

**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 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,	)	<b>COMPLAINT</b>
	)	
	)	
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”).

20. Sage and IHS extended the 2009 Contract without interruption for successive years, through FY 2013. In August 2013, Sage proposed a renewal contract for a three-year term, FY 2014 through FY 2016, together with a successor AFA for FY 2014. Sage proposed no material changes in the budget or the PFSAs.

21. IHS never acted to approve or disapprove Sage's proposed contract for FY 2014-2016. Instead, IHS opted to extend Sage's contract and to provide Sage with funding on a monthly basis while IHS launched a review and audit.

22. The month-to-month contract extension continued for most of FY 2014. As the end of FY 2014 loomed, Sage submitted to IHS another proposed three-year renewal contract for FY 2015-2017 and a successor AFA for FY 2015.

23. On September 29, 2014, IHS purported to decline the renewal contract and successor AFA referred to in paragraph 22. As a result, Sage immediately lost access to Federal Tort Claims Act ("FTCA") coverage for malpractice claims (as provided in 25 U.S.C. § 5321(d)) and access to low-cost pharmaceutical supplies from IHS suppliers (as provided in 25 U.S.C. § 5324(k)).

24. On October 23, 2014, Sage filed a complaint in this Court seeking immediate injunctive relief to reverse IHS's declination decision, compel IHS to award and fund Sage's renewal contract and successor AFA, provide FTCA coverage for Sage and its employees, and restore Sage's ability to purchase pharmaceuticals from IHS suppliers.

25. On April 9, 2015, this Court issued a preliminary injunction in which it ordered IHS to fund Sage at pre-declination levels and ordered the parties to comply with the terms and conditions of the last AFA and Contract that were in effect, including reinstating Sage's FTCA

coverage. *Sage I*, 100 F. Supp. 3d at 1190-91. The Court determined that Sage had demonstrated irreparable harm based on its loss of funding, *id.* at 1171, that Sage had demonstrated a likelihood of success on the merits because 25 C.F.R. §§ 900.32 and 900.33 likely prohibited NAIHS from declining Sage's renewal contract and successor AFAs, *id.* at 1173, that the balance of harms weighed in favor of Sage because it was "unlikely that the NAIHS will suffer greatly, if at all, if its decades-long relationship with Sage Hospital is continued for a short while until trial," *id.* at 1189, and that "forc[ing] [Sage's] patients to go to other facilities at much greater distances is not in the public interest," *id.* at 1190.

26. On August 31, 2015, this Court granted summary judgment in favor of Sage. *Sage II*, 256 F. Supp. 3d at 1192 (amended opinion issued October 26, 2015). The Court concluded that 25 C.F.R. § 900.32 prohibits IHS "from declining a successor AFA proposal that is 'substantially the same' as its predecessor," the "2014 AFA's contents [we]re substantially the same as the 2013 AFA's contents," and therefore IHS had "no discretion" to decline such a proposal. *Id.* at 1224-25. With respect to Sage's renewal contract, the Court concluded that 25 C.F.R. § 900.33 prohibits IHS "from declining the 2013 Renewal, because the 2013 Renewal did not contain a 'material and substantial change to the scope or funding' of Sage Hospital's PFSAs," and therefore IHS "unlawfully declined the 2013 Renewal." *Id.* at 1234-36. This Court therefore "deem[ed] the 2013 Renewal and the 2014 AFA approved." *Id.* at 1236. The Court also "deem[ed] both the 2014 Renewal and the 2015 AFA approved." *Id.* at 1237.

27. After this Court granted summary judgment to Sage and injunctive relief to force the agency to award the FY 2014 and FY 2015 renewal contracts, IHS nonetheless declined Sage's proposed FY 2016 AFA. IHS did so even though the successor 2016 AFA proposed the same

amount of funding and the same PFSAs as the 2015 AFA.

28. On November 23, 2016, this Court granted Sage summary judgment reversing IHS's unlawful declination of Sage's FY 2016 successor AFA. *Navajo Health Found.-Sage Mem'l Hosp., Inc v. Burwell*, 220 F. Supp. 3d 1190, 1255 (D.N.M. 2016) ("*Sage III*"). Because the 2015 AFA and 2016 AFA were "substantially similar," and the "FY 2016 AFA [was] a successor funding agreement under 25 C.F.R. § 900.33," this Court "deem[ed] the FY 2016 AFA approved." *Id.* The Court again concluded that IHS had "no authority to decline a substantially similar successor funding agreement," *id.* at 1264, and awarded Sage damages, *id.* at 1266.

29. Following these and other rulings adverse to IHS (*see, e.g., Navajo Health Found.-Sage Mem'l Hosp., Inc v. Burwell*, 263 F. Supp. 3d 1083 (D.N.M. 2016) ("*Sage IV*"), on October 2, 2017, Sage and IHS entered into a settlement agreement under which IHS agreed to pay Sage \$122.5 million and to enter into a three-year renewal contract for FY 2018-2020. The settlement also required that Sage provide IHS quarterly financial reports.

30. Since that time, Sage has continued to provide quality services to its beneficiaries and to comply with all the terms and conditions of its contracts and settlement agreement with IHS.

### **C. Sage's FY 2021-2023 Renewal Contract**

31. On May 29, 2020, Sage submitted a renewal contract proposal to IHS that included a draft FY 2021-2023 contract, a draft FY 2021 AFA, and a draft FY 2021 scope of work. The renewal contract included the same PFSAs and the same annual funding as its FY 2018-2020 contract and FY 2020 AFA. Sage specifically noted in its submission that "the only changes from last year's documents are to update the dates and to correct typos or formatting," and it invoked



the successor funding agreement provisions in the ISDEAA and its implementing regulations. Sage also indicated that “[t]he Navajo Nation resolution number is highlighted in the draft contract since that may need to be updated based on the actual number given to the extension resolution.” *Id.* (As noted in paragraph 19, the 15-year old Navajo Nation authorizing Resolution No. CJN-35-05 was set to expire at the end of the fiscal year, September 30, 2020.).

32. Meanwhile, the COVID-19 pandemic devastated the Navajo Nation. According to a New York Times analysis, “the coronavirus positivity rate for Indian Health Service patients in Navajo Nation and the Phoenix area was nearly 20 percent from the start of the pandemic through July, compared with 7 percent nationally during the same period.” Mark Walker, *Pandemic Highlights Deep-Rooted Problems in Indian Health Service*, N.Y. Times, Sept. 29, 2020, <https://www.nytimes.com/2020/09/29/us/politics/coronavirus-indian-health-service.html>. The Navajo Nation had the highest per capita infection rate in the United States at times. *See* Hollie Silverman et al., *Navajo Nation surpasses New York state for the highest Covid-19 infection rate in the US*, CNN, May 18, 2020, <https://www.cnn.com/2020/05/18/us/navajo-nation-infection-rate-trnd/index.html>.

33. In New Mexico, for example, despite Native Americans representing only 11 percent of the total population, Native Americans represented nearly 30 percent of all infections. Walker, *supra*.

34. IHS healthcare facilities within the Nation were particularly overwhelmed, ill-equipped, and ill-prepared to respond to the pandemic. The ratio of hospital beds to population on the Navajo Nation is only about a third of the number for the rest of the United States. Hospitals within the Nation are also critically understaffed, and medical workers have faced severe shortages

of personal protective equipment. *Id.*; see also Kenzi Abou-Sabe et al., ‘Hit us at our core’: *Vulnerable Navajo Nation fears a second COVID-19 wave*, Aug. 3, 2020, <https://www.nbcnews.com/specials/navajo-nation-fears-second-covid-19-wave/index.html>.

35. Throughout the pandemic, the Navajo Nation has faced a consistent shortage of hospital beds and limited access to healthcare facilities for its citizens. Walker, *supra*. IHS’s refusal to award Sage’s renewal contract removes 25 hospital beds from the already limited system.

36. To date, the virus has killed nearly 600 people in the Navajo Nation. See Navajo Nation COVID-19 Dashboard, <https://www.ndoh.navajo-nsn.gov/COVID-19/Data> (last updated Nov. 12, 2020).

37. The virus’s spread and the insufficiency of the IHS health care system to adequately respond to COVID-19 significantly impacted the Navajo Nation. The Nation shut down its government for a period of time from March 16, 2020 until August 16, 2020, many Chapters similarly stopped meeting, stringent curfews were imposed, and the Navajo Nation President issued several emergency orders in an attempt to mitigate the spread of the virus. See Navajo Nation Executive Order No. 001-20 (March 13, 2020), <https://www.ndoh.navajo-nsn.gov/Portals/0/COVID-19/News/NNExecutiveOrderNo001-20.Updated.pdf?ver=CxXC5FtoUxYcaF9gVLPRjw%3d%3d>; Navajo Nation Executive Order No. 008-20 (July 22, 2020), [https://www.ndoh.navajo-nsn.gov/Portals/0/PDF/Executive%20Order%20008-20.pdf?ver=qmG\\_qxIPjf5vp\\_f0DWPig%3d%3d](https://www.ndoh.navajo-nsn.gov/Portals/0/PDF/Executive%20Order%20008-20.pdf?ver=qmG_qxIPjf5vp_f0DWPig%3d%3d). For Sage, the COVID-19 pandemic brought about drastic changes to its service delivery model. Further, the government shutdowns within the Navajo Nation impacted Sage’s ability to obtain an extension of its authorizing resolution from the Navajo Nation Legislative Council.

38. On June 9, 2020, IHS wrote to Sage to request that Sage provide a resolution from the Navajo Nation authorizing Sage to contract during the proposed contract term.

39. On July 11, 2020, counsel for Sage informed IHS by email that “[d]ue to the COVID pandemic, submission of [the authorizing] resolution has been delayed, but Sage will have the resolution in place before the start of the proposed contract term on October 1, 2020.”

40. Throughout June, July, and August 2020, as local Chapters began to meet again, Sage obtained resolutions in support from all the local Navajo Chapters it serves.

41. On August 17, 2020, Sage met with the Navajo Nation Health, Education, and Human Services Committee (“HEHSC”) to discuss reauthorizing Sage as a tribal organization by tribal resolution.

42. In response to that meeting, on August 24, 2020, IHS sent a letter to Navajo Nation leadership, purportedly to bring alleged “improper activity” to the Nation’s attention. IHS sent that letter to the Navajo Nation President, the Navajo Nation Legislative Council Speaker, and the HEHSC Committee Chair and Vice-Chair. Importantly, IHS did not provide a copy of that letter to Sage.

43. The “improper activity” that IHS referenced in its letter involved issues that were a matter of public record and that occurred before IHS entered into its 2017 settlement with Sage and at a time when the government had already investigated and dismissed any claims of wrongdoing against Sage’s current leadership. Many of these issues were summarized by this Court in the course of ruling against IHS. *See Sage I*, 100 F. Supp. 3d at 1139-40; *Sage III*, 220 F. Supp. 3d at 1201-02. IHS’s letter omitted that since the 2017 settlement IHS has been receiving quarterly reports on Sage’s finances, and it omitted that IHS has never raised any objections to

those quarterly reports.

44. On information and belief, on September 25, 2020, Defendants Tso and Yazzie met in Executive Session with the Navajo Nation HEHSC, and without any advance notice to Sage. On information and belief, Defendants Tso and Yazzie informed the Council members that Sage's authorizing resolution did not need to be in place by October 1, 2020, because there was an "alternative method" NAIHS could use to work with Sage while the resolution went through the legislative process.

45. On September 30, 2020, after being informed of the conversation referred to in paragraph 44, Sage contacted Defendants Tso and Yazzie and asked for a call to discuss the "alternative method" these Defendants discussed with the Council. Defendant Yazzie and IHS attorney Paula Lee participated in that call. Defendant Yazzie and IHS Attorney Lee stated there was no "alternative method" they were aware of and that IHS would refuse to award a contract if no resolution was in place on October 1, 2020.

46. IHS engaged in a series of actions deliberately designed to undermine Sage's relationship with the Navajo Nation. IHS's action's severely impacted Sage's ability to secure an authorizing resolution from the Navajo Nation in a timely manner. IHS improperly interfered in Sage's relationship with the Navajo Nation. IHS affirmatively hid from Sage the nature and extent of its communications with the Navajo Nation.

47. Nonetheless, on September 30, 2020, the Navajo Nation Council passed a resolution approving and reauthorizing Sage as a tribal organization under ISDEAA for purposes of contracting with IHS, beginning October 1, 2020 and ending September 30, 2040. (Resolution CS-79-20, passed at 3:12 p.m. MST on Sept. 30, 2020). The resolution highlighted that if health

and medical services provided by Sage were to end, “25,000 patients within the service area will be impacted,” and that “especially during these unprecedented times with the Covid-19 virus pandemic” it would be “in the best interest of the Navajo Nation to immediately approve the reauthorization of such crucial services provided by the hospital.”

48. Counsel for Sage emailed IHS at 3:37 p.m. MST on September 30 to notify IHS that the resolution had passed, that Sage would drop off a physical copy of the resolution at the NAIHS office that afternoon, and that counsel would send an electronic copy by email as soon as it was available.

49. At 5:21 p.m. MST on September 30, after receiving notice from Sage that the Navajo Nation had enacted its authorizing resolution, IHS issued a letter refusing to award Sage’s proposed contract renewal. IHS first claimed that Sage’s May 29 submission did not qualify as a proposal under the ISDEAA, despite IHS having treated it as a proposal for the preceding four months. In the alternative, IHS asserted it was declining the proposed renewal on the grounds that Sage’s proposal did not satisfy 25 U.S.C. § 5321 because it lacked an authorizing resolution from the Navajo Nation for the contract period, even though Sage had notified IHS less than two hours earlier that a resolution had been enacted and a physical copy was forthcoming.

#### **D. Post-Decision Actions**

50. Sage responded to IHS’s decision that same day and requested that IHS comply with the ISDEAA and issue the contract as proposed because the May 29 submission was a valid proposal for a renewal contract and successor AFA under the ISDEAA. Sage explained that IHS had consistently treated Sage’s May 29 proposal as a valid contract renewal proposal in all prior agency communications, and IHS thus had no basis to claim it did not qualify as a lawful renewal

proposal. Sage also reiterated that the Navajo Nation Council had now adopted a resolution extending Sage's authorization to contract with IHS until September 30, 2040. *Id.* at 3. Sage further explained that renewal contracts that propose no substantive changes are exempt from the declination process, and therefore IHS was without authority to decline Sage's renewal proposal under 25 C.F.R. § 900.33.

51. On information and belief, IHS representatives met with the Navajo Nation Office of President and Vice President on September 30, 2020. At this meeting, IHS informed the Nation's leadership that Sage did not need to have an authorizing resolution in place by October 1, 2020 because IHS had already declined Sage's renewal contract.

52. Later in the evening of September 30, 2020, Navajo Nation President Jonathan Nez and Vice-President Myron Lizer vetoed Resolution CS-79-20, citing the need for further time to vet the proposal, based on many of the allegations IHS had raised in its August 24 letter to Navajo Nation leadership.

53. On October 20, 2020, the Navajo Nation Council again passed a resolution reauthorizing Sage as a tribal organization under ISDEAA for purposes of contracting with IHS. The authorization was made retroactive to October 1, 2020.

54. On October 21, 2020, Sage resubmitted its renewal contract to IHS, together with the new authorizing resolution.

55. On November 5, 2020, IHS alleged that in issuing NABIO-44-20 the Navajo Nation Council acted without the appropriate Navajo Nation authority. In effect, IHS asserted that the resolution was unlawful under Navajo law.

56. Also on November 5, 2020, IHS requested additional documentation from Sage

relating to its October 21 submission, claiming that the submission constituted not a renewal contract but an initial contract that is subject to the declination process and the requirements of 25 C.F.R. § 900.8. Sage had already provided all the requested section 900.8 information when it first contracted with IHS in 2009, and Sage had provided all required renewal information in its renewal contract proposal.

57. In a call with Sage on November 6, 2020, IHS reiterated its position that Sage did not qualify for a renewal contract, and would instead be treated as an initial contractor, because there had been a 21-day lapse between the end of FY 2020 and Sage's submission on October 21. IHS also stated that the submission could not be treated as a renewal proposal because it was not "substantially the same" as the prior contract. IHS's only support for this assertion was that the proposal references a different authorizing resolution number than Sage's last contract. IHS further stated that it would not review Sage's proposal until Sage provided the requested supporting documentation, even though the requested documentation included information that Sage had previously submitted and that was already in IHS's possession. IHS stated that once the documentation was received and reviewed, it would agree that the parties could engage in a dialogue on when to schedule negotiation dates. Sage reiterated its concerns regarding the impact of a delayed process on Sage's patients and requested a short-term contract extension while the parties negotiated the contract renewal in order to ensure there would be no continuing lapse in patient care. IHS declined to commit to any interim contract extension.

58. On November 9, 2020, Sage sent a letter to IHS reiterating that Sage was not required to provide the information that IHS had requested on November 5 because under 25 C.F.R. § 900.33 renewal contracts do not go through the section 900.8 initial contract proposal

process. Sage again requested that IHS immediately approve and award its renewal contract. But to avoid further delays and interruptions in patient care, Sage also provided IHS all of the documentation that IHS had requested.

59. Also on November 9, 2020, IHS declined Sage's request that IHS issue a short-term contract extension to Sage. IHS stated that "IHS has been trying to resolve and ascertain with the [Navajo Nation] HEHS Committee and the Navajo Nation Legislative Counsel the validity of resolution NABIO-44-20."

60. On November 10, 2020, Sage sent a letter notifying IHS that unless IHS awards a FY 2021 contract by close of business Thursday, November 12, 2020, Sage intends to initiate legal action and to seek immediate injunctive relief against IHS under the ISDEAA, and referring IHS to this Court's prior decisions on this issue.

61. IHS responded to that letter just before close of business on November 13, 2020. In its response IHS admits that it received confirmation on November 10, 2020 that the Tribal authorization was valid, and now three days later, it offers to "commence . . . good faith contract negotiations" with Sage. IHS also explicitly reserves until January 19, 2021 to make a final determination on whether it will contract with Sage, and offers no solution for continuation of care in the interim. Moreover, IHS makes clear that if it does award a contract to Sage, it will not be a renewal contract but an entirely new contract that will contain substantively different terms.

**E. Impact of IHS's Failure to Award the Renewal Contract**

62. Despite IHS's refusal to award Sage's renewal contract, on October 2, 2020, IHS asked Sage if it would continue to provide services to IHS beneficiaries. Sage agreed to do so.

63. However, on October 3, 2020—*unknownst to Sage*—IHS issued a press release



notifying beneficiaries in the Ganado Service Area served by Sage that they could no longer access covered health services at Sage.<sup>1</sup> IHS did not provide Sage a copy of this notice until October 28, 2020.

64. The more than 25,000 Navajo people in the Ganado Service Area who receive health-care services at Sage are now forced to travel long distances to obtain their health care at IHS facilities in either Chinle, AZ, Gallup, NM, or Fort Defiance, AZ. IHS has also asserted that any patients that continue to receive health care at Sage are now “personally responsible” for the costs of that care.

65. IHS has refused to compensate Sage for healthcare services it continues to provide to IHS beneficiaries since October 1, 2020.

66. The loss of IHS funding represents a monthly loss of approximately \$1.8 million, or about half of Sage’s operating revenue. Without this revenue, Sage has been required to divert reserve funding that was dedicated for the construction of a new 120,000-square-foot hospital to instead cover its day-to-day operations.

67. Construction of the new hospital was slated to begin on October 15, 2020, but construction is now on hold indefinitely. Sage’s financing for the new hospital was contingent on Sage’s revenue from its multi-year contract with IHS. Without that collateral to secure its financing, the hospital project is at immediate risk of collapse.

68. Sage has already invested approximately \$3.5 million into the development and

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<sup>1</sup> IHS has also removed Sage from the list of Navajo Area Health Facilities on its website. *See* IHS Navajo Area, Healthcare Facilities, <https://www.ihs.gov/navajo/healthcarefacilities/> (last visited Nov. 8, 2020).

planning of the facility, with the design phase almost complete.

69. Sage's current facility is out of date and limits the services that Sage is able to provide. The new hospital would enable Sage to add surgical services, including an intensive care unit, labor and delivery services, dialysis and a cardiac catheterization lab, as well as housing a new state-of-the-art MRI machine, the only one of its kind on the Navajo Nation. Last year, Sage had to medivac approximately 5,000 patients to other hospitals because it was not able to provide those services in its current facility. The new hospital would enable Sage to better serve its existing patients and to expand its capacity to serve even more patients.

70. IHS's decision also leaves Sage and its professionals without FTCA coverage as of October 1, 2020. Prior to IHS's failure to award the renewal contract, Sage had automatic FTCA coverage for all of its employees pursuant to 25 U.S.C. § 5321(d), all at no cost to Sage.

71. Sage has now also lost access to low-cost pharmaceuticals and other supplies from the Gallup Regional Supply Service Center, a federal supplier, including COVID-19 test kits and personal protective equipment. Sage therefore must now purchase pharmaceutical supplies at a higher cost from commercial vendors. Sage's cost of pharmaceuticals is estimated to rise by 300-400% as a result of IHS's action.

72. Sage has also lost the opportunity to receive potential COVID-19 vaccines from the federal government, distributed through the IHS system. A tribal organization had to notify IHS by November 6, 2020, if it preferred to receive vaccines from IHS or to coordinate with State and local governments. To receive vaccines from IHS, a completed, signed agreement is due to IHS by November 15, 2020. Because Sage will not have a contract with IHS in place by November 15, Sage is entirely cut out of IHS's tribal health system vaccine distribution process.

73. Sage has also lost access to IHS's Catastrophic Health Emergency Fund ("CHEF"), which reimburses extraordinary medical costs associated with the treatment of disasters and/or catastrophic illnesses. Sage typically averages 12 to 20 cases per year that depend on CHEF reimbursement, with costs per case ranging from over \$19,000 to close to \$1,000,000.

74. Sage's ability to recruit additional providers has also been impacted, as it is no longer able to offer providers benefits like the IHS student loan repayment program. Sage has had at least one applicant so far decline a position because Sage could not guarantee access to the IHS student loan repayment program.

75. Sage may no longer be able to provide comprehensive diabetes case management because it may no longer be eligible to apply for new and recurring IHS grant opportunities. Specifically, the Special Diabetes Program for Indians (SDPI) continuing grant application is due December 15, 2020. If Sage does not have a contract with IHS in place by that date it likely will not be eligible to renew its SDPI funding for FY 2021.

76. Sage and the Navajo people who depend upon Sage's services are suffering irreparable harm due to the interruption in continuity of care and decreased access to vital health care services, all as a consequence of IHS's decision to discontinue contracting with Sage in the middle of a pandemic.

#### **COUNT I**

#### **(Failure to award Sage's renewal contract and successor AFA submitted on May 29, 2020, as required by the ISDEAA)**

77. Sage incorporates all previous allegations of fact and law into this Cause of Action.

78. Sage submitted a valid renewal contract and successor AFA on May 29, 2020. By law, IHS was required to award this contract because Sage did not propose a "material and

substantial change” from the preceding contract. 25 C.F.R. §§ 900.33, 900.22.

79. IHS failed to award Sage’s renewal contract and successor AFA as required by the ISDEAA.

80. Because IHS violated the ISDEAA, Sage is entitled to immediate injunctive relief to compel the Secretary to award and fund the renewal contract submitted by Sage on May 29, 2020, to correspondingly provide FTCA coverage for Sage and its employees, and to restore Sage’s ability to purchase pharmaceutical and other supplies from low-cost federal suppliers. *See Sage II*, 256 F. Supp. 3d at 1234, 1247; 25 U.S.C. § 5331(a).

## COUNT II

### **(Failure to award Sage’s renewal contract and successor AFA submitted on October 21, 2020, as required by the ISDEAA)**

81. Sage incorporates all previous allegations of fact and law into this Cause of Action.

82. Putting aside IHS’s objections to the May 29, 2020 renewal proposal, Sage resubmitted a valid renewal contract and successor AFA on October 21, 2020. By law, IHS was required to award this contract because Sage did not propose a “material and substantial change” from the preceding contract. 25 C.F.R. §§ 900.33, 900.22.

83. IHS failed to award Sage’s renewal contract and successor AFA as required by the ISDEAA.

84. Because IHS violated the ISDEAA, Sage is entitled to immediate injunctive relief to compel the Secretary to award and fund the renewal contract submitted by Sage on October 21, 2020, to correspondingly provide FTCA coverage for Sage and its employees, and to restore Sage’s ability to purchase pharmaceutical and other supplies from low-cost federal suppliers. *See Sage II*, 256 F. Supp. 3d at 1234, 1247; 25 U.S.C. § 5331(a).

**COUNT III**  
**(Unlawful declination of Sage’s renewal contract and successor AFA)**

85. Sage incorporates all previous allegations of fact and law into this Cause of Action.

86. IHS’s alternative conclusion in its September 30 decision—that IHS must fully decline Sage’s contract proposal—violates the ISDEAA and its implementing regulations because IHS unlawfully applied the declination criteria to a renewal contract and successor AFA.

87. IHS does not have the discretion to decline a renewal contract and successor AFA that is substantially the same as the prior contract and AFA. *See* 25 C.F.R. §§ 900.32, 900.33; *Sage II*, 256 F. Supp. 3d at 1224-25, 1234-36.

88. Sage is therefore entitled to immediate injunctive relief compelling IHS to award the FY 2021-2023 contract and FY 2021 AFA as proposed. *See Sage II*, 256 F. Supp. 3d at 1234, 1247; 25 U.S.C. § 5331(a).

**COUNT IV**  
**(Bad faith breach of contract)**

89. Sage incorporates all previous allegations of fact and law into this Cause of Action.

90. IHS has asserted that it will not award Sage’s renewal contract, and that Sage’s October 21, 2020 resubmission will instead be treated as an initial contract proposal, because there was a lapse period after Sage’s FY 2018-2020 contract expired on September 30, 2020.

91. IHS’s reliance on a three-week gap in Sage’s resolution authority from the Navajo Nation provides no basis for not adhering to 25 C.F.R. § 900.33 because NABIO-44-20 was made retroactive to October 1, eliminating any gap in authority, and because section 900.33 must “be liberally construed for the benefit of Indian tribes and tribal organizations to effectuate the strong Federal policy of self-determination,” and further, “any ambiguities herein [must] be construed in

favor of the Indian tribe or tribal organization so as to facilitate and enable the transfer of [PFSAs] authorized by the [ISDEAA].” 25 C.F.R. § 900.3(b)(11).

92. Additionally, if IHS declines a proposal, IHS must “state any objections in writing to the tribal organization” and “provide assistance to the tribal organization to overcome the stated objections.” 25 U.S.C. § 5321(b).

93. But the only reason the gap in Sage’s resolution authority occurred is because IHS engaged in a concerted effort to undermine Sage’s renewal contract, contrary to its duty under ISDEAA to support tribal self-determination and to provide technical assistance to tribal organizations. *Id.* §§ 5302, 5321(b); 25 C.F.R. § 900.28 (“[U]pon receiving a proposal, the Secretary shall provide any necessary requested technical assistance to an Indian tribe or tribal organization, and shall share all relevant information with the Indian tribe or tribal organization, in order to avoid declination of the proposal.”).

94. First, after Sage met with the Nation to discuss renewing its authorizing resolution, IHS sent a letter to the Nation, purportedly “to bring to [the Nation’s] attention improper activity that is alleged at Sage Memorial.” The subject matter of that letter involved issues that have long since been resolved and that are a matter of public record. IHS’s clear intent was to interfere in tribal politics and undermine Sage’s relationship with the Nation.

95. Next, IHS issued its September 30, 2020 decision—which alleged that Sage did not have authorization from the Navajo Nation to contract under the ISDEAA—nearly two hours after Sage notified IHS that the Navajo Nation Council had reenacted an authorizing resolution.

96. And on information and belief, after IHS learned that the Navajo Nation Council reenacted an authorizing resolution, IHS engaged in closed door discussions with the Nation’s

leadership to persuade the Nation's President and Vice-President to veto the resolution.

97. After Sage obtained a second authorizing resolution on October 20, 2020—which was made retroactive to October 1 to prevent a lapse in coverage—IHS now alleges that the resolution was not validly entered into by the Navajo Nation Council. It is an affront to the sovereignty of the Navajo Nation for IHS to question the facial validity of a tribal law.

98. Based on its allegations regarding the validity of the resolution, IHS has refused to issue the renewal contract. Even after allegedly confirming the validity of the resolution on November 10, IHS still refuses to enter into the renewal contract. IHS has also refused Sage's request for a short-term contract extension while the parties negotiate these contracting issues, despite the critical need for healthcare to support the Navajo Nation's citizens during the COVID-19 pandemic.

99. This refusal is in bad faith and contrary to IHS's duties under the ISDEAA.

100. Sage is therefore entitled to immediate injunctive relief compelling IHS to award the FY 2021-2023 contract and FY 2021 AFA as proposed.

## **V. PRAYER FOR RELIEF**

WHEREFORE, Sage prays that this Court grant the following relief:

- (a) A declaratory judgment that the Secretary acted in violation of the ISDEAA by failing to award Sage's renewal contract and successor AFA;
- (b) Preliminary and permanent injunctive relief ordering IHS to: (1) award and fund Sage according to the terms of the FY 2021-2023 Contract and FY 2021 AFA, (2) reinstate Sage's coverage under the FTCA, and (3) restore Sage's ability to purchase pharmaceuticals and other supplies from federal suppliers;

