

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

Navajo Health Foundation-Sage Memorial	)	
Hospital, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	
Alex Azar, Secretary, U.S. Department of	)	<b>COMPLAINT</b>
Health and Human Services; Michael	)	
Weahkee, Principal Deputy Director,	)	
Indian Health Service; Roselyn Tso, Area	)	
Director, Navajo Area Indian Health	)	
Service; Marquis Yazzie, Agency Lead	)	
Negotiator/Director, Office of Indian Self-	)	
Determination, Navajo Area Indian Health	)	
Service,	)	
	)	
and	)	
	)	
United States of America,	)	
	)	
Defendants.	)	

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I. INTRODUCTION

1. This action is brought in the middle of a pandemic to secure immediate injunctive relief compelling the Indian Health Service (“IHS”) to award and fund the renewal contract of the Navajo Health Foundation-Sage Memorial Hospital (“Sage”) under the Indian Self-Determination and Education Assistance Act (“ISDEAA”), 25 U.S.C. §§ 5301-5423. As this Court held in *Navajo Health Found.-Sage Mem’l Hosp., Inc. v. Burwell*, 100 F. Supp. 3d 1122, 1173, 1192 (D.N.M. 2015) (“*Sage I*”) and *Navajo Health Found.-Sage Mem’l Hosp., Inc. v. Burwell*, 256 F. Supp. 3d 1186, 1234, 1247 (D.N.M. 2015) (“*Sage II*”), IHS is required by law to award a renewal contract that does not propose a “material and substantial change” from the preceding contract, 25

C.F.R. § 900.33. Yet, once again IHS has refused to do so.

2. Immediate injunctive relief is required so that Sage can continue operating as a tribal self-determination contractor providing health care to 25,000 Navajo people in the middle of the COVID-19 pandemic; to protect Sage from the loss of \$1.8 million per month in operating revenue; to protect Sage's access to federal sources of supply (including pharmaceuticals); to protect Sage's ability to recruit additional providers by providing benefits like the IHS loan repayment program; to protect Sage's ability to provide comprehensive diabetes case management under related grants; to protect Sage's right to liability protection under the Federal Tort Claims Act; and to prevent Sage's patient population from being required to obtain inferior health care at distant locations. Congress gave the District Courts the power to impose strong and immediate remedies where, as here, IHS's refusal to award a renewal contract is contrary to the ISDEAA and its implementing regulations. 25 U.S.C. § 5331(a).

## II. JURISDICTION

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1362 and 25 U.S.C. § 5331(a).

4. Venue is proper pursuant to 28 U.S.C. § 1391(e)(1)(A) because some of the Defendants reside in New Mexico.

## III. PARTIES

5. Plaintiff Sage is a private not-for-profit corporation that owns and operates a health care facility in Ganado, Arizona, serving approximately 25,000 Navajo people within the exterior boundaries of the Navajo Reservation. The Navajo Nation is a federally recognized Indian Tribe and has designated Sage as a "tribal organization," 25 U.S.C. § 5304(*l*), for purposes of contracting

with IHS under the ISDEAA. Since 2009, Sage has provided health care services to members of the Navajo Nation pursuant to a contract with IHS under Title I of the ISDEAA, 25 U.S.C. §§ 5301-5332.

6. Alex Azar is the Secretary of the U.S. Department of Health and Human Services (“HHS”). Secretary Azar exercises limited responsibilities designated to him by Congress pursuant to the ISDEAA and other applicable law.

7. Michael Weahkee is the Director of the Indian Health Service (“IHS”). Director Weahkee exercises authority delegated to him by the Secretary to carry out the Secretary’s responsibilities under the ISDEAA and other applicable law. As used throughout this Complaint (and unless context commands otherwise), the terms “Secretary,” “HHS,” “Director,” and “IHS” are used interchangeably.

8. Roselyn Tso is the Area Director of the Navajo Area Indian Health Service (“NAIHS”). Director Tso carries out the functions, authorities, and duties of the IHS within the Navajo Nation service area, including contracting with Indian tribal organizations under the ISDEAA. Director Tso resides in Albuquerque, New Mexico.

9. Marquis Yazzie is the Agency Lead Negotiator and Director of the Office of Indian Self-Determination within the NAIHS. Mr. Yazzie is the main agency contact for the negotiation of contracts under Title I of the ISDEAA and has communicated with Sage on behalf of the agency regarding the fiscal year 2021 contract renewal. Mr. Yazzie resides in Gallup, New Mexico.

#### **IV. BACKGROUND**

##### **A. Brief Overview of the ISDEAA**

10. The purpose of the ISDEAA is to ensure “maximum Indian participation” in the

provision of services to Indian communities. 25 U.S.C. § 5302(a). The Act seeks to achieve this purpose through the “establishment of a meaningful Indian self-determination policy,” which provides for the transition of federal programs serving Indian Tribes from IHS operation to tribal operation. *Id.* § 5302(b).

11. The ISDEAA authorizes tribes and tribal organizations to contract with IHS to provide federally funded healthcare services that IHS would otherwise provide directly. A Tribe may designate a tribal organization, *id.* § 5304(l), to contract with IHS on the Tribe’s behalf.

12. A tribal organization may choose to contract for any portion of a health care program, function, service, and activity (“PFSA”), including administrative activities, that IHS carried out in its operation of the federal healthcare program. *Id.* § 5321(a).

13. Contracts under Title I of the ISDEAA generally must be renewed every three years. 25 U.S.C. § 5324(c)(1)(A). The contracting tribal organization and IHS must also negotiate annual funding agreements (“AFAs”) that are incorporated into each contract and may be amended throughout the year to add funds the agency makes available. *See* 25 U.S.C. § 5329(c) (model agreement).

14. The proposal content requirements for a renewal contract and successor AFA are not the same as for an initial contract proposal. *Compare* 25 C.F.R. § 900.12 (renewal contract and successor annual funding agreement), *with id.* § 900.8 (initial contract proposal). A renewal proposal need only provide funding information and identify any proposed changes. *Id.* § 900.12.

15. If a tribal organization submits a proposal to renew a term contract “where no material and substantial change to the scope or funding of a [PFSA] has been proposed,” then IHS may not review the renewal proposal for declination issues. *Id.* § 900.33; *cf. id.* § 900.22

(describing declination criteria that are only applicable to initial contracts). Instead, such renewal contracts must be automatically approved.

16. Similarly, if a tribal organization submits a successor AFA that “is substantially the same as the prior [AFA] . . . the Secretary shall approve and add to the contract the full amount of funds to which the contractor is entitled, and may not decline, any portion of a successor [AFA].” *Id.* § 900.32.

17. The ISDEAA provides a comprehensive range of remedies when IHS violates the Act, including the right to obtain immediate injunctive relief and money damages. 25 U.S.C. § 5331(a).

18. The ISDEAA and its regulations must “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); *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 194 (2012); *see also* 25 C.F.R. § 900.3(b)(11) (“The Secretary’s commitment to Indian self-determination requires that these regulations be liberally construed for the benefit of Indian tribes and tribal organizations . . .”).

### **B. Prior Litigation History**

19. On June 3, 2005, the Navajo Nation Council enacted Resolution No. CJN-35-05, which named Sage as a “tribal organization” for purposes of contracting with IHS for the provision of healthcare services to Navajo people within Sage’s service area. The resolution authorized Sage to manage and operate contracts with IHS under the ISDEAA from October 1, 2005 through September 30, 2020. Under that authority, Sage entered into an ISDEAA contract with IHS beginning in 2009 (“2009 Contract”).

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