No.

In the Supreme Court of the United States

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

v.

NORTHERN ARAPAHO TRIBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH 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, in his official capacity as Secretary of Health and Human Services; Roselyn Tso, in her official capacity as Director of the Indian Health Service*; and the United States.

Respondent (plaintiff-appellant below) is the Northern Arapaho Tribe.

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

RELATED PROCEEDINGS

United States District Court (D. Wyo.):

Northern Arapaho Tribe v. *Becerra*, No. 21-cv-37 (July 8, 2021)

United States Court of Appeals (10th Cir.):

Northern Arapaho Tribe v. *Becerra*, No. 21-8046 (Mar. 6, 2023)

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In the Supreme Court of the United States

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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 Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-39a) is reported at 61 F.4th 810. The order of the district court (App., *infra*, 40a-56a) is reported at 548 F. Supp. 3d 1134.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2023. A petition for rehearing en banc was denied on June 2, 2023 (App., *infra*, 57a-58a). On August

21, 2023, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including September 20, 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*, 59a-72a.

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

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

respondent Northern Arapaho Tribe and the Indian Health Service (IHS), to which the Secretary of 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 those 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 should 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 as authorized by 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. 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 language, enacted in 1994, 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"); see also *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 Northern Arapaho Tribe entered into a self-determination contract to assume specified IHS programs under ISDA, including primary care, physical therapy, and optometry programs. C.A. App. 9, 72. In 2016, the Tribe contracted with IHS to receive approximately $457,000 in annual contract support costs. *Id.* at 71, 84.[2]

In 2021, the Tribe filed this suit under 25 U.S.C. 5331(a), claiming that it was entitled to additional contract support costs for fiscal years 2016 and 2017. C.A. App. 6-8. The Tribe argued that IHS was statutorily required to pay contract support costs to support the Tribe's expenditure of income from third-party health care payors. *Id.* at 7-8. Specifically, the Tribe claimed that the "direct cost base" used to calculate indirect contract support costs, see p. 6, *supra*, should have included not only the funds the Tribe received from IHS, but also the funds it received as income from third parties; the Tribe also argued that some of its expenditures of that income gave rise to direct contract support costs. *Id.* at 14-17. The Tribe sought roughly $1.5 million in additional contract support costs for that two-year period. *Id.* at 21.

2. The government filed a motion to dismiss the Tribe's complaint, adhering to IHS's longstanding position that costs associated with activities funded by third-party income are not eligible contract support

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[2] The record in this case does not reflect the amount the Tribe received in Secretarial amount funding.

costs under ISDA. The district court agreed and dismissed the suit. App., *infra*, 40a-56a. Relying on the D.C. Circuit's decision in *Swinomish Indian Tribal Community* v. *Becerra*, 993 F.3d 917 (2021)—which agreed with the government's position—the district court reasoned that ISDA requires IHS to pay contract support costs to support IHS-funded contract activities, not activities funded by other tribal revenue streams. App., *infra*, at 47a-48a. The court explained that Section 5325(a)(2) sets forth a "limited scope for" contract support costs "and does not mention or include the Tribe's earned program income received from third-party payers." *Id.* at 48a. The court additionally noted ISDA's separate treatment of "program income" received from third parties as "'supplemental funding'" to that furnished by IHS under the contract. *Id.* at 49a (quoting 25 U.S.C. 5388(j)); see *id.* at 50a (also citing 25 U.S.C. 5325(m)). In the alternative, the court concluded that Section 5326 precludes IHS from paying the costs at issue because the Tribe's costs of spending third-party reimbursement revenue are not "directly attributable" to the ISDA contract and "are associated with agreements with Medicare, Medicaid and other third-party payers." *Id.* at 53a; see *id.* at 51a-54a.

3. The court of appeals reversed in a fractured decision with no controlling opinion and one dissent. App., *infra*, 1a-39a; see *id.* at 2a.

a. Writing for herself only, Judge Moritz concluded that "the relevant statutory provisions are ambiguous, and the Indian canon of statutory construction resolves the ambiguity in the tribe's favor." App., *infra*, 2a; see *id.* at 1a-26a. Judge Moritz disagreed with the D.C. Circuit's reading of Section 5325's funding provisions in *Swinomish*. *Id.* at 19a-20a & n.9. Instead, she was

persuaded by the Ninth Circuit's more recent decision in *San Carlos Apache Tribe* v. *Becerra*, 53 F.4th 1236 (2022), petition for cert. pending, No. 23-___ (filed Sept. 13, 2023), which applied the Indian canon of construction to conclude that the government must pay contract support costs to subsidize a tribe's third-party-revenue-funded health care activities. App., *infra*, 16a-17a, 19a-20a & n.8, 25; see *San Carlos Apache*, 53 F.3d at 1244.

Judge Moritz first perceived ambiguity as to whether the disputed category of costs has to meet the definition of "contract support costs" in Section 5325(a)(2), or whether the costs need only meet the terms of Section 5325(a)(3)(A)(i) or (ii). App., *infra*, 12a-14a. Assuming that issue in the Tribe's favor under the Indian canon, Judge Moritz concluded that the costs need only qualify under Section 5325(a)(3)(A)(i) or (ii). *Id.* at 14a. She then reasoned that the expenditure of revenue from third parties could qualify as either "direct program expenses" under Section 5325(a)(3)(A)(i) or expenses incurred "in connection with" the federal program under subsection (a)(3)(A)(ii). *Id.* at 15a (quoting 25 U.S.C. 5325(a)(3)(A)(i)-(ii)). In reaching that conclusion, Judge Moritz emphasized that the Tribe's ISDA contract contemplates that "the Tribe will engage in third-party billing," *id.* at 16a, and also noted that "the Self-Determination Act requires the Tribe to deploy its program income 'to further the general purposes of [its] contract' with IHS," *ibid.* (quoting 25 U.S.C. 5325(m)(1)) (brackets in original). However, Judge Moritz disclaimed the view that Section 5325(a) unambiguously supports the Tribe's position or that "the government's contrary interpretation of this provision is *un*reasonable." *Id.* at 14a n.7.

Judge Moritz also found other statutory provisions to be ambiguous on the question whether expenditures of third-party income are eligible for payment of contract support costs. While acknowledging Section 5388(j)'s statement that "program income" from third parties "'shall be treated as supplemental'" to the Tribe's funding agreement, Judge Moritz concluded that the provision "does not squarely address the pertinent question here." App., *infra*, 18a (citation omitted). And she felt bound to accept the Tribe's interpretation of the prohibition in Section 5326, reasoning that because (in her view) the Tribe's ISDA contract with IHS requires it to spend program income "to further the healthcare program," the resulting costs could qualify as "'directly attributable'" to the contract with IHS within the meaning of that provision. *Id.* at 25a (quoting 25 U.S.C. 5326); see *id.* at 23a-25a.

b. Judge Eid also voted to reverse the district court, but "reach[ed] that result by taking a different path" than her colleague. App., *infra*, 26a; see *id.* at 26a-35a. In Judge Eid's view, "the Tribe presents the only reasonable construction" of ISDA. *Id.* at 26a. Judge Eid recognized that a "tribe with an [ISDA] contract will already be fully reimbursed through the secretarial amount and contract support costs," and that "therefore, program income is extra money on top of basic reimbursement." *Id.* at 29a. But she nonetheless concluded that ISDA requires payment of contract support costs for activities funded by third-party revenue because the contract contemplates that the Tribe will collect revenue; "the statutory text * * * requires the tribe to inject [that income] back into its healthcare program"; and Section 5325(m)(1) mandates that "the

government cannot pay less because of program income." *Id.* at 29a-30a.

Judge Eid additionally concluded that payment of contract support costs to support expenditures funded by third-party income does not violate the prohibition in Section 5326. App., *infra*, 31a-34a. In her view, activities funded by payments from third parties are "'directly attributable'" to the Tribe's ISDA contract and "'associated with'" that contract (and not others) because the ISDA contract "contemplates and requires spending program income," *id.* at 31a, and "[a]ny contractual arrangements the Tribe may have with third parties that facilitate receiving program income are subordinate to the agreement with IHS," *id.* at 34a.

c. Judge Baldock dissented in part. App., *infra*, 35a-39a. He agreed with Judge Eid that Section 5325(a) unambiguously includes costs associated with the expenditure of third-party income as reimbursable contract support costs. *Id.* at 36a. But like the district court, he found that "Section 5325 is limited by [Section] 5326," and concluded that Section 5326 unambiguously precludes IHS from paying the costs at issue. *Ibid.* Judge Baldock reasoned that Section 5326 "imposes two restrictions" on IHS's contract-support-cost obligation: "First, the costs must be 'directly attributable' to the Tribe's contract with IHS," and "[s]econd, the costs cannot be 'associated with'" a third-party contract. *Id.* at 37a (quoting 25 U.S.C. 5326). Even assuming that the Tribe could show a sufficiently direct connection under the first requirement, Judge Baldock did not see how the Tribe could get around the second. *Id.* at 38a. He characterized his fellow panel members as "work[ing] hard to read § 5326 as saying something other than what it says," *id.* at 38a-39a, and criticized the Ninth Circuit's

decision in *San Carlos Apache* on the same basis, *id.* at 37a n.1.

4. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 57a-58a.

REASONS FOR GRANTING THE PETITION

This case presents the question whether the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 5301 *et seq.*, requires the Indian Health Service to pay contract support costs to support not only the IHS-funded programs that are transferred to a tribe under a self-determination contract, but also activities that the contracting tribe funds using reimbursement income from third-party health care payors. The court of appeals decided that IHS is required to pay contract support costs to subsidize such activities. As the government has explained in its petition for a writ of certiorari in *Becerra* v. *San Carlos Apache Tribe*, No. 23-___ (filed Sept. 13, 2023), that conclusion is wrong, *id.* at 14-25, and the question presented is the subject of a 2-1 circuit split warranting this Court's review, *id.* at 25-28.

This case presents the same question as *San Carlos Apache*. That case was decided earlier and the Ninth Circuit's reasoning is reflected in a single majority opinion, which will facilitate this Court's review. See *San Carlos Apache* v. *Becerra*, 53 F.4th 1236 (9th Cir. 2022). The government has not identified any reason why the Court would benefit from full merits briefing and argument in both that case and this one, given that the two cases have materially similar fact patterns and present an identical legal question. Accordingly, the government respectfully requests that the Court hold this petition for a writ of certiorari pending the Court's disposition of *San Carlos Apache*, and then dispose of this petition as appropriate.

CONCLUSION

The Court should hold this petition for a writ of certiorari pending disposition of *Becerra* v. *San Carlos Apache Tribe*, *supra* (No. 23-___), and then dispose of the petition as appropriate in light of the Court's disposition in that case.

Respectfully submitted.

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SEPTEMBER 2023

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-8046

NORTHERN ARAPAHO TRIBE,
PLAINTIFF-APPELLANT

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES;
ELIZABETH FOWLER, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR, INDIAN HEALTH SERVICE;
UNITED STATES OF AMERICA,
DEFENDANTS-APPELLEES

NATIVE AMERICAN TRIBES;
TRIBAL ORGANIZATIONS; INDIAN HEALTH BOARDS;
THE NATIONAL CONGRESS OF AMERICAN INDIANS,
AMICI CURIAE

Filed: Mar. 6, 2023

OPINION

Before: MORITZ, BALDOCK, and EID, Circuit Judges.

MORITZ, Circuit Judge.

The Northern Arapaho Tribe and the Indian Health Service (IHS) entered into a contract under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 5301-5423 (Self-Determination Act), for the Tribe to operate a federal healthcare program. Under

the contract, the Tribe provides healthcare services to Indians and other eligible beneficiaries. In exchange, the Tribe is entitled to receive reimbursements from IHS for certain categories of expenditures, including "contract support costs." 25 U.S.C. § 5325(a)(2), (a)(3)(A).

The contract anticipates that the Tribe will bill third-party insurers such as Medicare, Medicaid, and private insurers. In return, the Tribe obtains payments that become program income, which the Tribe is statutorily required to inject back into the healthcare program "to further the general purposes" of its contract with the government. § 5325(m)(1). The Tribe contends that overhead costs associated with setting up and administering this third-party billing infrastructure, as well as the administrative costs associated with recirculating the third-party revenue it receives, qualify as reimbursable contract support costs under the Self-Determination Act and the Tribe's agreement with IHS. But when the Tribe attempted to collect those reimbursements, IHS disagreed and refused to pay. Contending it had been shortchanged, the Tribe sued the government. The district court, agreeing with the government's reading of the Self-Determination Act and the contract, granted the government's motion to dismiss.

The Tribe appeals, and two members of the panel vote to reverse, albeit for different reasons.[1] I do so because, in my view, the relevant statutory provisions are ambiguous, and the Indian canon of statutory construction resolves the ambiguity in the Tribe's favor. That is, because the Tribe presents a reasonable interpretation of the ambiguous statutes, the canon dictates

[1] Judge Baldock dissents; though he agrees with portions of Judge Eid's separate opinion, he would nevertheless affirm.

that the statutes "must be construed that way." *Ramah Navajo Chapter* v. *Salazar*, 44 F. 3d 1054, 1062 (10th Cir. 2011) (quoting *Ramah Navajo Chapter* v. *Lujan*, 112 F. 3d 1455, 1462 (10th Cir. 1997)), aff'd, 567 U.S. 182, 132 S. Ct. 2181, 183 L. Ed. 2d 186 (2012). Judge Eid would instead reverse because the relevant statutes unambiguously support the Tribe's interpretation, making it unnecessary to resort to the Indian canon of construction. Under either of our interpretations, however, the administrative expenditures associated with collecting and expending revenue obtained from third-party insurers qualify as reimbursable contract support costs. Accordingly, we reverse and remand to the district court for further proceedings.

Background

In 1975, President Gerald Ford signed the Self-Determination Act into law "to achieve 'maximum Indian participation in the direction of educational as well as other [f]ederal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.'" *Salazar* v. *Ramah Navajo Chapter*, 567 U.S. 182, 185-86, 132 S. Ct. 2181, 183 L. Ed. 2d 186 (2012) (quoting 25 U.S.C. § 5302(a)). To that end, the statute directs the secretary of the relevant federal program—in this case, the Secretary of the Department of Health and Human Services—upon any tribe's request, "to enter into a self-determination contract . . . with a tribal organization to plan, conduct, and administer" health, education, economic, and social programs that the relevant secretary would otherwise have administered. 25 U.S.C. § 5321(a). In essence, these self-determination contracts "transfer responsibility for various programs from federal agen-

cies to the tribes themselves, while maintaining federal funding of the programs." *Ramah Navajo Chapter*, 644 F. 3d at 1058. In enacting the legislation, Congress declared its "commit[ment] to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." § 5302(b).

In this case, the Tribe has contracted with IHS under Title I of the Self-Determination Act since 2016 to operate a federal health program that IHS otherwise would have operated. The contract comprises three documents—the contract itself, an annual funding agreement, and a document outlining the Tribe's scope of work—and provides that both it and the Self-Determination Act must be liberally construed in favor of the Tribe.

Under the contract, the Tribe provides healthcare services to eligible beneficiaries. In return, IHS must provide the Tribe two types of funding under the Self-Determination Act: (1) "program" funds, meaning the amount the Secretary would have provided had IHS retained responsibility for the healthcare program,[2] § 5325(a)(1); and (2) "contract support costs," meaning the reasonable administrative and overhead costs associated with carrying out the healthcare program, § 5325(a)(2)-(3). This appeal concerns the scope of contract support costs, the latter category of funding.

The Tribe, believing that certain administrative expenses qualified as reimbursable contract support costs under the statute, requested reimbursement from IHS

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[2] This is sometimes called the "[s]ecretarial [a]mount." App. 10; *see also Salazar*, 567 U.S. at 186, 132 S. Ct. 2181.

for fiscal years 2016 and 2017. IHS disagreed and did not pay. Accordingly, the Tribe timely sued to recover those unpaid costs under the Contract Disputes Act, 41 U.S.C. § 7104(b)(3). *See also* 25 U.S.C. § 5331(a).

In its complaint, the Tribe alleges that, by statute and under the contract, it is required to collect third-party revenue by billing third-party insurers, including Medicare, Medicaid, and private insurers. And after the Tribe receives the revenue from third parties, it expends some of that revenue to "provide services within the scope" of the agreement. App. 15; *see also* § 5325(m)(1). But "[e]arning, collecting, and expending" this revenue "on additional health[ ]care services create[s] additional overhead costs" that the Tribe contends qualify as reimbursable contract support costs. Aplt. Br. 20. Accordingly, the Tribe seeks to recover unpaid contract support costs of $538,936 for 2016 and $1,001,201 for 2017 (plus interest on those amounts). The Tribe also sought a declaratory judgment that IHS's obligation to pay contract support costs includes reimbursement for "third-party revenues expended on health[ ]care services within the scope of the" contract and the incorporated annual funding agreement. App. 21.

The government moved to dismiss the Tribe's complaint. Broadly, the government argued that neither the Self-Determination Act nor the contract requires or even authorizes IHS to reimburse contract support costs related to third-party program income. Looking to the text of the Self-Determination Act's relevant provisions, the district court agreed, concluding that the statute unambiguously favored the government's interpretation. It therefore dismissed the Tribe's complaint. The Tribe appeals.

Analysis

We review a dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim de novo. *Vote Solar v. City of Farmington*, 2 F. 4th 1285, 1289 (10th Cir. 2021). In reviewing "such a motion, [we] must take as true '[a]ll well-pleaded facts, as distinguished from conclusory allegations,' view all reasonable inferences in favor of the nonmoving party, and liberally construe the pleadings." *Reznik v. inContact, Inc.*, 18 F. 4th 1257, 1260 (10th Cir. 2021) (second alteration in original) (quoting *Ruiz v. McDonnell*, 299 F. 3d 1173, 1181 (10th Cir. 2002)). We also review questions of statutory and contract interpretation de novo. *See Bancamerica Com. Corp. v. Mosher Steel of Kan., Inc.*, 100 F. 3d 792, 796 n.4 (10th Cir.), *amended by* 103 F. 3d 80 (10th Cir. 1996).

Generally, when reviewing a dismissal under Rule 12(b)(6), we consider "only the contents of the complaint." *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.*, 21 F. 4th 704, 709 (10th Cir. 2021) (quoting *Berneike v. CitiMortgage, Inc.*, 708 F. 3d 1141, 1146 (10th Cir. 2013)), *cert. denied*, —U.S.—, 142 S. Ct. 2779, 213 L. Ed. 2d 1017 (2022). But here, we may also consider the documents referenced in the complaint—the contract, the annual funding agreement, and the scope-of-work document—because they are "central to the [Tribe's] complaint" and the parties do not dispute the documents' authenticity. *Id.* (quoting *Berneike*, 708 F. 3d at 1146).

I. Threshold Matters of Statutory Interpretation

The parties agree that the task of construing the Self-Determination Act must "begin with its plain text." *Ramah Navajo Chapter*, 644 F. 3d at 1062. "If the terms of the statute are clear and unambiguous, they are controlling absent rare and exceptional circumstances." *Id.*

(quoting *Chickasaw Nation v. United States*, 208 F. 3d 871, 876 (10th Cir. 2000)). In addition, "the broader context of the statute as a whole" may clarify "the meaning of a particular provision." *Id.* (quoting *Conrad v. Phone Directories Co.*, 585 F. 3d 1376, 1381 (10th Cir. 2009)).

Ordinarily, these bedrock principles of statutory interpretation are uncontroversial. Not so here. As the Tribe points out, these principles function differently in cases involving Indian tribes. *See Ramah Navajo Chapter*, 644 F. 3d at 1062. In such cases, federal statutes "are to be construed liberally in favor of [tribes], with ambiguous provisions interpreted" in their favor. *Lujan*, 112 F. 3d at 1461. This principle of liberal construction is "rooted in the unique trust relationship between the United States" and Indian tribes. *Id.* (quoting *Oneida Cnty. v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985)). Thus, under this canon, if a statute "can reasonably be construed as the Tribe would have it construed, it must be construed that way."[3] *Id.* at 1462 (quoting *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988)).

Yet the parties dispute precisely when this canon of construction is triggered. The Tribe maintains that the canon applies from the outset of the interpretive inquiry and not only when a statute is ambiguous, whereas the government maintains that the canon kicks in "[o]nly if the terms of a statute are ambiguous." Aplee. Br. 17. On this point, I agree with the government that the canon applies only if the statute is ambiguous in the first place.[4]

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[3] This canon applies equally to the interpretation of contracts. *See Ramah Navajo Chapter*, 644 F. 3d at 1057.

[4] Because Judge Eid would find the statute unambiguous in favor of the Tribe, she does not reach this interpretive issue.

As a logical matter, that must be so: If the text of a statute is unambiguous, there cannot be competing reasonable interpretations. *See Maralex Res., Inc. v. Barnhardt*, 913 F. 3d 1189, 1201 (10th Cir. 2019) ("A statute is 'ambiguous if it is reasonably susceptible to more than one interpretation or capable of being understood in two or more possible senses or ways.'" (quoting *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F. 3d 1199, 1226 (10th Cir. 2014))). Tenth Circuit precedent is in accord. *Ramah Navajo Chapter*, 644 F. 3d at 1062 (explaining that courts "'look to traditional canons of statutory construction,'" including the canon of construction favoring Indian tribes, "if [the] statute is ambiguous" (quoting *Conrad*, 585 F. 3d at 1381)).

But one aspect of the Tribe's argument, which the government does not dispute, is well-founded: Once a statute is determined to be ambiguous, the rule of liberal construction is more than an "ambiguity tiebreaker." Rep. Br. 9. Instead, when faced with ambiguity, the Tribe need not advance the best interpretation of the statute at issue, only a reasonable one. *See Ramah Navajo Chapter*, 644 F. 3d at 1057; *Lujan*, 112 F. 3d at 1462 (observing that "the canon of construction favoring [tribes] necessarily 'constrain[s] the possible number of reasonable ways to read an ambiguity in [the] statute'" (alterations in original) (quoting *Massachusetts v. U.S. Dep't. of Transp.*, 93 F. 3d 890, 893 (D.C. Cir. 1996))).

In sum, I would conclude that the longstanding canon of construction favoring tribes is triggered only when there is ambiguity in the first place. And once a statute is found to be ambiguous, the Tribe need only present a reasonable interpretation to prevail. *See Ramah Navajo Chapter*, 644 F. 3d at 1057. Or, framing the question from

the opposite perspective, to avoid the application of the canon and resort to a tribe's reasonable interpretation, the government must "demonstrate that its reading is clearly required by the statutory language." *Salazar*, 567 U.S. at 194, 132 S. Ct. 2181. With this interpretive lens in focus, I turn to the relevant provisions of the Self-Determination Act.[5]

II. Interpretation of the Self-Determination Act

A. 25. U.S.C. § 5325

The central dispute in this case is whether the Tribe is entitled to contract support costs for its administrative expenditures associated with collecting and then recirculating revenues generated by billing third-party insurers. The Tribe argues that the district court, in answering that query in the negative, too narrowly interpreted the subsection of the Self-Determination Act that defines the contours of contract support costs, § 5325(a).

Section 5325(a) contains three relevant provisions addressing the "[a]mount of funds provided" by IHS to contracting tribes. The first two provisions provide an initial

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[5] The Tribe points to two additional sources—the liberal-construction provision in the contract and a statutory provision in the Self-Determination Act—to support its view that the statute and contract must be construed in its favor. *See* § 5321(g). Notably, however, Congress enacted the statutory provision in 2020, whereas the contract governed during fiscal years 2016 and 2017. The parties have not briefed whether the timing of the provision's enactment affects § 5321(g)'s application. In any event, because I would find that the Indian canon of construction takes the Tribe as far as it needs to go to prevail in this appeal, no further discussion of these other potential interpretive guides is necessary.

framework distinguishing between program funds and contract support 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 [s]ecretary would have otherwise provided for the operation of the programs . . . for the period covered by the contract. . . . .
>
> (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 [s]ecretary in his direct operation of the program; or
>
> (B) are provided by the [s]ecretary in support of the contracted program from resources other than those under contract.

§ 5325(a). Building on this initial framework, subsection (a)'s third relevant provision further delineates two types of reimbursable contract support costs, direct and indirect:

> (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 [f]ederal program that is the subject of the contract; and
>
> (ii) any additional administrative or other expense incurred by the governing body of the Indian [t]ribe or [t]ribal organization and any overhead expense incurred by the tribal contractor in connection with the operation of the [f]ederal 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.

Id.

Interpreting these provisions, the district court concluded the statute unambiguously favored the government. Specifically, the court held that (1) a cost must satisfy the conditions of § 5325(a)(2) to be an "'eligible' cost under § 5325(a)(3)(A)," *id.* (quoting § 5325(a)(3)(A)); (2) the provisions' silence about third-party revenue indicates the Tribe is not entitled to contract support costs for administrative expenditures associated with such income; (3) the Tribe is owed contract support costs only for activities it *must* undertake under the contract, and the contract does not *require* the Tribe to collect third-party revenue; and (4) expenses generated when spending third-party revenue are not "subject or pursuant to the IHS contract" under § 5325(a)(3)(A)(i) and (ii), App. 129.

Challenging the first of these conclusions, the Tribe argues that the statute does not require that an expense under subsection (a)(3)(A) first qualify for reimbursement under subsection (a)(2). From there, the Tribe rests its

statutory interpretation on subsection (a)(3)(A)'s broad language. It argues that the district court too narrowly construed the "the contracted federal program." Aplt. Br. 26. According to the Tribe, the salient point is that the contract requires the Tribe to collect third-party revenue, making expenses associated with that process part of "the operation of the [f]ederal program." § 5325(a)(3)(A).

In response, the government attempts to dispute the Tribe's statutory interpretation and defend the district court's conclusions. But—perhaps tellingly—it leads with arguments based on the contract and an IHS manual that it asserts is relevant here. Despite the government's implicit invitation to look outside the statute, the analysis must "begin with [the statute's] plain text." *Ramah Navajo Chapter*, 644 F. 3d at 1062.

To start, § 5325(a)(2) explains that when certain conditions are satisfied, contract support costs "shall be added to the amount required by [subsection (a)(1)]." Then, § 5325(a)(3)(A) states that "contract support costs that are eligible costs . . . shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of" the "direct program expenses" and "any additional administrative or other expense incurred." But the statute does not inform the reader whether, to qualify as a contract support cost under subsection (a)(3)(A), subsection (a)(2)'s requirements must be met. Stated differently, nothing in subsection (a)(3)(A) explains whether that subsection creates *additional* categories of contract support costs (on top of those listed in subsection (a)(2)) orm whether subsection (a)(3)(A) instead *limits* the categories of contract support costs described in subsection (a)(2). This absence is particularly telling given that Congress has shown in these very provisions that it knows how to

specifically incorporate earlier ones. For instance, subsection (a)(2) refers back "to the amount required by [subsection (a)(1)]," and subsection (a)(3)(A)'s final clause likewise references subsection (a)(1). By contrast, the disputed provisions of subsection (a)(3)(A) nowhere specifically mention subsection (a)(2).

Given this lack of clarity, there are at least two ways to interpret the relationship between the subsections. One way to read these provisions—as the Tribe asserts—is to understand subsection (a)(3)(A) as a standalone provision that describes additional categories of contract support costs. On the other hand, the government echoes the district court's reading, asserting that § 5325(a)(3)(A)(i) and (ii) do not create new categories of contract support costs. Rather, according to the government, both provisions "are limited by the requirements of § 5325(a)(2)." Aplee. Br. 20. But the government's one-sentence assertion offers no justification for concluding that this interpretation is "clearly required by [§ 5325(a)'s] statutory language."[6] *Salazar*, 567 U.S. at 194, 132 S. Ct. 2181.

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[6] Without elaboration, the government cites *Cook Inlet Tribal Council, Inc. v. Dotomain*, in which the D.C. Circuit held that § 5325(a)(3)(A) "does not expand the types of contract support costs" available under subsection (a)(2) but rather "divides into two the contract support costs already defined by [subsection] (a)(2)." 10 F. 4th 892, 895 (D.C. Cir. 2021). To be sure, that is one possible reading of the statute. But *Cook Inlet* did not consider whether this aspect of the statute was ambiguous. *See id.* at 895-96. And the government's citation to this case, unaccompanied by any argument tethered to the language of the statute, does not establish that *Cook Inlet*'s interpretation is *required* by the statutory language. *See Salazar*, 567 U.S. at 194, 132 S. Ct. 2181.

Thus, I would hold that the interplay between subsections (a)(2) and (a)(3)(A) is ambiguous.[7] *See Maralex Res.*, 913 F. 3d at 1201. And in this context, ambiguity is critical because it triggers the Indian canon of construction. Recall that under this canon, the Tribe's proffered interpretation of an ambiguous statute must be accepted if it is reasonable. *See Ramah Navajo Chapter*, 644 F. 3d at 1057. And the Tribe's reading of the statute—that subsection (a)(3)(A) is a standalone provision recognizing additional categories of contract support costs—is reasonable. That's in large part because, as explained earlier, there's nothing in subsection (a)(3)(A) directly harkening back to subsection (a)(2), despite other specific cross-references included in these provisions.

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[7] Contrary to Judge Eid's suggestion, I do not reach this conclusion simply because these provisions are "complex" and interpreting them " 'requires a taxing inquiry.' " Op. of Eid, J., 823-24, 828 (quoting *Kisor v. Wilkie*, —U.S.—, 139 S. Ct. 2400, 2415, 204 L. Ed. 2d 841 (2019)). I do so because, as explained above, subsections (a)(2) and (a)(3)(A) are "susceptible to more than one reasonable reading." *Kisor*, 139 S. Ct. at 2410; *see also Maralex*, 913 F. 3d at 1201 ("A statute is 'ambiguous if it is reasonably susceptible to more than one interpretation or capable of being understood in two or more possible senses or ways.' " (quoting *Nat'l Credit Union*, 764 F. 3d at 1226)). Judge Eid persuasively explains, for reasons I largely agree with, why the Tribe's reading of § 5325(a) is reasonable. But she does not explain why the government's contrary interpretation of this provision is *un*reasonable, instead merely declaring that it is. And by neglecting the government's proffered interpretation of § 5325(a), Judge Eid fails to support her conclusions that "the Tribe presents the *only* reasonable construction" and that the relevant provisions are therefore *not* ambiguous. Op. of Eid, J., 824 (emphasis added). This omission is particularly troubling given that the district court concluded that the same statutory language unambiguously favored the government's interpretation.

Instead, as the Tribe maintains, subsection (a)(3)(A)'s "eligible costs" are reasonably read as linked to the two types of reimbursable contract support costs listed in this provision: (1) "direct program expenses for the operation of the [f]ederal program that is subject to the contract," § 5325(a)(3)(A)(i); and (2) "any additional administrative or other expense . . . and any overhead expense" the Tribe incurs "in connection with the operation of the [f]ederal program, function, service, or activity pursuant to the contract," § 5325(a)(3)(A)(ii). This reasonable reading of the relevant and ambiguous statutory provisions is all that is required for the Tribe's interpretation to succeed. *See Ramah Navajo Chapter*, 644 F. 3d at 1057.

And as the Tribe persuasively explains, it prevails under this reasonable interpretation because its administrative costs associated with generating and then expending third-party revenue qualify under either subpart of subsection (a)(3)(A). That is, these costs can be reasonably understood as "direct program expenses for the operation of the [f]ederal program that is the subject of the contract." § 5325(a)(3)(A)(i). And these costs can also be reasonably understood as "additional administrative" or "overhead expense[s] incurred by the [Tribe] in connection with the operation of the [f]ederal program, function, service, or activity pursuant to the contract." § 5325(a)(3)(A)(ii).

The contract, which governs the Tribe's operation of the federal healthcare program, shows why. The contract unambiguously anticipates that the Tribe will bill third-party insurers, including Medicare, Medicaid, and private insurers, for healthcare services it provides. Specifically, the Tribe's scope-of-work document, which is incorporated into the contract, states that the Tribe will:

- obtain and maintain "accreditation standards in order to qualify for funds through third[-]party[ ]payers";
- "[u]se [IHS's] third-party billing system" until the Tribe is able to "set up its own functioning . . . third-party billing system";
- coordinate benefits to perform alternate resource determinations;
- ensure necessary certifications are maintained;
- manage claims; and
- conduct "[q]uality assurance and all third-party billing processes."

App. 105-06. These provisions plainly contemplate that the Tribe will engage in third-party billing to generate revenue. And importantly, once the Tribe establishes this infrastructure and collects third-party revenue, the Self-Determination Act requires the Tribe to deploy its program income "to further the general purposes of [its] contract" with IHS. § 5325(m)(1). Moreover, § 5325(m)(2) states that "program income earned by a tribal organization in the course of carrying out a self-determination contract . . . shall not be a basis for reducing the amount of funds otherwise obligated to the contract." That the Tribe must recirculate the third-party revenue that it earns (minus any administrative cost) further supports its contention that these administrative costs are "direct program expenses for the operation of the [f]ederal [healthcare] program" that are "incurred . . . in connection with" the operation of the federal healthcare program "pursuant to the contract." § 5325(a)(3)(A)(i)-(ii). Indeed, the Ninth Circuit recently reached a similar conclusion for that very reason. *See San Carlos Apache Tribe v. Becerra*, 53 F. 4th 1236, 1242 (9th Cir. 2022) (holding that costs related to "third-party-revenue-funded

healthcare activities" were performed "'in connection with'" tribe's operation of its program because "the [c]ontract requires the [t]ribe to provide third-party-funded health[ ]care" and thus "causes the [t]ribe to carry out those activities" (quoting § 5235(a)(3)(A)(ii)).

To evade the conclusion that these expenses satisfy subsection (a)(3)(A), the government pivots away from the statutory text, arguing instead that the statute only provides "in general terms the expenses" contract support costs are designed to cover and that the Tribe is now seeking to recover contract support costs above what it agreed to in its contract. Aplee. Br. 24. That is, the government contends that even if subsection (a)(3)(A) authorizes reimbursement for these costs, the parties' contract precludes such reimbursement. In support, the government cites an IHS manual referenced in the annual funding agreement that it contends reflects an already-negotiated amount of contract support costs. Yet the annual funding agreement—which again, forms part of the contract—states that the parties' agreed-upon calculation of contract support costs is an "estimate" that "shall be recalculated as necessary . . . to reflect the full [contract support costs] *required under* [*§ 5325*] and, *to the extent not inconsistent* with the [Self-Determination Act], as specified in [the] IHS [m]anual." App. 84 (emphasis added). And that's the rub. Reimbursement for these administrative expenditures *is* required to reflect the full contract support costs to which the Tribe is entitled under the statute. Thus, the government's reliance on the IHS manual and the initially negotiated contract support costs is to no avail. *See San Carlos Apache Tribe*, 53 F. 4th at 1240 (rejecting similar argument because it "ignores the flexibility written into the [c]ontract").

Next, the government points to a separate section of the Self-Determination Act providing that program income, like the insurance reimbursements obtained by the Tribe, "shall be treated as supplemental funding to that negotiated in the funding agreement." Aplee. Br. 25-26 (quoting 25 U.S.C. § 5388(j)). From there, the government argues that this income should also be treated as separate from the amount provided under § 5325(a)(1). The district court similarly concluded that § 5388(j) demonstrates that program income is "treated as supplemental funding to that negotiated in the funding agreement." App. 124 (quoting § 5388(j)). Yet as the government acknowledges, § 5388(j) applies only to compacts under Title V of the Self-Determination Act and not, as here, to self-determination contracts under Title I. The government clarifies that it relies on § 5388(j) to generally "illustrate[ ] Congress's treatment of third-party income." Aplee. Br. 26 n.9. But § 5388(j) does not squarely address the pertinent question here: whether the Tribe is entitled to reimbursement, under § 5325(a), for administrative costs associated with collecting and expending that third-party income—actions that the contract clearly anticipates the Tribe will carry out.

The government also argues (as the district court concluded) that the Tribe is entitled, but not required, to collect income from third parties like Medicare, Medicaid, and private insurers—and therefore its expenses from collecting and expending that income are not reimbursable. There are two problems with this argument. First, as explained, the contract plainly anticipates that the Tribe will set up and maintain a third-party billing system and will collect reimbursements for patients with third-party coverage. And more to the point, under the Tribe's reasonable interpretation of the statute, it doesn't matter

whether the Tribe is required to collect income from third parties. The question is whether the Tribe's administrative expenditures in doing so count as "direct program expenses," § 5325(a)(3)(A)(i), or "any additional administrative or other expense incurred," § 5325(a)(3)(A)(ii). For the reasons explained earlier, I would find they do.

Nevertheless, to support a narrower understanding of contract support costs, the government leans heavily on the D.C. Circuit's decision in *Swinomish Indian Tribal Community v. Becerra*, 993 F. 3d 917 (D.C. Cir. 2021). There, the D.C. Circuit rejected the argument the Tribe posits here, concluding that "'the [f]ederal program' does not encompass spending insurance payments" because the statute refers to "'the [f]ederal program that is the subject of *the* contract' and 'the [f]ederal program, function, service, or activity pursuant to *the* contract.'" *Id.* at 921 (quoting § 5325(a)(3)(A)(i)-(ii)). Indeed, *Swinomish* interpreted the statutory provisions in § 5325(a)—like the district court did here—as limited to activities that "'ensure compliance with the terms of the contract' conducted by the tribe 'as a contractor.'" *Id.* at 920 (emphasis omitted) (quoting § 5325(a)(2)). In other words, *Swinomish* understood the statute to limit contract support costs exclusively to funds provided by IHS. *See id.*

But § 5325(a)'s expansive language does not support *Swinomish*'s narrow reading, as the Ninth Circuit persuasively outlined in *San Carlos Apache Tribe*, 53 F. 4th 1236.[8]

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[8] In so doing, the Ninth Circuit relied on the Indian canon after concluding that the statutory language underlying *Swinomish*'s interpretation is at least ambiguous. *See San Carlos Apache Tribe*, 53 F.4th at 1242-43. As discussed in the paragraph above, I do not find such language ambiguous. But even if I did, the canon would require that I resolve such ambiguity in the Tribe's favor, as the

For one thing, the phrase "the [f]ederal program" is most naturally read as referring to "all activities required by the [c]ontract, regardless of funding source," which "encompass[es] those portions of the Tribe's healthcare program funded by third-party revenue." *San Carlos Apache Tribe*, 53 F. 4th at 1242. And even if there were no way to read that phrase to include those third-party funds, such conclusion would not end the analysis because the statute "does not limit [contract support costs] to 'the [f]ederal program'" itself. *Id.* at 1243. Instead, it limits them to costs "incurred by the [Tribe] *in connection with* the operation of" that program, § 5325(a)(3)(A)(ii) (emphasis added); it therefore "contemplates that there are at least some costs *outside* of the [f]ederal program itself that require [contract support costs]," *San Carlos Apache Tribe*, 53 F.4th at 1243. And as already explained, the costs at issue satisfy that broad limit: The Tribe seeks reimbursement for administrative costs associated with services it provided pursuant to its self-determination contract with IHS, services it could not have provided without that contract.[9] *See id.* at 1241-42. So contrary to *Swinomish*'s view, the Self-Determination Act entitles the Tribe to reimbursement for those administrative costs.

Moreover, the statute's legislative purpose and history align with the Tribe's interpretation of subsection (a)(3)(A). *See Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 19-20, 126 S. Ct. 1264, 164 L.Ed. 2d 10 (2006) (examining legislative history to support statutory interpre-

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Ninth Circuit did. *See id.*; *Ramah Navajo Chapter*, 644 F. 3d at 1057.

[9] For this reason, *Swinomish*'s concern that IHS could be "on the line for unlimited contract support costs" is misplaced. 993 F. 3d at 921.

tation); *Medina v. Cath. Health Initiatives*, 877 F. 3d 1213, 1226 (10th Cir. 2017) ("A textually permissible interpretation that furthers rather than obstructs the [statute's] purpose should be favored." (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012))). In 1994, Congress added subsections (a)(3)(A)(i) and (ii) to "assure that there is no diminution in program resources when programs, services, functions[,] or activities are transferred to tribal operation." S. Rep. No. 103-374, at 9 (1994). And as the legislative history shows, without these amendments, a tribe would be compelled to "divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid." *Id.* That is what would happen (and indeed, if the Tribe's allegations are correct, what has been happening) were the Tribe required to use the third-party income it collects to cover the administrative costs associated with generating and then expending revenue from third-party insurers. *See id.*; § 5302(a) (emphasizing government's obligation to "assur[e] maximum Indian participation in the direction of . . . [f]ederal services to Indian communities"); *Ramah Navajo Chapter*, 644 F. 3d at 1058 (explaining that self-determination contracts "transfer responsibility for various programs from federal agencies to the tribes themselves, while maintaining federal funding of the programs").

In this regard, the district court's decision in *Navajo Health Foundation-Sage Memorial Hospital, Inc. v. Burwell*, 263 F. Supp. 3d 1083 (D.N.M. 2016), is persuasive. There, the court granted summary judgment on this issue to a tribal organization that had entered into a self-determination contract with IHS. 263 F. Supp. 3d at 1085-86. It considered a contract that, like the one in this case, expressly provided for "billing and collecting third[-]party

reimbursements." *Id.* at 1165. After engaging in a lengthy review of the Self-Determination Act's legislative purpose and history, the court concluded that the Self-Determination Act had been amended to "give greater assurances that IHS would cover [t]ribes' full amount of [contract support costs]." *Id.* at 1168; *see also id.* at 1167 ("The legislative history of the [Self-Determination Act's] 1988 amendments, which first defined the term 'contract support costs,' shows that Congress was determined to counter IHS['s] persistent failure to provide full funding for the indirect costs associated with self-determination contracts.").

From there, the court considered the question at issue here: "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 [Self-Determination Act]." *Id.* at 1164. Looking to the Tribe's annual funding agreement with the government, the court answered in the affirmative, explaining that each of those third-party payers "provides funding for . . . American Indian healthcare services."[10] *Id.* at 1165.

Consistent with *Burwell*, I read § 5325(a)(3)(A)'s broad language to mandate reimbursement for "direct program expenses for the operation of the [f]ederal program that is the subject of the contract," § 5325(a)(3)(A)(i), as well as "any additional administrative or other expense incurred by the . . . Tribal organization and any overhead ex-

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[10] To solidify its conclusion, the district court in *Burwell* applied the Indian canon of construction, noting that the canon provided "further reason" to interpret the statutory term "'federal program [ ]' broadly and in [the Tribe's] favor." 263 F. Supp. 3d at 1165 (quoting § 5325(a)(3)(A)).

pense incurred by the tribal contractor in connection with the operation of the [f]ederal program, function, service, or activity pursuant to the contract," § 5325(a)(3)(A)(ii). Thus, the Tribe's expenses count as contract support costs under either of those provisions, and the Tribe is entitled to reimbursement for the administrative expenditures related to collecting and expending third-party revenue that it generated by billing third parties.

B. 25 U.S.C. § 5326

Seeking an escape hatch, the government points to 25 U.S.C. § 5326. That statute provides:

> Before, on, and after October 21, 1998, and notwithstanding any other provision of law, funds available to the [IHS] 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 [IHS].

§ 5326. The government argues that under this statutory provision, IHS is not required to cover "'indirect costs associated with' funding received from third parties, as opposed to costs 'directly attributable' to the [self-determination] contract."[11] Aplee. Br. 34 (quoting § 5326). In its

[11] The government criticizes *Burwell* because it did not address § 5326. But that is likely because the government defendants

dismissal order, the district court similarly concluded that § 5326 barred the Tribe's claim for contract support costs because the Tribe's claimed administrative "costs" are not "'directly attributable' to the Tribe's" contract with IHS. App. 127 (quoting § 5326).

In my view, the government's argument and the district court's corresponding interpretation are mistaken. The district court imported its earlier premise—flawed, for the reasons noted above—that the only reimbursable costs were those incurred "to administer the resources and programs provided by IHS." *Id.* In the context of § 5326, the district court concluded, the expenditures for which the Tribe seeks reimbursement were "associated with agreements [it had] with Medicare, Medicaid[,] and other third-party payers" and not with the Tribe's agreement with IHS. *Id.*

The parties offer competing interpretations about how close the connection must be for a cost to be "directly attributable" to a self-determination contract rather than an "indirect cost[ ] associated with" some other contract. § 5326. The government contends that a cost cannot be directly attributable to the contract if the cost is indirect—as here, if the funding flows from an arrangement between the Tribe and third parties. The Tribe, to support its interpretation, points out that the contract with IHS is what triggers the availability of the funding in the first place.

Once again, because the Tribe's interpretation is reasonable, the Indian canon compels its adoption. *See Ramah Navajo Chapter*, 644 F. 3d at 1057. Indeed, the Tribe's contract with IHS mandates that the Tribe imple-

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there did not make an argument under that provision in response to the plaintiff's summary-judgment motion.

ment and maintain a third-party billing system to collect reimbursements for patients with third-party insurance coverage. And once this program income has been collected, the Tribe is statutorily required to expend it to further the healthcare program. *See* § 5325(m)(1). Therefore, I would conclude that the costs associated with collecting and expending this program income are "directly attributable to" the Tribe's contract with IHS, not "associated with" non-IHS agreements.[12] § 5326; *see also San Carlos Apache Tribe*, 53 F.4th at 1244 (finding § 5326 ambiguous on whether tribe's spending of third-party revenue is "'directly attributable' to the [c]ontract").

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[12] Unlike my colleagues, I do not read § 5326 as stating "two [independent] restrictions on the funds a tribe can receive." Dissent 829; *see also* Op. of Eid, J., 826. That is, I do not read the statute as both (1) requiring that costs be "directly attributable to" the Tribe's contract with IHS *and* (2) precluding reimbursement for "indirect costs associated with" non-IHS contracts. § 5326. Instead, like the parties, I read § 5326 as stating two different sides of the same limitation: On one side, "funds *available to*" IHS "may be *expended* only for costs *directly attributable* to" self-determination contracts; on the other, "no funds *appropriated by*" IHS to tribes "shall be *available* for any . . . *indirect costs associated with* any [non-IHS] contract." *Id.* (emphases added). Contrary to Judge Baldock's view, the fact that Congress linked these two inverse clauses with the word "and" does not automatically convert them into independent requirements. *See Confederated Tribes & Bands of Yakama Nation v. Yakima Cnty.*, 963 F. 3d 982, 990 (9th Cir. 2020) ("[J]ust because the ordinary meaning of 'and' is typically conjunctive does not mean 'and' cannot take on other meanings in context."). And at the very least, § 5326 does not unambiguously support such a reading. So under the Indian canon, the Tribe's reasonable interpretation—that costs "directly attributable" to an IHS contract are necessarily not "associated with" a non-IHS contract (and vice versa)—must be accepted. § 5326; *see also Ramah Navajo Chapter*, 644 F. 3d at 1057.

Conclusion

Applying the Indian canon of construction, I would adopt the Tribe's reasonable interpretation to resolve the ambiguous relationship between § 5325(a)(2) and § 5325(a)(3)(A). Under that interpretation, the contract support costs sought by the Tribe—administrative expenses incurred in connection with the Tribe's contractually anticipated collection and expenditure of third-party income—are direct expenses incurred while operating the healthcare program that is the subject of its contract with IHS. *See* § 5325(a)(3)(A)(i). These expenses are also incurred "in connection with the operation of the [f]ederal program" that it contracted to run. § 5325(a)(3)(A)(ii). Again applying the Indian canon, I would reject the government's contention that § 5326 bars the Tribe's claim for contract support costs because, contrary to the government's contention, the Tribe's costs are directly attributable to the contract. With Judge Eid's separate opinion and this opinion, a majority of this panel reverses and remands to the district court for further proceedings.

EID, Circuit Judge, concurring in the judgment.

I agree with Judge Moritz that the statutory scheme in question supports the Tribe's position, but I reach that result by taking a different path. Judge Moritz finds that both the Tribe and the government put forth reasonable interpretations of the statutory language and then employs the Indian canon of statutory construction to break the tie in favor of the Tribe. *See* Moritz op. at 811-12. The statutory scheme here is undoubtedly complex and requires a good deal of analysis, but that does not mean that it is ambiguous. In my view, the Tribe presents the only reasonable construction because the government's

interpretation vitiates much of the statutory scheme. Accordingly, I respectfully concur only in the judgment.

The Indian Self-Determination and Education Assistance Act ("ISDEAA") provides that when a tribe contracts with the federal government to provide its own services—like healthcare—the tribe receives whatever funds the government would have spent to run the program had it provided those services directly. This is called the "[s]ecretarial amount." Aplt. Br. at 5; Aple. Br. at 4. But a tribe faces additional costs that the federal government need not incur to operate the same system, including, for example, the costs of audits, workers' compensation insurance (which often involves paying into state-run programs), and taxes. The ISDEAA adds "contract support costs" to the secretarial amount to cover these items. 25 U.S.C. § 5325(a)(2), (a)(3)(A).

The statute broadly defines "contract support costs." *See id.* § 5325(a)(2)-(3). Contract support costs "shall consist of an amount for the reasonable costs for activities [that] must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management" but that (A) the federal government does not normally incur when directly operating the program or (B) the relevant agency provides "in support of the contracted program from resources other than those under contract." *Id.* § 5325(a)(2). Moreover, "[t]he 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." *Id.* § 5325(a)(3)(A). The statute states that contract support cost funding "shall not duplicate any funding provided under subsection (a)(1)," which provides for the secretarial amount. *Id.*; *see also id.* § 5325(a)(1).

In other words, the statute provides that "[t]he 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" both (i) "direct program expenses" and (ii) "any additional administrative or other expense" that the tribe incurs and "any overhead expense" that "the tribal contractor [incurs] in connection with the operation of the Federal program, function, service, or activity pursuant to the contract." *Id.* § 5325(a)(3)(A). "[C]ontract support costs" is thus a very broad term. *Id.*

A tribe's funding arrangement is complicated by the complexities of the modern healthcare system. The federal government's Indian Health Service ("IHS") does not fund a contracting tribe's healthcare system in a vacuum. Healthcare is increasingly funded by reimbursements from non-tribe, non-IHS, third-party payors such as Medicare, Medicaid, and private insurers.[1] These revenues are called "program income," 25 U.S.C. § 5325(m), and they reimburse a provider's direct expenses.

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[1] *See* Medicaid & CHIP Payment & Access Comm'n, *Medicaid's Role in Health Care for American Indians and Alaska Natives* 5-6 (2021), https://www.macpac.gov/wp-content/uploads/2021/02/Medicaids-Role-in-Health-Care-for-American-Indians-and-Alaska-Natives.pdf.

Notably, by statute, the amount IHS must pay a tribe because of the contract is not reduced when a tribe collects program income. *See id.* § 5325(m)(2). The statute explicitly provides that "program income earned by a tribal organization in the course of carrying out a self-determination contract . . . shall not be a basis for reducing the amount of funds otherwise obligated to the contract." *Id.* § 5325(m). Funds authorized by law and directly provided for in the contract are clearly "obligated to the contract." *Id.* § 5325(m)(2). Likewise, because contract support costs stem from activities that a tribe must undertake "to ensure compliance with the terms of the contract and prudent management" and because the statute requires that contract support costs be paid because of the IHS contract, *id.* § 5325(a)(2), they are "funds [ ] obligated to the contract." *Id.* § 5325(m)(2). Therefore, the secretarial amount and the amount of reimbursement for contract support costs that are authorized and required by the contract and by statute may not be reduced because of program income. *See id.*; *see also id.* § 5388(j) (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" and "shall not result in any offset or reduction in the amount of funds the Indian tribe is authorized to receive under its funding agreement . . . ").

A tribe with an ISDEAA contract will already be fully reimbursed through the secretarial amount and contract support costs; and, therefore, program income is extra money on top of basic reimbursement. However, a tribe does not simply receive a windfall. The statute provides that "program income . . . shall be used by the tribal organization to further the general purposes of the contract." *Id.* § 5325(m). That is, the statutory text con-

templates this additional money and requires the tribe to inject it back into its healthcare program.

The Northern Arapaho Tribe contracts with the federal government to provide healthcare on the reservation that the government would otherwise be obligated to provide. IHS refused to provide the Tribe with contract support costs corresponding to the portion of its healthcare system funded with program income. The issue here is whether tribes are owed "contract support costs" on the program income that they receive and then spend on more programming.

As laid out above, the term "contract support costs" has a broad meaning. Additionally, the government cannot pay less because of program income, which the statute requires to be injected back into the Tribe's program and which itself only exists because of the IHS contract. *See id.* § 5325. Also, the Tribe's contract—the relevant provisions of which Judge Moritz lays out, *see* Moritz op. at 818-19 (quoting App'x at 105-06)—"plainly contemplate[s] that the Tribe will engage in third-party billing to generate revenue," *id.* at 818. Based on the plain meaning of both the contract and § 5325, the Tribe must be reimbursed for these contract support costs.

As Judge Moritz points out, *see id.* at 822-23, it is true that § 5326 of the statute provides limits on recovering contract support costs, *see* 25 U.S.C. § 5326.[2] And these

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[2] That provision states in full:

> 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

limits exist "notwithstanding any other provision of law." *Id.* While Judge Moritz focuses largely on the first portion of § 5326, *see* Moritz op. at 82-23, I do not read § 5326 as establishing two mutually exclusive conditions—where, for example, the cost being "directly attributable" to the IHS contract automatically makes the cost not be "associated with" a non-IHS contract, *see* Aple. Br. at 34. I instead read § 5326 to contain two similar statutory conditions that must both be met.

First, § 5326 limits contract support cost recovery to "costs *directly attributable* to contracts, grants and compacts pursuant to the Indian Self-Determination Act." 25 U.S.C. § 5326 (emphasis added). The costs incurred when spending program income are "directly attributable" to the Tribe's self-determination contract. Because of the contract, the Tribe takes control of its healthcare services and is required to spend the program income it has accepted as a "prudent" provider on more healthcare services. *Id.* § 5325(a)(2); *see also id.* § 5325(m)(1). The contract—which incorporates the statute—thus contemplates and requires spending program income "to further the general purposes of the contract." *Id.* § 5325(m)(1). The contract support costs associated with the required spending of program income—including costs associated with collecting and spending program income—are, therefore, "directly attributable" to the contract. To hold otherwise would be to hold that costs contemplated by the

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> 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.

contract and required by the statute are not directly attributable to the contract. In sum, such a contradictory interpretation—one that is adopted by the government, *see* Aple. Br. at 34-35—would ignore the mandatory aspect of the spending.

Second, § 5326 prohibits the government from paying "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 (emphasis added). The costs incurred when collecting and spending program income are not "associated with" non-IHS agreements, at least under any interpretation of the statute that does not destroy it entirely. Contracting is ubiquitous. As one court has observed, the "literal requirement that no funds from any appropriation whatever, including other agency appropriations, may ever be used to pay costs 'associated with' other agencies would . . . eliminat[e] the possibility of funding any indirect costs at all." *Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 417 (D.D.C. 2008). Likewise, a broad reading of this phrase would vitiate most, if not all, of the ISDEAA's explicit contract support costs funding. One can easily imagine many non-IHS agreements that would be "associated with" traditional contract support costs incurred by contracting tribes under the broad reading of the phrase. Under this reading, the contract support costs incurred when a tribe conducts federally required audits might be said to be "associated with" the tribe's contract hiring an auditor. Additionally, under the expansive reading proposed by the government, this could also be said about the tribe's contracts with insurers involved in obtaining and paying for workers' compensation

insurance—which often involves paying into state-run programs. Moreover, the contract support costs incurred when a tribe computes its tax obligations might be said to be "associated with" the tribe's agreement with its accounting firm under the government's reading. Adopting such an expansive reading of the "associated with" language would foreclose recovery of all of these costs. But that would eliminate the meaning of much of § 5325; and, therefore, the interpretation must be rejected as unreasonable. *Cf. Standing Akimbo, Inc. v. United States*, No. 21-1379, 2023 WL 569405, at *5 n.5 (10th Cir. Jan. 27, 2023) (unpublished) (noting that the court would "not extend the Anti-Injunction Act to summons proceedings . . . because such an extension would directly conflict with (and possibly moot) the statutory scheme entitling taxpayers to challenge summonses in the district court").

The dissent agrees that the language of § 5325 unambiguously entitles the Tribe to the funds it seeks. *See* diss. op. at 828-29. But then it concludes that § 5326 unambiguously takes those funds away. *See id.* at 829-30. I disagree with this analysis.

In the dissent's view, the "notwithstanding" clause of § 5326, which imposes the two requirements of the section "notwithstanding any other provision of law," impliedly repeals the language of § 5325. It then concludes that § 5326, when considered in isolation, disallows the funds at issue in this case. But the "notwithstanding" clause does not come into play unless there is a conflict between the two provisions in question in the first place. *See Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18, 113 S. Ct. 1898, 123 L. Ed. 2d 572 (1993) (citing *Shomberg v. United States*, 348 U.S. 540, 547-48, 75 S. Ct. 509, 99 L. Ed. 624 (1955)) ("As we have noted previously in construing statutes, the use of

such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override *conflicting* provisions of any other section." (emphasis added)). Here, there is no conflict.

Contract support costs incurred when collecting and spending program income are both "directly attributable" to the IHS contract and "associated with" the IHS contract—not contracts with other entities—for purposes of § 5326. 25 U.S.C. § 5326; *see also San Carlos Apache Tribe v. Becerra*, 53 F. 4th 1236, 1244 (9th Cir. 2022) ("This spending occurs only because the Contract allows the Tribe to recover the insurance money and requires the Tribe to spend it."). Any contractual arrangements the Tribe may have with third parties that facilitate receiving program income are subordinate to the agreement with IHS to expend all program income "to further the general purposes of the [IHS] contract." 25 U.S.C. § 5325(m)(1). The program income is earned by operating the funded activities pursuant to the self-determination contract, not from unrelated activities. Also, the relevant costs for reimbursement purposes are incurred in connection with spending program income on more healthcare activities (as the self-determination contract and the ISDEAA require), not in connection with any contractual obligations to third parties. *See San Carlos Apache Tribe*, 53 F. 4th at 1241-43. The connection to third parties is thus highly attenuated.

In sum, I reject the government's position not because it reaches an absurd result, *see* diss. op. at 829-30, but because we should not read § 5326 as vitiating the text of § 5325 when we can give effect to both sections without straining the text.

In the end, there is no question that the statutory scheme and its intersection with the contract in place in this case is complex. However, "[a] regulation is not ambiguous merely because 'discerning the only possible interpretation requires a taxing inquiry.'" *Kisor v. Wilkie*, —U.S.—, 139 S. Ct. 2400, 2415, 204 L. Ed. 2d 841 (2019) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 707, 111 S. Ct. 2524, 115 L. Ed. 2d 604 (1991) (Scalia, J., dissenting)). The same holds true for statutes. These statutes are not ambiguous. Here, I would find that the Tribe presents the only reasonable construction of the statutory scheme because the government's view vitiates much of the scheme without a conflict sufficient to invoke the "notwithstanding" clause and, therefore, must be rejected. Accordingly, I concur only in Judge Moritz's judgment.

BALDOCK, Circuit Judge, dissenting in part.

Let me begin by acknowledging the complexity of the statutory scheme we consider today. My colleagues and I cannot reach a consensus on its meaning. This fact alone speaks volumes about Congress's ability to draft a coherent statute. But we do not make the law. We can only interpret and apply it to the best of our ability in the cases that come before us, and that is what we have done here.

In this case, we are asked to determine whether the Northern Arapaho Tribe is entitled to additional "contract support costs" to cover the administration of "program income"—funds received from third-party payors—under the terms of the Indian Self-Determination and Education Assistance Act ("ISDEAA"). To answer that question, we consider two provisions from the ISDEAA: 25 U.S.C. § 5325 and 25 U.S.C. § 5326. According to

Judge Moritz, the language of these provisions is ambiguous, meaning that the Tribe prevails through the Indian canon of construction. Judge Eid agrees that the Tribe prevails but offers the view that the statutory language is unambiguous, and that the Tribe wins under its plain language. I agree with Judge Eid that § 5325 is unambiguous and that under its terms, the Tribe wins. That, however, is not the end of the story. Section 5325 is limited by § 5326. I cannot join the interpretation of § 5326 offered by either of my colleagues. Its language is unambiguous, and the Tribe cannot receive the funds it seeks when § 5326 is applied as written. I therefore respectfully dissent.

We face two questions of statutory interpretation in this case. First, we must ask whether the Tribe is entitled to receive the funds it seeks under § 5325. The Panel's unanimous answer to that question is "yes." As Judge Eid explains in her concurrence, the statute unambiguously provides that "contract support costs" include "both (i) 'direct program expenses' and (ii) 'any additional administrative or other expense' that the tribe incurs and 'any overhead expense' that 'the tribal contractor [incurs] in connection with the operation of the Federal program, function, service, or activity pursuant to the contract.'" Concurrence 824 (quoting § 5325(a)(3)(A)). Based on the plain language of this provision, and the other relevant provisions of § 5325, I have little difficulty concluding that the Tribe is entitled to the funds it seeks under that section, at least when it is considered in a vacuum.

I similarly believe the language of § 5326 is unambiguous. Section 5326 provides:

> 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.

Thus, this provision imposes two restrictions on the funds a tribe can receive. First, the costs must be "directly attributable" to the Tribe's contract with IHS for it to receive reimbursement. Second, the costs cannot be "associated with any contract . . . entered into between an Indian tribe . . . and any entity other than the Indian Health Service."[1] § 5326. These limitations apply "notwithstanding any other provision of law" and expressly constrain the funds available under the ISDEAA "or any other Act." *Id.* Because the two requirements are joined conjunctively, both conditions must be satisfied to comply with the statute. *See, e.g.*, *United States v. Fredette*, 315 F. 3d 1235, 1244 (10th Cir. 2003);

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[1] According to a recent Ninth Circuit decision, § 5326 poses no obstacle to the Tribe's recovery. *See San Carlos Apache Tribe v. Becerra*, 53 F.4th 1236, 1243–44 (9th Cir. 2022). But the Ninth Circuit's brief analysis only addressed the "directly attributable" prong and its conclusory statement that it is "not clear that [§ 5326] unambiguously means that this spending is *not* 'directly attributable' to the Contract" does not persuade me to change my view of the statute. *Id.* at 1244.

United States v. Browning, 252 F. 3d 1153, 1160 (10th Cir. 2001).

Even assuming for the sake of argument that the Tribe can pass the "directly attributable" prong by showing that its contract with IHS "contemplate[s]" the Tribe doing business with third-party payors, *see* Op. 818-19, 822-23; Concurrence 825-26, I struggle to see how the Tribe can get past the "associated with" prong. To be sure, the first prong requires a tight nexus between the costs at issue and the Tribe's contract with IHS to be reimbursable while the second prong only requires a loose nexus between the costs and a contract with a third-party for the same costs to be excluded from reimbursement. And Judge Eid may be right that this provision could exclude a variety of other contract support costs and indirect costs. *See* Concurrence 826-27. But that is what § 5326 says. Although we abide by the principle that if "a plain language interpretation of a statute would lead to an absurd outcome which Congress clearly could not have intended, we employ the absurdity exception to avoid the absurd result," this is not one of the occasions when the result is one that Congress did not intend. *In re McGough*, 737 F. 3d 1268, 1276 (10th Cir. 2013) (citing *Resolution Trust Corp. v. Westgate Partners Ltd.*, 937 F. 2d 526, 529 (10th Cir. 1991)). After all, Congress expressly employed language stating that the rules enunciated in § 5326 trump those in other provisions of the statute. Accordingly, I would read § 5326 as a superseding provision that bars the Tribe from receiving the funds it seeks even though § 5325 would otherwise allow it.

My colleagues, however, do not share this view. Instead, they have each worked hard to read § 5326 as saying some-

thing other than what it says.[2] But as I have discussed, § 5326's language is plain and unambiguous. If § 5326 does not bar the Tribe from receiving the costs in question, I struggle to see when it would apply or what purpose it would serve. Congress chose to draft a clear and broadly applicable statute. In my view, the Tribe's issue with § 5326 is better addressed by Congress than by us. I respectfully dissent.

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[2] Judge Eid cites our recent decisions, *Standing Akimbo, Inc. v. United States*, No. 21-1379, 2023 WL 569405 at *5 n.5 (10th Cir. Jan. 27, 2023) (unpublished), to support her view that my reading of § 5326 "would eliminate the meaning of much of § 5325" and "must be rejected as unreasonable." Concurrence 827. Specifically, Judge Eid highlights our rejection of the IRS's argument that the Anti-Injunction Act barred us from exercising jurisdiction in that case. *Id.* But that discussion is an inapposite comparison with this case. In *Standing Akimbo*, we concluded the Anti-Injunction Act did not apply because the Tax-payers did not seek an injunction. 2023 WL 569405 at *5 n.5. We also explained that expanding the Anti-Injunction Act to cover summons proceedings would undermine a separate statutory scheme granting taxpayers the right to challenge third-party summons issued by the IRS. *See id.* In contrast, this case involves two provisions of the same statutory scheme. Furthermore, even if *Standing Akimbo* was directly on point (which it is not), it is unpublished authority. And the unpublished decisions of this Court are merely persuasive.

APPENDIX B

UNITED STATES DISTRIC COURT
DISTRICT OF WYOMING

No. 21-CV-0037

NORTHERN ARAPAHO TRIBE, PLAINTIFF

v.

NORRIS COCHRAN, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES;
ELIZABETH FOWLER, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR, INDIAN HEALTH SERVICE;
UNITED STATES OF AMERICA,
DEFENDANTS

Filed: July 7, 2021

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

NANCY D. FREUDENTHAL, United States District Judge.

The Northern Arapaho Tribe brings this case against the Government for violation of law and breach of contract by the Indian Health Service ("IHS") in failing to pay full funding of contract support costs ("CSC") for the operation of its federal health program under a Contract and Annual Funding Agreement authorized by the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 5301 *et seq*. CM/ECF Docu-

ment ("Doc.") 1. Funding for CSC reimburses the Tribe for the additional, reasonable direct and indirect costs for contract administrative expenses[1] and overhead to ensure contract compliance and prudent management. 25 U.S.C. § 5325(a)(3)(A). This case focuses on IHS's refusal "to pay CSC associated with that portion of the Tribe's health care program funded with third-party revenues—payments from Medicate, Medicaid, private insurers, and others"[2] for fiscal year 2016 and FY2017.[3] *Id.* at ¶¶ 3-4. With regard to FY2016, the Tribe claims it is entitled to $538,936.00 for IHS's failure to pay CSC on expended third party-revenues. Doc. 1, ¶ 34. For FY2017, the Tribe claims $1,001,201.00. Doc. 1, ¶37.

Defendants move to dismiss the Tribe's case arguing neither the law nor the contract with the Tribe support the Tribe's claim that IHS must pay CSC on that portion of the Tribe's federal health care program funded by third-party revenues such as payments from Medicare, Medicaid, private insurers and others. Doc. 18. The Tribe opposes dismissal, arguing Defendants misread the ISDEAA. The Tribe argues it is required by law and contract to collect third-party revenues and use them for additional services within the scope of the Tribe's contract with the Secretary of Health and Human Services. Further, the tribe argues these

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[1] A common example is workers' compensation paid to states for employees of the health facility. Doc 19, fn.1.

[2] The other third-party payers include workers' compensation and tortfeasors. 25 U.S.C. §§ 1621e(b) and 1621e(e)(3)(A).

[3] Neither the Secretarial amount paid as required by 25 U.S.C. § 5325(a)(1), nor the negotiated indirect cost rate are in dispute. *See Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 104-05 (D.D.C. 2019) (describing indirect cost system).

additional services made possible by third-party revenue generate additional administrative and overhead costs of precisely the kind that Congress required be funded by CSC.

The court concludes that the ISDEAA and the Tribe's contract entitle the Tribe to receive CSC funding on expenditures of funds received under the contract with the IHS, which does not include expenditures of third-party income. Therefore, the Court grants Defendants' motion to dismiss.

Background

The ISDEAA authorizes Indian tribes and tribal organizations to assume responsibility to administer programs, functions, services, and activities (PFSAs) the Secretary would otherwise be obligated to provide under federal law to American Indians and Alaska Natives. 25 U.S.C. § 5321(a)(1). Pursuant to this authorization, the Northern Arapaho Tribe has entered into a contract with the Secretary of Health and Human Services to assume responsibility for the Tribe's federal healthcare program. The purpose of the ISDEAA is to reduce federal domination of Indian programs and promote tribal self-determination and self-governance. *See* 25 U.S.C. § 5302(b); *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 639, 125 S. Ct. 1172, 161 L.Ed.2d 66 (2005).

The ISDEAA requires the amount of funds provided to the Tribe "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). The amount the Secretary otherwise would have provided to operate the program is commonly referred to as the "Secretarial amount." Further, the ISDEAA requires, in addition to

the Secretarial amount, payment of direct and indirect CSC to cover the administrative and overhead expenses for activities which must be carried on by the Tribe as a contractor to ensure compliance with, and prudent management of the terms of the contract. 25 U.S.C. § 5325(a)(2).

This dispute involves funding for both direct and indirect CSC to cover the Tribe's expenditures of third-party income to further the general purposes of the Tribe's contract with IHS. The Tribe pursued its claims for underpaid CSC for FY2016 and FY2017, which the IHS denied by letter dated February 20, 2020. Doc. 1, ¶ 7. This civil action was filed within twelve months of receipt of the IHS decision, as required by the Contract Disputes Act, 41 U.S.C. § 7104(b)(3). *Id.* Therefore, this Court has jurisdiction to review the IHS denial under the Contract Disputes Act and Section 110 of the ISDEAA. 41 U.S.C. § 7104(b); 25 U.S.C. § 5331(a), (d).

Applicable Law

Standard of Review

In determining a Rule 12(b)(6) motion to dismiss, a court "must accept as true all well-pleaded facts, as distinguished from conclusory allegations, and those facts must be viewed in the light most favorable to the non-moving party." *Moss v. Kopp*, 559 F. 3d 1155, 1159 (10th Cir. 2009). As this dispute arises under the Contract Disputes Act, the Court's review is *de novo*, and the Tribe has the burden of proof. 41 U.S.C. § 7104(b)(4); *J.C. Equip. Corp v. England*, 360 F. 3d 1311, 1318 (Fed. Cir. 2004). When interpreting the ISDEAA, the Court begins with the "language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002).

Applicable Provisions of the ISDEAA

§ 1623. Special rules relating to Indians

(b) Payer of last resort

Health programs operated by . . . Indian tribes . . . shall be the payer of last resort for services provided by such . . . tribes . . . to individuals eligible for services through such programs, not

withstanding any Federal, State, or local law to the contrary.

§ 5325. 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 . . . covered by the contract ["the Secretarial amount"]. . . .

(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) 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.

* * * * *

(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.

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

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

Applicable Provisions of the Tribe's Scope of Work Incorporated in its Annual Funding Agreement

> The Tribe's Business Office . . . will have an established accounting system to monitor the number of billings submitted, claims completed and total payments received. It will maintain accreditation standards in order to qualify for funds through third party-payers. . . .

Doc. 20-3, pp. 15-16.[4]

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[4] The Tribe did not attach copies of its contract at issue, annual funding agreement, or the scope of work to the Complaint. The Tribe attached these documents to its response brief. The Court considers these documents without converting to summary judgment as they are referenced in and central to the Complaint, and their authenticity is undisputed. Doc. 1, ¶¶ 13, 21 (alleging the Scope of Work is incorporated into the Annual Funding Agreement,

Discussion

By its complaint, the Tribe relies on 25 U.S.C. § 5325(a)(3)(A) for its claim that "the entire 'Federal program' that is the subject of the contract—including program income from that Federal program—generates CSC requirements." Doc. 1, ¶ 18. The Tribe also alleges that it is required by law and contract to collect third-party revenues in order to assure that the Indian health program is a payer of last resort. *Id.* at ¶ 20; 25 U.S.C. § 1623(b). The third-party revenues (or program income) must be expended on PFSAs included in the Tribe's Annual Funding Agreement, thus the expenditures from third-party program income must be included in the base for calculation and payment of CSC. Doc. 1, ¶ 22; 25 U.S.C. § 5325(m). Defendant disagrees, arguing it paid the Tribe's full CSC on expenditures from the Secretarial amount that was transferred and funded by IHS, but that neither the ISDEAA nor the contract requires or allows the IHS to pay CSC on the Tribe's expenditure of its earned program income received from third parties.

The requirement to pay and the definition of CSC is in 25 U.S.C. § 5325(a)(2). This statute speaks only of the reasonable costs for activities which "**must** be carried on" by the Tribe "**as a contractor** to ensure compliance with the terms of **the** contract and prudent management [emphasis added]." The statute refers to "the contract" which is limited to the one contract between the Tribe and IHS.[5] Section 5325(a)(2) does not mention activities car-

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which is in turn incorporated in the Tribe's contract). *Gee v. Pacheco*, 627 F. 3d 1178, 1186 (10th Cir. 2010).

[5] As noted, the Tribe's contract incorporates Annual Funding Agreements and a related Scope of Work. See Doc. 20-1, 20-2 and 20-3.

ried on by the Tribe in the expenditure of third-party program income received from Medicaid, Medicare, private insurers and others. Even though these expenditures "further the general purposes of the contract" (25 U.S.C. § 5325(m)), neither the ISDEAA nor the IHS contract suggests that, in spending third-party program income, the Tribe is acting "as a contractor" for IHS. *See Swinomish Indian Tribal Community v. Becerra*, 993 F. 3d 917, 920 (D.C. Cir. 2021) ("[t]he scope of [CSC] is thus limited to those under one "contract"—the one between a "contractor" (the tribe) and the contracting agency [IHS]"). Consequently, the ISDEAA repeatedly reinforces the limited scope for CSC and does not mention or include the Tribe's earned program income received from third-party payers.

The Tribe argues the statute does not exclude from the definition of CSC the portion of the federal program funded by third parties and the logic of the ISDEAA does not support rewriting the statute to insert such an exclusion. This argument is unavailing. As noted above, the Tribe bears the burden of proof. *See also Pennsylvania Dept. of Transp. v. United States*, 643 F. 2d 758, 762 (Ct. Cl. 1981) (noting "the well-established rule in this court that a 'government contractor bears the burden of establishing the fundamental facts of liability, causation and resultant injury,' "(citations omitted)), *cert. denied*, 454 U.S. 826, 102 S. Ct. 117, 70 L. Ed. 2d 101 (1981). Thus the Tribe may not rely on statutory silence to support liability in the form of an obligation to pay CSC on expenditures of tribal earned program income received from third parties, particularly in the face of a statutory scheme which repeatedly reinforces a limited scope for the contract support costs it requires to be paid.

Further, the IHS contract specifies and limits the activities which "**must** be carried on" by the Tribe as an IHS contractor. The overarching objective is for the Tribe "to administer the resources and programs **provided by the Indian Health Service** as authorized by [the ISDEAA] . . .". Doc. 20-1, p. 3. Thus, it is this IHS contract which operates "to transfer the funding and . . . related functions, services, activities, and programs . . . including all related administrative functions, from the Federal Government to the Contractor for the operation of its health division." *Id.* There is no mention of third-party reimbursements in the contract, which makes sense as these resources are not "provided by the Indian Health Service." *Id.* Rather, this income is "earned by an Indian tribe" and is "treated as supplemental funding to that negotiated in the funding agreement." 25 U.S.C. § 5388(j).

There also is no contractual requirement to collect third-party program income. Contrary to the Tribe's argument, the statute (25 U.S.C. § 1623(b)) provides only that the health program operated by the Tribe is the payer of last resort. This law protects and enhances[6] the health program operated by the Tribe; it does not impose any obligation on the Tribe other than to use earned program income to further the general purposes of the contract. 25 U.S.C. § 5325(m)(1), (2). And while the Tribe/contractor must maintain accreditation standards to qualify for funds through third-party payers (See Doc. 20-3, p. 16), this only assures eligibility to receive earned program income—again, a benefit to the Tribe/contractor. The requirement

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[6] The law enhances the Tribe's health program because the reimbursement revenue cannot be a basis for reducing the amount of funds otherwise obligated by the IHS to the contract. 25 U.S.C. §§ 5325(m)(2) & 5388(j).

to remain eligible certainly does not convert the Tribe's earned program income into a resource provided by the IHS. These reimbursements constitute "program income earned by" the Tribe (25 U.S.C. § 5325(m)), not contractual payments from IHS. Finally, while the Tribe must use its earned program income to further the general purposes of the IHS contract, such expenditures of program income are by the Tribe, not by the Tribe as an IHS contractor spending IHS resources.

In arguing that the law and contract allow an expanded cost base (to include expenditures of third-party income) in calculating CSC, the Tribe argues the canon of construction favoring Native Americans. This canon is reflected in the following contractual provision:

> Each provision of the [ISDEAA] 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 (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor for operation of its health division, the Wind River Family and Community Health Care System (WRFCHCS).

Doc. 20-1, p. 3; *see also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"); *S. Ute Indian Tribe v. Sebelius*, 657 F. 3d 1071, 1078 (10th Cir. 2011) ("[t]he canon of construction [favoring Native Americans] controls over more general rules of deference to an agency's interpretation of an ambiguous statute").

Obviously, this canon of construction applies only if terms of a statute are ambiguous. "If the terms of the statute are clear and unambiguous, they are controlling absent rare and exceptional circumstances." *Id.* (citing *Chickasaw Nation v. United States*, 208 F. 3d 871, 876 (10th Cir. 2000)). The Court finds the terms in 25 U.S.C. § 5325(a)(2) clearly and unambiguously define the "cost base" for calculation and payment of CSC to include only the Secretarial amount, and these terms do not sweep into the calculation program income earned by the Tribe (third-party reimbursements).[7] The Tribe's expenditures of its earned program income are not activities which **must** be carried on by the Tribe/contractor under the IHS contract. Further, the Tribe/contractor is not ensuring compliance with the terms of the IHS contract in spending its earned program income. The Tribe/contractor is also not administering the resources and programs provided by the IHS under the contract when it is spending its earned program income. Because of this, CSC may not be calculated based on the Tribe's expenditures of its earned program income.

Even if these weren't the Court's conclusions based on 25 U.S.C. § 5325(a)(2), the Court finds persuasive *San Carlos Apache Tribe v. Azar*, 482 F. Supp. 3d 932 (D. Ariz. 2020), *appeal pending*, which concluded that 25 U.S.C. § 5326 prohibits payment of CSC on expenditures of reimbursements from Medicare, Medicaid and any other third-party payers. As noted above, this statute provides:

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[7] The Tenth Circuit concluded the phrase "reasonable costs" in 25 U.S.C. § 5325(a)(2) is ambiguous. *Ramah Navajo Chapter v. Lujan*, 112 F. 3d 1455, 1463 (10th Cir. 1997). This Court's decision does not rely on the phrase "reasonable costs," nor the phrase "associated with" in 25 U.S.C. 5325(d)(2).

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

25 U.S.C. § 5326.

Congress passed § 5326 expressing "concern" about the Tenth Circuit decision in *Ramah Navajo Chapter v. Lujan*, 112 F. 3d 1455 (10th Cir. 1997). *See* H.R. Rep. 105-609 at 57, 108 (1998) (expressing "concern" about the decision made by the court in the 1997 *Ramah Navajo* case and "recommend[ing] . . . specifying that IHS funding may not be used to pay for non-IHS contract support costs [CSC]."); *id.* at 110 (same); *see also Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 418 (D.D.C. 2008), *recon. den'd*, 655 F. Supp. 2d 62 (D.D.C. 2009).

Defendant argues § 5326 bars the Tribe's claim because IHS is specifically precluded from paying CSC or indirect costs associated with any contract or agreement between the Tribe and any entity other than IHS. The Tribe argues there is no contract other than the IHS contract to which the indirect costs associated with spending the reimbursements could be allocated. The Tribe's argument is not persuasive. The issue isn't how or where to allocate

indirect costs but whether these costs are "directly attributable" to the Tribe's IHS contract. The Court concludes they are not. The only contract support costs (CSC) **directly attributable** to the IHS contract are the costs the Tribe/contractor incurs to administer the resources and programs provided by the IHS. Administrative and indirect costs associated with the Tribe's expenditures of its earned program income are not directly attributable to the IHS contract, but rather are associated with agreements with Medicare, Medicaid and other third-party payers which result in reimbursements to the Tribe. This is further explained by the court in *San Carlos Apache*:

> 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 the Tribe obtained third-party revenue "while administering programs under its contract with IHS," [citation omitted], 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 [web citation omitted] (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. [Citation] 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.

San Carlos Apache, 482 F. Supp. 3d at 938-939.

The Tribe urges the Court to follow the reasoning in *Navajo Health Foundation-Sage Memorial Hospital, Inc. v. Burwell*, 263 F. Supp. 3d 1083 (D.N.M. 2016) (*Sage Memorial*), *appeal dismissed*, 2018 WL 4520349 (10th Cir. July 11, 2018), to conclude that "expenditures made with third-party revenues in support of programs administered under a self-determination contract are spent on the federal program and are therefore eligible to be reimbursed

as CSC." *Id.* at 1162. In reaching this conclusion, the court appears to rely on 25 U.S.C. § 5325(a)(3)(A) which identifies the direct and indirect CSC that "are eligible costs for the purposes of receiving funding." Upon reading this subpart in conjunction with 25 U.S.C. § 5325(a)(2), the Court concludes subpart (a)(2) **defines** CSC, while (a)(3)(A) further limits CSC by **eligibility**. Consequently, unless a cost satisfies the definition of CSC under § 5325(a)(2), it cannot be an "eligible" cost under § 5325(a)(3)(A). Because the Court has already concluded that the administrative and indirect costs associated with spending the Tribe's earned program income does not fall within the definition of CSC under § 5325(a)(2), the statutory language in subpart (a)(3)(A) does not change this conclusion.

Further, the reference to "the operation of the Federal program" in subpart (a)(3)(A) means the program that is "the subject of the contract." 25 U.S.C. § 5325(a)(3)(A)(i). *See also* 25 U.S.C. § 5325(a)(3)(A)(ii) ("any additional administrative or other expense incurred by the tribal contractor in connection with the operation of the Federal program . . . **pursuant to the contract**"). As explained above, the expenditure of program income earned by the Tribe is not subject or pursuant to the IHS contract, which is silent on such expenditures. The law requires any expenditures by the Tribe of its earned income be to further the purposes of the contract, but it does not bring expenditures within the IHS contract nor does it convert the Tribe into an IHS contractor in spending its earned income. In short, the Tribe's earned income from third-party payers is not spent "on the program" (as concluded by the court in *Sage Memorial*), but it is spent as required by law. For these reasons, the Court finds *Sage Memorial* to be unpersuasive.

Finally, the Tribe argues that an outcome which excludes earned program income from the calculation of CSC disadvantages the Tribe in its operation of the federal health program because it is then forced "to cannibalize the third-party funding for administrative and overhead costs, reducing the level of health care services that can be provided, or subsidize the federal program with tribal funds." Doc. 20, p. 15. The Court sees no disadvantage to having supplemental funding for the tribal operated health program. The law advantages the Tribe by allowing it to retain and spend this earned income without any offset or reduction in the amount of funds the Tribe is authorized to receive under its funding agreement. Even if the Court were to detect a disadvantage to this arrangement, the statute defines the base for the calculation of CSC—which is the contract funding from IHS for the operation of the program. While the federal program in fact includes supplemental funding from third-party payers above and beyond that provided for the operation of the program by IHS, Congress allowed only for the funding of **contract** support costs, not **program** support costs. The Tribe's complaint about this arrangement is with Congress, not the courts.

Conclusion

For all the above-stated reasons, the Court concludes Defendants have met their contractual obligation by paying all CSC required by the ISDEAA, and the Tribe has not identified a contractual provision that obligates Defendants to pay CSC on the Tribe's expenditures of its earned program income. Accordingly, Defendants' motion is GRANTED. The complaint is DISMISSED WITH PREJUDICE.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-8046

(D.C. No. 0:21-CV-00037-NDF) (D. Wyo.)

NORTHERN ARAPAHO TRIBE, PLAINTIFF-APPELLANT

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS-APPELLEES

NATIVE AMERICAN TRIBES, ET AL., AMICI CURIAE

Filed: June 2, 2023

ORDER

Before MORITZ, BALDOCK, and EID, Circuit Judges.

Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

By: /s/ CHRISTOPHER M. WOLPERT
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX D

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,

capable 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.

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(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.