney explained that when tribes bill insurance companies, they "plow that money back into *the program*" and "pay for general costs that are associated with *the program*." Counsel also explained that third-party revenue "is an additional benefit that allows [the Tribe] to expand services under *the program* and basically to expand *the program*." Finally, counsel for Defendants explained that both IHS and the Tribe, when administering health care, have "obligations to continue to use those funds for purposes of the contract, so there's no disparity there: *the program* works the same way for the government and the Tribe with respect to third-party income." At least informally, then, IHS itself refers to the expanded suite of services funded by third-party revenue as being part of "the program." It is difficult, therefore, to credit Defendants' argument—and *Swinomish*'s conclusion—that the meaning of the statutory phrase "the Federal program" is not *at least* ambiguous.

But even if "the Federal program" does not refer to those third-party-revenue-funded healthcare activities, *Swinomish* still misreads § (a)(3)(A). That statutory language does not limit CSC to "the Federal program"; it limits CSC to costs "incurred by the tribal contractor in connection with the operation of the Federal program." That language contemplates that there are at least some costs *outside* of the Federal program itself that require CSC. Even if the third-party-funded activities are *not* part of the "Federal program," their ad-

ministrative costs were "incurred . . . in connection with the operation of the Federal program" and are therefore recoverable by the Tribe from IHS.

In short, we cannot conclude that § 5325(a) *unambiguously* excludes those third-party-revenue-funded portions of the Tribe's healthcare program from CSC reimbursement. Indeed, the plain language of this section appears to include those costs. This would lead us to conclude that the district court erred. Before reaching that conclusion, however, we turn to the additional sections of the statute upon which the parties rely.

B.

None of the additional statutory language to which Defendants point erases this ambiguity. First, Defendants refer to 25 U.S.C. § 5325(m), which provides that:

> The program income earned by a tribal organization in the course of carrying out a self-determination contract—
>
> **(1)** shall be used by the tribal organization to further the general purposes of the contract; and
>
> **(2)** shall not be a basis for reducing the amount of funds otherwise obligated to the contract.

The district court reasoned that because § 5325(m) concerns "program income earned," while § 5325(a) concerns funds "provided" by the Secretary, the two refer to separate funds. *Swinomish* similarly reasoned that because this section refers to insurance monies without CSC, Congress could not have intended to provide CSC

for third-party-revenue-funded portions of the health-care program. 993 F.3d at 921.

This reading is erroneous as well. This section says nothing about the administrative costs of the third-party-revenue-funded programs; it therefore cannot clearly be read as taking a position on how those costs should be funded. Congress's intentions are not clear; Congress may have intended the reading *Swinomish* favored, but it may also have assumed that § 5325(a) covered CSC and refrained from mentioning them again so as not to be redundant. We conclude, therefore, that this passage is ambiguous as to CSC.

Second, Defendants point to 25 U.S.C. § 5326, which reads:

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

This section of the ISDA prevents IHS from paying CSC for contracts between a tribe and an entity other than IHS. It is not clear that this section is relevant. Congress enacted § 5326 in response to a Tenth Circuit case that required the BIA to pay administrative costs for a

New Mexico *state* program. *See Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997); H.R. Rep. No. 105-609, at 110 (1998). It thus seems directed at preventing IHS from being on the hook for programs unrelated to its healthcare contract with the Tribe. Perhaps for this reason, *Swinomish* did not consider § 5326. Nonetheless, because Defendants contend that it is dispositive, we consider it.

Are CSC for the third-party-revenue-funded extensions of the Tribe's healthcare program "directly attributable" to the Contract? Or are they "associated with [a] contract" between the Tribe and another "entity"? The Tribe argues that the CSC associated with third-parties revenue are "directly attributable" to the Contract because but for that Contract, the Tribe would not be required to bill Medicare and Medicaid—nor would it have the right to. Defendants urge us to agree with the district court, which reasoned that, although the third-party revenue at issue here was "undoubtedly 'attributable' to [the Tribe's] contract with IHS," it was not "*directly* attributable" to that contract. The district court reasoned that this language precluded the Tribe from collecting additional CSC.

We are sensitive to the district court's careful analysis, but we disagree. We cannot conclude that the statute *unambiguously* follows Defendants' interpretation. Consider how insurance billing works in practice: a healthcare provider performs a procedure. The office then bills the patient's insurance. The Contract requires the Tribe to do so. If insurance turns out to cover the procedure, the Tribe can keep the money. Otherwise, it's on the hook. Either way, the procedure has already been performed as required by the Con-

tract. If the Tribe keeps the money, it may spend it on further program services. This spending occurs only because the Contract allows the Tribe to recover the insurance money and requires the Tribe to spend it. It is therefore not clear that this section unambiguously means that this spending is *not* "directly attributable" to the Contract.

## III.

The Tribe administers its own healthcare program and bills outside insurers, despite the cost, because IHS has allegedly demonstrated that it cannot do so effectively. The Tribe now seeks to be put on equal footing with IHS. The Tribe merely needs to demonstrate that the statutory language is ambiguous. It has met that burden. Because the statutory language is ambiguous, the Indian canon applies, and the language must be construed in favor of the Tribe. We hold that the ISDA requires payment of CSC for third-party-funded portions of the Federal healthcare program operated by the Tribe. We therefore find that the Tribe has met its burden under Rule 12(b)(6), reverse the dismissal of this claim, and remand for further proceedings.

REVERSED AND REMANDED.

**APPENDIX B**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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No. CV-19-05624-PHX-NVW

SAN CARLOS APACHE TRIBE, PLAINTIFF

*v.*

ALEX AZAR, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; MICHAEL WEAHKEE, PRINCIPAL DEPUTY DIRECTOR, INDIAN HEALTH SERVICE; UNITED STATES OF AMERICA, DEFENDANTS

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ALEX AZAR, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; MICHAEL WEAHKEE, PRINCIPAL DEPUTY DIRECTOR, INDIAN HEALTH SERVICE; UNITED STATES OF AMERICA, COUNTERCLAIMANTS

*v.*

SAN CARLOS APACHE TRIBE, COUNTERDEFENDANT

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Filed: Feb. 12, 2021

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**FINAL JUDGMENT**

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The parties have stipulated to Entry of Final Judgment (Doc. 46) with stipulations of fact for the record. Good cause appearing, the Court adopts the parties' stipulated facts as follows pursuant to Rule 52 of the Federal Rules of Civil Procedure:

a. Regarding the claims in Count I for fiscal year 2011, the direct cost base for the expenditures made with IHS appropriated dollars was $2,137,614, following passthroughs and exclusions of $1,036,481 attributable to those appropriated funds. $12,218 remains due for indirect CSC and $15,096 remains due for direct CSC.

b. Regarding the claims in Count I for fiscal year 2012, the direct cost base for the expenditures made with IHS appropriated dollars was $2,638,038, following passthroughs and exclusions of $240,462 attributable to those appropriated funds. $49,863 remains due for indirect CSC and $19,992 remains due for direct CSC.

c. Regarding the claims in Count I for fiscal year 2013, the direct cost base for the expenditures made with IHS appropriated dollars was $3,915,990, following passthroughs and exclusions of $283,008 attributable to those appropriated funds. $173,490 remains due for indirect CSC and $28,824 remains due for direct CSC.

d. In accord with the figures stated in paragraphs a, b, and c above, $299,483.00 remains due to Plaintiff for indirect CSC and direct CSC.

e. The parties stipulated and agreed that Counts III, IV, and V and Defendants' Counterclaim be dismissed with prejudice.

IT IS THEREFORE ORDERED that the Joint Motion (Doc. 46) is granted.

IT IS FURTHER ORDERED that Plaintiff San Carlos Apache Tribe have judgment against Defendants on Count I of Plaintiff's Complaint (Doc. 1) for $299,483.00 plus interest as authorized by the Contract Disputes Act, 41 U.S.C. § 7109, for the period of September 28, 2017 through the date of payment.

IT IS FURTHER ORDERED that Counts III, IV, and V of Plaintiff's Complaint (Doc. 1) and Defendants' Counterclaim (Doc. 26) are dismissed with prejudice.

IT IS FURTHER ORDERED that judgment is entered in favor of Defendants against Plaintiff on Count II of Plaintiff's Complaint (Doc. 1), which was previously dismissed with prejudice by Order dated August 31, 2020 (Doc. 23).

IT IS FURTHER ORDERED that each party bear its own attorney's fees and costs.

The Clerk shall terminate this case.

Dated: Feb. 12, 2021.

/s/ NEIL V. WAKE
NEIL V. WAKE
Senior United States District Judge

**APPENDIX C**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-19-05624-PHX-NVW

SAN CARLOS APACHE TRIBE, PLAINTIFF

*v.*

ALEX AZAR, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; MICHAEL WEAHKEE, PRINCIPAL DEPUTY DIRECTOR, INDIAN HEALTH SERVICE; UNITED STATES OF AMERICA, DEFENDANTS

Signed: Aug. 31, 2020

**ORDER**

NEIL V. WAKE, Senior United States District Judge

Before the Court is Defendants' Motion to Dismiss Count II of Plaintiff's Complaint (Doc. 13). For the reasons stated below, the motion shall be granted.

**A. 25 U.S.C. § 5325(a)**

The Indian Health Service ("IHS") is not required by the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 5301 *et seq.* ("ISDEAA"), to pay Plaintiff San Carlos Apache Tribe's (the "Tribe") indirect contract support costs associated with the income it received from third-party payors. This conclusion is principally informed by the language of 25 U.S.C.

§ 5325(a), which outlines the funds IHS must provide to federally recognized Indian tribes under self-determination contracts such as the one entered into between IHS and the Tribe.[1] (*See generally* Doc. 13-2.)

The first type of funding is provided for direct program costs, which is known as the "Secretarial Amount." *See Swinomish Indian Tribal Cmty. v. Azar*, 406 F. Supp. 3d 18, 21 (D.D.C. 2019), *appeal docketed*, 19-5299 (D.C. Cir. Oct. 31, 2019). This funding includes

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[1] Defendants attached the Tribe's IHS contract to their motion. While the Tribe did not attach it to their complaint, because this contract "forms the basis of" the Tribe's claims, it has been incorporated by reference therein and the Court has considered it. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). The Court has also considered the annual funding agreements Defendants attached (Doc. 13-2 at 16-21, 23-30) because those agreements are incorporated into the contract itself (Doc. 13-2 at 3-13). (*See* Doc. 13-2 at 12.) Because the fiscal year 2013 scope of work document (Doc. 13-3) is incorporated into the contract through the fiscal year 2013 funding agreement, the Court has considered that document as well. (*See* Doc. 13-2 at 28.) Meanwhile, the Tribe attached three documents to the Complaint: Part 6, Chapter 3 of the 2007 Indian Health Manual (Docs. 1-1, 1-2), the Tribe's claim letter to IHS (Doc. 1-3), and IHS's July 2019 decision and counterclaim (Doc. 1-4). "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c). The types of instruments that typically qualify for incorporation under Rule 10(c) "'consist largely of documentary evidence, specifically, contracts, notes, and other writings on which a party's action or defense is based.'" *See DeMarco v. DepoTech Corp.*, 149 F. Supp. 2d 1212, 1220 (S.D. Cal. 2001) (quoting *Rose v. Bartle*, 871 F.2d 331, 339 n.3 (3d Cir. 1989)); *see also Trombley Enters., LLC v. Sauer, Inc.*, Case No. 5:17-cv-04568-EJD, 2018 WL 4407860, at *2 (N.D. Cal. Sept. 17, 2018) ("Common exhibits to complaints include agency decisions, contracts, patents, correspondence, and the like."). The Tribe's exhibits constitute written instruments within the meaning of Rule 10(c), are part of the Complaint, and have been considered.

an amount of funds that "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract." 25 U.S.C. § 5325(a)(1). "In other words, a tribe receives the amount the Secretary would have provided for the programs, functions, services, and activities had the IHS retained responsibility for them." *Swinomish Indian Tribal Cmty.*, 406 F. Supp. 3d at 21 (internal alterations, quotation marks, and citation omitted).

The second type of funding is provided for contract support costs. This type of funding is added to the Secretarial 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," except such activities that "normally are not carried on by the respective Secretary in his direct operation of the program" or "are provided by the Secretary in support of the contracted program from resources other than those under the contract." 25 U.S.C. § 5325(a)(2). "[E]ligible [contract support] costs for the purposes of receiving funding" include direct and indirect contract support costs. *See* 25 U.S.C. § 5325(a)(3)(A). Direct costs are "direct program expenses for the operation of the Federal program that is the subject of the contract" and indirect costs are "any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract." *Id.*

None of the above provisions makes any reference to third-party revenue. *See Swinomish Indian Tribal Cmty.*, 406 F. Supp. 3d at 27-28 (finding "§ 5325(a) does

not entitle the Tribe to collect CSC [contract support costs] for its expenditure of third-party revenue, as that section's references to the 'Secretarial amount' to which CSC must be added and the 'Federal program' that generates CSC do not include third-party revenue" (footnote omitted)). While the Tribe argues the "Federal program" language in 25 U.S.C. § 5325(a)(3)(A) signifies Congress' intent that IHS pay contract support costs on "all healthcare activities carried out pursuant to the Tribe's contract with IHS, both the portion funded directly by IHS appropriations and the portion funded by the third-party revenues the Tribe is required to collect and reinvest in the program," (Doc. 21 at 11), to accept this argument would be to read language into the statute that is not there and in effect "enlarge[ ] . . . it . . . so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." *See Iselin v. United States*, 270 U.S. 245, 251, 46 S. Ct. 248, 70 L. Ed. 566 (1926) (internal citations omitted). Moreover, this argument ignores the language that is there, as § 5325(a)(3)(A) refers to a single "Federal program that is the subject of the contract." 25 U.S.C. § 5325(a)(3)(A)(i); 25 U.S.C. § 5325(a)(3)(A)(ii) (including as contract support costs eligible for reimbursement costs of "any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of *the* Federal program . . . pursuant to the contract (emphasis added)). It would be unreasonable to construe this program as an-

ything other than the program or programs[2] IHS would be charged with operating absent an ISDEAA contract.

**B. 25 U.S.C. § 5325(m)**

Defendants' argument with regard to 25 U.S.C. § 5325(m) misses the mark. Quoting that section, Defendants contend "Medicare, Medicaid, and other program income is 'earned by a tribal organization in the course of carrying out a self-determination contract,' not provided by the Secretary as part of the Secretarial amount." (Doc. 13 at 11.) But that is not what the statute says. Rather, it provides:

> **(m) Use of Program Income Earned**
>
> The program income earned by a tribal organization in the course of carrying out a self-determination contract—
>
> (1) shall be used by the tribal organization to further the general purposes of the contract; and
>
> (2) shall not be a basis for reducing the amount of funds otherwise obligated to the contract.

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[2] To be sure, "program" is referred to in the plural elsewhere in 25 U.S.C. § 5325, *e.g.*, 25 U.S.C. § 5325(a)(1) ("The amount of funds provided under the terms of self-determination contracts entered into pursuant to this chapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the *programs* or portions thereof for the period covered by the contract. . . . " (emphasis added)), and multiple programs were performed under the Tribe's IHS contract. (*See* Doc. 13-3.) This fact does not change the outcome; just because "program" can be construed as encompassing multiple IHS-funded programs does not mean it can be construed as encompassing a theoretically unlimited number of programs funded by any number of third-party payors.

25 U.S.C. § 5325(m). This section only concerns how program income—which both sides agree does not come from IHS—can be used, not the types or amounts of funds that IHS must provide. These funds are addressed in 25 U.S.C. § 5325(a).

But this does not mean § 5325(m) is irrelevant, as the language therein informs—and further bolsters—the conclusion regarding the meaning of § 5325(a). "Statutory interpretation must account for both 'the specific context in which language is used' and 'the broader context of the statute as a whole.'" *Castillo v. Metro. Life Ins. Co.*, 970 F.3d 1224, 1232 (9th Cir. 2020) (internal alterations omitted) (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014)). Indeed, "[s]tatutory construction is a holistic endeavor." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60, 125 S. Ct. 460, 160 L. Ed. 2d 389 (2004) (internal quotation marks and citations omitted).

Numerous subsections within § 5325(a) refer to funds that are "provided" by the Secretary as part of the Secretarial Amount. *See* 25 U.S.C. §§ 5325(a)(1); (a)(3)(A). Other subsections refer to contract support costs that must be "paid" by the Secretary. *See id.* at § 5325(a)(5) ("[D]uring the initial year that a self-determination contract is in effect, the amount to be paid under paragraph (2) shall include. . . . "); § 5325(a)(6) ("Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if. . . . "). In contrast, § 5325(m)—the only section in § 5325 concerning program income (and accordingly, third-party revenue)—refers to "income *earned* by a tribal organization in the course of carrying out a self-determination

contract." (emphasis added). The Court therefore agrees with the court in *Swinomish Indian Tribal Community* that "[r]ead together, the ISDEAA's various provisions clearly limit the Secretarial amount to funds that the IHS appropriates and exclude from that amount any third-party revenue that the Tribe collects on its own." 406 F. Supp. 3d at 29. Contract support costs accordingly need not be provided for expenditures of third-party revenue.

**C. 25 U.S.C. § 5326**

25 U.S.C. § 5326 also dooms the Tribe's claim. That statute states:

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

Accordingly, it "prevents the IHS from paying more than its *pro rata* share of the indirect costs incurred by contracting tribes and tribal organizations." *Tunica-*

*Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 418 (D.D.C. 2008).[3]

As an initial matter, Defendants misconstrue this statute, erroneously contending it "prohibits payment of [contract support costs] on all non-IHS funds, including Medicare, Medicaid or any other third-party reimbursements." (*See* Doc. 13 at 13.) The statute prohibits not payment of contract support costs on "all non-IHS funds," but rather payment on such costs "associated with any *contract* . . . entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service." 25 U.S.C. § 5326 (emphasis added). The legislative history Defendants cite only further confirms this. *See* H.R. Rep. No. 105-609, at 108 (1998) (recommending "specifying that IHS funding may not be used to pay for non-IHS *contract* support costs" (emphasis added)).

For its part, the Tribe correctly notes that "[t]he plain meaning of this provision is that IHS must pay [contract support costs] on costs arising under the ISDEAA contract, but it does not owe [contract support costs] on costs arising under other agencies' contracts or grants." (*See* Doc. 21 at 23.) But it argues the statute nevertheless does not apply here because it seeks contract support costs to cover expenses it incurred "in carrying out programs under its ISDEAA contract with IHS, using third-party revenues it collected and then spent pursuant to that same ISDEAA contract." (*See id.*) In other words, the Tribe seeks contract support costs "directly attributable to" a contract "entered into

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[3] The *Tunica-Biloxi Tribe* court analyzed this language when it was contained in a different section of the United States Code, 25 U.S.C. § 450j-2.

between an Indian tribe or tribal organization" and IHS. *See* 25 U.S.C. § 5326.

The text of § 5326 compels a different conclusion. The revenue the Tribe obtained from third parties (and therefore the contract support costs thereon) was undoubtedly "attributable" to its contract with IHS, as numerous contract documents contemplate the Tribe generating and spending such revenue. For example, the fiscal year 2013 scope of work document required the Tribe to "[m]aintain an efficient billing system, to maximize third party revenues" and noted that third-party payors "include[ ]: Medicare, AHCCCS [Arizona's Medicaid agency], Private Insurance, and IHS Contract Health Services." (Doc. 13-3 at 3.) In addition, the contract itself specifies requirements the Tribe must adhere to with regard to "[e]ach contract entered into" by the Tribe "with a third party in connection with performing the obligation of the [Tribe] under this contract." (Doc. 13-2 at 9.)

But just because this revenue was "attributable" to the IHS contract does not mean it was "*directly* attributable" thereto. "Directly" is the key word here and it (like all other words in the statute) must be given effect. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks and citations omitted)); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004) ("[Courts] must, if possible, construe a statute to give every word some operative effect." (in-

ternal citation omitted)). The Tribe insists, without explanation, that the contract support costs it seeks are directly attributable to its IHS contract. The Court however disagrees and finds that for "directly" to be given effect, it must be construed to limit the contract support costs Indian tribes can receive to costs of administering programs that are funded by IHS under IHS contracts.

This finding is principally informed by the definitions of "directly" and the context in which it appears. First, "directly" is defined as (1) "[i]n a straightforward manner," (2) "[i]n a straight line or course," or (3) "[i]mmediately." *Directly*, Black's Law Dictionary (11th ed. 2019); *see also Direct*, Merriam-Webster, https://www.merriamwebster.com/dictionary/direct (last visited on Aug. 27, 2020) (defining "direct," when employed as an adverb, as "from point to point without deviation: by the shortest way," "from the source without interruption or diversion," or "without an intervening agency . . . or step"). Contract support costs associated with third-party revenue do not derive from IHS contracts "[i]n a straight line or course" because third-party revenue does not emanate from IHS "without interruption or diversion." Indeed, such revenue sometimes literally involves "intervening agenc[ies]."

Second, the rest of ISDEAA suggests Congress took special care to include this limiting modifier in this particular context. Indeed, while "attributable" is included numerous times in the section that immediately (or "directly") precedes 25 U.S.C. § 5326, in no instance therein is that word modified by "directly." *See, e.g.*, 25 U.S.C. §§ 5325(a)(4) ("For each fiscal year during which a self-determination contract is in effect, any sav-

ings attributable to the operation of a Federal program. . . . "); 5325(e) ("Indian tribes and tribal organizations shall not be held liable for amounts of indebtedness attributable to theoretical or actual under-recoveries. . . . ").[4] The legislative history of § 5326 suggests this as well; indeed, in its Report on the Department of the Interior and Related Agencies Appropriations Bill, 1999, the Committee on Appropriations for the House of Representatives criticized the decision in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), in which the Tenth Circuit held ISDEAA "require[s] full funding of indirect [contract support] costs and prohibit[s] any adverse adjustments stemming from the failure of other agencies to pay their full share of indirect costs" and effectively forced the United States Department of the Interior's Bureau of Indian Affairs to pay contract support costs on programs funded by the United States Department of Justice. *See* H.R. Rep. No. 105-609, at 57 ("The Committee is concerned about the Ramah Navajo Chapter v. Lujan settlement concerning contract support and the expectation that the settlement payments from the Claims and Judgment Fund be reimbursed from agency appropriations. The Committee believes that the court in this case made an erroneous decision and that the Administration erred by failing to appeal."); *Ramah Navajo Chapter*, 112 F.3d at 1462.

The Tribe's third-party revenue could not have been obtained pursuant to its contract with IHS and therefore was not "directly attributable" to it. Even though

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[4] While "directly" is employed in another section of ISDEAA, 25 U.S.C. § 5327, that section is materially identical to § 5326; it applies to the Department of the Interior instead of IHS.

the Tribe obtained third-party revenue "while administering programs under its contract with IHS," (Doc. 1, ¶ 34), it only could have done so by first entering into agreements with third-party payors and then billing and collecting from them pursuant thereto. *See*, *e.g.*, Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs., Pub. No. 100-01, Medicare General Information, Eligibility, and Entitlement Manual, Ch. 5, § 10.1, https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/ge101c05.pdf (listing hospitals, skilled nursing facilities, clinics, rehabilitation agencies, and community mental health centers among "[t]he following provider types" that "must have provider agreements under Medicare"); 42 C.F.R. § 431.107(b) ("A State plan must provide for an agreement between the Medicaid agency and each provider or organization furnishing services under the plan. . . . "); *see also In re TLC Hosps., Inc.*, 224 F.3d 1008, 1011 (9th Cir. 2000) ("In accordance with the terms of the Medicare statute and the regulations promulgated by the Secretary of HHS, a participating facility is reimbursed for the 'reasonable costs' of services rendered to Medicare beneficiaries. *See* 42 U.S.C. §§ 1395x(v)(1)(A), 1395f(b); 42 C.F.R. pt. 413. In order to be reimbursed, however, the participating facility, must agree to certain terms as set forth in 42 U.S.C. § 1395cc." (footnote omitted)); *Neighborcare Health v. Porter*, CASE NO. C11-1391JLR, 2012 WL 13049188, at *1 (W.D. Wash. July 24, 2012) ("As a condition of receiving federal Medicaid funding, the Health Care Authority must have written agreements with medical providers who want to participate in the Medicaid program." (citing 42 U.S.C. § 1396a(a)(27); 42 C.F.R. § 431.107; *Banks v. Sec'y of Ind. Family and Soc. Servs. Admin.*,

997 F.2d 231, 235 (7th Cir. 1993)). Indeed, the Tribe's IHS contract expressly contemplates the Tribe entering into contracts with third parties. (Doc. 13-2 at 9.) While such contracts are not alleged in the Complaint, revenue from third parties such as Medicare and Medicaid cannot be collected by virtue of an agreement to which they are absent. It can therefore hardly be said that the Tribe's third-party revenue was "directly" attributable to its contract with IHS.

Tribes may bristle at this conclusion, claiming it would be unjust to prevent them from receiving contract support costs for their expenditures of revenue that (according to the Tribe) they are required to bill and spend just as IHS usually would. (*See, e.g.*, Doc. 21 at 7; Doc. 1, ¶ 28.) The Court acknowledges and agrees with the court in *Tunica-Biloxi Tribe* that the language of § 5326 is "inartful." *Tunica-Biloxi Tribe*, 577 F. Supp. 2d at 417. But even inartful language must be followed, and allowing the Tribe to receive contract support costs associated with revenue generated pursuant to contracts to which IHS is not a party would render meaningless Congress' directive that contract support costs may be expended only for costs "directly attributable" to IHS contracts. *Cf. id.* at 417-18 (acknowledging "the language contained in § 450j-2 is inartful" and explaining how it cuts against congressional purpose, but finding "this does not mean . . . that the plain language of the statute should be neglected altogether, for 'whatever degree of confidence about congressional purpose one derives from the legislative history, that purpose must find expression within the permissible limits of the language before it can be given effect'" (quoting *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 495 (D.C. Cir. 2004))).

Because the contract support costs the Tribe demands were incurred in carrying out programs that were funded by parties other than IHS, the Tribe is not entitled to them under 25 U.S.C. § 5326.

**D. Relevant Caselaw**

Each side leans heavily on a district court decision; Defendants claim *Swinomish Indian Tribal Community* is in their corner and the Tribe claims *Navajo Health Found.—Sage Mem'l Hosp., Inc. v. Burwell*, 263 F. Supp. 3d 1083 (D.N.M. 2016), is in theirs.[5] First, while Defendants argue *Swinomish Indian Tribal Community* "[p]ersuasively [d]ecided the [i]ssue [p]resented," (Doc. 22 at 2), that case is not entirely relevant because much of the analysis therein was under Title V of ISDEAA, whereas this case arises under Title I. *See, e.g.*, *Swinomish Indian Tribal Cmty.*, 406 F. Supp. 3d at 26-29. While it is true that 25 U.S.C. § 5325(a) applies equally to contracts under Titles I and V, this distinction makes a difference: Title V contains language that is materially different from that in Title I and was integral to the *Swinomish Indian Tribal Community* court's decision. *See.*, *e.g.*, *id.* at 28 (analyzing 25 U.S.C. § 5388(j), which contains "explicit textual reference[s] to third-party revenue" that are not present in Title I). But while such language was integral, it was not indispensable; in addition to finding "§ 5325(a) does not entitle the Tribe to collect CSC [contract support costs] for its expenditure of third-party revenue" based on § 5388(j), the court came to that conclusion based on the text of § 5325(a) itself. *See id.* at 27-28. This case

[5] There are no relevant decisions from the Ninth Circuit (or any circuit court, for that matter) on 25 U.S.C. § 5325, § 5326, or § 5327.

therefore has persuasive value. *See supra*, at sections AB (citing *Swinomish Indian Tribal Cmty.*).

The same cannot be said about *Sage Memorial*. To be sure, while that case is hardly a carbon copy of this one, its relevance cannot seriously be questioned. Indeed, *Sage Memorial* both arose out of Title I of ISDEAA and addressed perhaps the key issue in this case: "whether funding that third parties such as Medicare, Medicaid, and private insurers provide is considered part of federal programming for the purposes of reimbursement under the ISDEAA." *See Sage Mem'l*, 263 F. Supp. 3d at 1164. While the *Sage Memorial* court answered that question in the Tribe's favor, it did not do so persuasively, as it did not engage with the text of any of the statutes discussed above. Instead, that court analyzed language in the plaintiff's annual funding agreements and two other statutes, the Indian Health Care Improvement Act and the Patient Protection and Affordable Care Act. *Id.* at 1164-65. A court must "start with the text of the statute" at issue and 25 U.S.C. § 5325, at least, was at issue there and is here. *See Babb v. Wilkie*, --- U.S. ----, ----, 140 S. Ct. 1168, 1172, 206 L. Ed. 2d 432 (2020) (internal citation omitted). Because the *Sage Memorial* court all but ignored the text of 25 U.S.C. § 5325, its decision is not persuasive.

* * *

Finally, a word is warranted on the Indian canon of statutory construction, on which the Tribe frequently relies. (*See, e.g.*, Doc. 21 at 23-24.) Under this canon, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985)

(internal citations omitted). This canon applies in ISDEAA cases. *Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 108 (D.D.C. 2019) ("If there were any doubt that the canon applies with full force in the context of ISDEAA cases, the Act itself puts the doubt to rest: The Act's model contract language expressly incorporates the canon—stating that every self-determination contract provision 'shall be liberally construed to the benefit of the [tribal] Contractor.'" (quoting 25 U.S.C. § 5329(a)(2))). But even though the canon applies here, it does not alter the outcome. "For one thing, canons are not mandatory rules. They are guides that need not be conclusive." *Chickasaw Nation v. United States*, 534 U.S. 84, 94, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001) (internal quotation marks and citation omitted). More importantly, "[t]he canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506, 106 S. Ct. 2039, 90 L. Ed. 2d 490 (1986) (footnote omitted). Indeed, the Indian canon of statutory construction is more of a tiebreaker. Based on the issues discussed above, neither 25 U.S.C. § 5325 nor § 5326 is fairly capable of two interpretations and therefore ambiguous. Because there is accordingly no tie to break, that canon is of no consequence.

The deficiencies in Count II outlined above cannot be cured by further pleading. Moreover, the Tribe does not argue for leave to amend. Therefore, Count II shall be dismissed with prejudice.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss Count II of Plaintiff's Complaint (Doc. 13) is granted.

IT IS FURTHER ORDERED that Count II of Plaintiff San Carlos Apache Tribe's Complaint (Doc. 1) is dismissed, with prejudice. No partial judgment shall be entered at this time.

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
DISTRICT OF ARIZONA, PHOENIX

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No. 21-15641
D.C. No. 2:19-cv-05624-NVW

SAN CARLOS APACHE TRIBE, PLAINTIFF-APPELLANT

*v.*

XAVIER BECERRA, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; ET AL., DEFENDANTS-APPELLEES

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[Filed: May 16, 2023]

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**ORDER**

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Before: HAWKINS, PAEZ, and WATFORD, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

## APPENDIX E

1. 25 U.S.C. 1621e(a) provides:

**Reimbursement from certain third parties of costs of health services**

**(a) Right of recovery**

Except as provided in subsection (f), the United States, an Indian tribe, or tribal organization shall have the right to recover from an insurance company, health maintenance organization, employee benefit plan, third-party tortfeasor, or any other responsible or liable third party (including a political subdivision or local governmental entity of a State) the reasonable charges billed by the Secretary, an Indian tribe, or tribal organization in providing health services through the Service, an Indian tribe, or tribal organization, or, if higher, the highest amount the third party would pay for care and services furnished by providers other than governmental entities, to any individual to the same extent that such individual, or any nongovernmental provider of such services, would be eligible to receive damages, reimbursement, or indemnification for such charges or expenses if—

(1) such services had been provided by a nongovernmental provider; and

(2) such individual had been required to pay such charges or expenses and did pay such charges or expenses.

2. 25 U.S.C. 1641 provides in pertinent part:

**Treatment of payments under Social Security Act health benefits programs**

**(a) 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 [42 U.S.C. 1395 et seq., 1396 et seq., 1397aa et seq.] 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.

* * * * *

**(c) Use of funds**

**(1) Special fund**

**(A) 100 percent pass-through of payments due to facilities**

Notwithstanding any other provision of law, but subject to paragraph (2), payments to which a facility of the Service is entitled by reason of a provision of title XVIII or XIX of the Social Security Act [42 U.S.C. 1395 et seq., 1396 et seq.] shall be placed in a special fund to be held by the Secretary. In making payments from such fund, the Secretary shall ensure that each Service unit of the Service receives 100 percent of the amount to which the facilities of the Service, for which such Service unit makes collections, are entitled by reason of a provision of either such title.

**(B) Use of funds**

Amounts received by a facility of the Service under subparagraph (A) by reason of a provision of title XVIII or XIX of the Social Security Act shall first be used (to such extent or in such amounts as are provided in appropriation Acts) for the purpose of making any improvements in the programs of the Service operated by or through such facility which may be necessary to achieve or maintain compliance with the applicable conditions and requirements of such respective title. Any amounts so received that are in excess of the amount necessary to achieve or maintain such conditions and requirements shall, subject to consultation with the Indian tribes being served by the Service unit, be used for reducing the health resource deficiencies (as determined in section 1621(c) of this title) of such Indian tribes, including the provision of services pursuant to section 1621d of this title.

* * * * *

**(d) Direct billing**

**(1) In general**

Subject to complying with the requirements of paragraph (2), a tribal health program may elect to directly bill for, and receive payment for, health care items and services provided by such program for which payment is made under title XVIII, XIX, or XXI of the Social Security Act [42 U.S.C. 1395 et seq., 1396 et seq., 1397aa et seq.] or from any other third party payor.

**(2) Direct reimbursement**

**(A) Use of funds**

Each tribal health program making the election described in paragraph (1) with respect to a program under a title of the Social Security Act [42 U.S.C. 301 et seq.] shall be reimbursed directly by that program for items and services furnished without regard to subsection (c)(1), except that all amounts so reimbursed shall be used by the tribal health program for the purpose of making any improvements in facilities of the tribal health program that may be necessary to achieve or maintain compliance with the conditions and requirements applicable generally to such items and services under the program under such title and to provide additional health care services, improvements in health care facilities and tribal health programs, any health care-related purpose (including coverage for a service or service within a contract health service delivery area or any portion of a contract health service delivery area that would otherwise be provided as a contract health service), or otherwise to achieve the objectives provided in section 1602 of this title.

* * * * *

3. 25 U.S.C. 1680c provides in pertinent part:

**Health services for ineligible persons**

* * * * *

**(c) Health facilities providing health services**

**(1) In general**

The Secretary is authorized to provide health services under this subsection through health facilities operated directly by the Service to individuals who reside within the Service unit and who are not otherwise eligible for such health services if—

(A) the Indian tribes served by such Service unit requests such provision of health services to such individuals, and

(B) the Secretary and the served Indian tribes have jointly determined that the provision of such health services will not result in a denial or diminution of health services to eligible Indians.

**(2) ISDEAA programs**

In the case of health facilities operated under a contract or compact entered into under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.),[1] the governing body of the Indian tribe or tribal organization providing health services under such contract or compact is authorized to determine whether health services should be provided under such contract or compact to individuals who are not eligible for such health services under any other subsection of this section or under any

[1] See References in text note below.

other provision of law. In making such determinations, the governing body of the Indian tribe or tribal organization shall take into account the consideration described in paragraph (1)(B). Any services provided by the Indian tribe or tribal organization pursuant to a determination made under this subparagraph shall be deemed to be provided under the agreement entered into by the Indian tribe or tribal organization under the Indian Self-Determination and Education Assistance Act. The provisions of section 314 of Public Law 101-512 (104 Stat. 1959), as amended by section 308 of Public Law 103-138 (107 Stat. 1416), shall apply to any services provided by the Indian tribe or tribal organization pursuant to a determination made under this subparagraph.

**(3) Payment for services**

**(A) In general**

Persons receiving health services provided by the Service under this subsection shall be liable for payment of such health services under a schedule of charges prescribed by the Secretary which, in the judgment of the Secretary, results in reimbursement in an amount not less than the actual cost of providing the health services. Notwithstanding section 1621f of this title or any other provision of law, amounts collected under this subsection, including Medicare, Medicaid, or children's health insurance program reimbursements under titles XVIII, XIX, and XXI of the Social Security Act [42 U.S.C. 1395 et seq., 1396 et seq., 1397aa et seq.], shall be credited to the account of the program providing the service and shall be

used for the purposes listed in section 1641(d)(2) of this title and amounts collected under this subsection shall be available for expenditure within such program.

* * * * *

4. 25 U.S.C. 5302 provides:

**Congressional declaration of policy**

**(a) Recognition of obligation of United States**

The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

**(b) Declaration of commitment**

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, ca-

pable of administering quality programs and developing the economies of their respective communities.

**(c) Declaration of national goal**

The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

5. 25 U.S.C. 5321 (2018 & Supp. III 2021) provides in pertinent part:

**Self-determination contracts**

**(a) Request by tribe; authorized programs**

(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C. 5342 et seq.];

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) [25 U.S.C. 13], and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C. 2001 et seq.];

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

* * * * *

**(g) Rule of construction**

Subject to section 101(a) of the PROGRESS for Indian Tribes Act, each provision of this chapter and each provision of a contract or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe.

6. 25 U.S.C. 5325 (2018 & Supp. III 2021) provides in pertinent part:

**Contract funding and indirect costs**

**(a) Amount of funds provided**

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this chapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

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

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

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

(3) (A) The contract support costs that are eligible costs for the purposes of receiving funding under this

chapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—

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

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

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

(B) In calculating the reimbursement rate for expenses described in subparagraph (A)(ii), not less than 50 percent of the expenses described in subparagraph (A)(ii) that are incurred by the governing body of an Indian Tribe or Tribal organization relating to a Federal program, function, service, or activity carried out pursuant to the contract shall be considered to be reasonable and allowable.

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

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or

activity under a self-determination contract by a tribe or tribal organization (including a cost reimbursement construction contract) shall—

(A) be used to provide additional services or benefits under the contract; or

(B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 13a of this title.

* * * * *

**(m) Use of program income earned**

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

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

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

* * * * *

7. 25 U.S.C. 5326 provides:

**Indian Health Service: availability of funds for Indian self-determination or self-governance contract or grant support costs**

Before, on, and after October 21, 1998, and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act or any other Act for Indian self-determination or self-governance contract or grant support costs may be expended only for

costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act [25 U.S.C. 5321 et seq.] 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.

8. 25 U.S.C. 5388 provides in pertinent part:

**Transfer of funds**

**(c) Amount of funding**

The Secretary shall provide funds under a funding agreement under this subchapter in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts under this chapter, including amounts for direct program costs specified under section 5325(a)(1) of this title and amounts for contract support costs specified under section 5325(a)(2), (3), (5), and (6) of this title, including any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.

* * * * *

**(j) Program income**

All Medicare, Medicaid, or other program income earned by an Indian tribe shall be treated as supple-

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

* * * * *

9. 25 U.S.C. 5396(a) provides:

**Application of other sections of this chapter**

**(a) Mandatory application**

All provisions of sections 5305(b), 5306, 5307, 5321(c) and (d), 5323, 5324(k) and (*l*), 5325(a) through (k), and 5332 of this title and section 314 of Public Law 101-512 (coverage under chapter 171 of title 28, commonly known as the "Federal Tort Claims Act"), to the extent not in conflict with this subchapter, shall apply to compacts and funding agreements authorized by this subchapter.