

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

Navajo Health Foundation-Sage Memorial)
Hospital, Inc.,)

Plaintiff,)

v.)

Civil Action No. 1:20-cv-01185-JB-JFR

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,)

and)

United States of America,)

Defendants.)

**MOTION FOR IMMEDIATE INJUNCTIVE RELIEF OR IN THE ALTERNATIVE A
TEMPORARY RESTRAINING ORDER & PRELIMINARY INJUNCTION WITH
SUPPORTING MEMORANDUM**

INTRODUCTION

The Navajo Nation is in the middle of a deadly pandemic that began early in 2020 and today threatens to exceed all previous records of misery and death. At a time like this, it is all-hands-on-deck for a fragile health care system that in the best of times is severely under-resourced to serve a population already challenged by disease, poor infrastructure, and extreme remoteness.

In the middle of this pandemic, the Indian Health Service (“IHS”) has decided to undermine and impede the right of the Navajo Health Foundation-Sage Memorial Hospital, Inc (“Sage”) to continue providing health care services on the Nation’s reservation, despite the fact that Sage has been providing these services for over a decade pursuant to a succession of contracts with IHS under the Indian Self-Determination and Education Assistance Act (“ISDEAA”), 25 U.S.C. §§ 5301-5423.

As is evident from prior litigation, IHS has for years targeted Sage by alleging all manner of financial misconduct principally focused on a private company Sage hired for several years to help Sage manage the Sage Memorial Hospital campus. *See Navajo Health Found.-Sage Mem’l Hosp., Inc. v. Burwell*, 100 F. Supp. 3d 1122 (D.N.M. 2015) (“*Sage I*”); *Navajo Health Found.-Sage Mem’l Hosp., Inc. v. Burwell*, 256 F. Supp. 3d 1186 (D.N.M. 2015) (“*Sage II*”); *Navajo Health Found.-Sage Mem’l Hosp., Inc. v. Burwell*, 220 F. Supp. 3d 1190 (D.N.M. 2016) (“*Sage III*”); *Navajo Health Found.-Sage Mem’l Hosp., Inc. v. Burwell*, 263 F. Supp. 3d 1083 (D.N.M. 2016) (“*Sage IV*”). Despite IHS’s often extreme allegations over a period of years, IHS has never filed any contract claims against Sage, *see* 25 U.S.C. § 5331(d),¹ never moved to suspend payment to Sage, *see id.* § 5325(l), and never moved to reassume from Sage operation of the contracted programs, *see id.* § 5330; *Sage II*, 256 F. Supp. 3d 1186 at 1233-34. Perhaps because all these remedies place important burdens on IHS, IHS has instead consistently sought to misappropriate

¹ Unless otherwise noted, all citations are to title 25, United States Code.

the easier “declination” process created in 25 U.S.C. § 5321(a)(2) and further explained in 25 C.F.R. §§ 900.14-900.33.

Specifically, no fewer than six times, IHS invoked the statutory declination process either to refuse to award a renewal contract that was materially identical to a prior contract, or to refuse to award a successor annual funding agreement (“AFA”) that was materially identical to a prior funding agreement. But the declination process does not apply to a renewal contract “where no material and substantial change to the scope or funding of a program, functions, services, or activities has been proposed,” 25 C.F.R. § 900.33, and it also does not apply to a proposed successor AFA that is “substantially the same” as a prior AFA, *id.* § 900.32. As a result, in two opinions this Court on summary judgment overturned *all* of IHS’s unlawful declinations involving materially identical contract or AFA proposals. *Sage II*, 256 F. Supp. 3d at 1234, 1247 (2014 and 2015 renewal contracts and 2014 and 2015 AFAs); *Sage III*, 220 F. Supp. 3d at 1255-56, 1266 (2016 AFA).

Ultimately, IHS paid Sage \$122.5 million to settle Sage’s claims and further agreed to enter into a three-year renewal contract with Sage covering FY 2018 through FY 2020. Sage committed these settlement funds to construction of a replacement hospital facility at Sage—a project that had been conceived over seven years ago but had been interrupted by the former litigation.

For FY 2021, Sage proposed to IHS a three-year FY 2021-2023 renewal contract that was, once again, materially identical to preceding contracts. There is accordingly only one distinction between the facts presented in the prior litigation and the facts presented here. Here, IHS’s interference in Sage’s relationship with the Navajo Nation caused a 20-day gap between the expiration of the prior authorizing Navajo Nation Resolution on midnight September 30, 2020, and the Legislature’s adoption on October 20, 2020 of a new Resolution made retroactive to October 1, 2020. That distinction makes no legal difference, for the indisputable fact remains that

Sage's proposed renewal contract is materially identical to the prior three-year contract.

Because IHS nonetheless refuses to honor the Navajo Nation's Resolution and IHS's obligations under the law, Sage now seeks "immediate injunctive relief" under § 5331(a) of the ISDEAA to secure an FY 2021-2023 renewal contract. In the alternative, Sage requests a temporary restraining order and preliminary injunction either (1) requiring IHS to award and fund the renewal contract, which contains the same terms and conditions as the prior contract, on a recurring monthly basis pending the disposition of this case on summary judgment, or (2) requiring IHS to extend the FY 2018-2020 contract on a recurring monthly basis pending disposition of the case. Sage recognizes that under identical circumstances in the prior litigation the Court chose to issue a preliminary injunction. *See Sage I*, 100 F. Supp. 3d at 1192. That said, Sage respectfully suggests that the Court's subsequent elucidation of the law in *Sage II* and *Sage III* makes immediate injunctive relief appropriate here.

Given the urgent circumstances presented by the pandemic and the need for continuity of care at a time when IHS is already diverting patients away from Sage, Sage respectfully requests that the Court act with urgency and all deliberate speed.

BACKGROUND

I. Applicable Law

This case arises under the ISDEAA, under which Sage contracts with the United States to provide health care to a remote region of the Navajo Reservation. 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). The ISDEAA authorizes tribes and tribal organizations to contract with IHS to provide federally funded

healthcare services that IHS would otherwise provide directly. As occurred here, a Tribe may designate a tribal organization, *id.* § 5304(I), to contract with IHS on the Tribe's behalf.

A tribal organization may choose to contract for any portion of an IHS health care program, function, service or activity, including administrative activities, that IHS would otherwise carry out for the community being served. *Id.* § 5321(a). Contracts under Title I of the ISDEAA generally must be renewed every three years. *Id.* § 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 id.* § 5329(c) (model agreement).

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 AFA), *with id.* § 900.8 (initial contract proposal). A renewal proposal need only provide funding information and identify any proposed changes. *Id.* § 900.12. 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 [program] 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. 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. The ISDEAA provides a comprehensive range of remedies when IHS violates the Act, including the right to obtain "immediate injunctive relief." 25 U.S.C. § 5331(a).

II. Sage's Relationship With The Navajo Nation

Sage is a private non-profit corporation that owns and operates a health care facility in Ganado, Arizona, serving approximately 25,000 Navajo people living in the Ganado Service Area of the Navajo Reservation. El-Meligi Decl. ¶ 3. The Ganado Service Area includes the following eight Navajo chapters: Cornfields, Nazlini, Ganado, Kindalichii, Klagetoh, Wide Ruins, Steamboat, and Greasewood Springs. *Id.* ¶ 4. Sage is managed by a five-member Board of Directors; each Director is a member of the Navajo Nation and lives within the Ganado Service Area. *Id.* Sage's facility is accredited by the Joint Commission as a Critical Access Hospital. Accreditation means that all of Sage's systems have been independently surveyed and found to meet the necessary requirements for a hospital facility. *Id.* ¶ 3.

The Navajo Nation is a federally recognized Indian Tribe that enacted Resolution No. CJN-35-05 in 2005 to designate Sage as a "tribal organization," 25 U.S.C. § 5304(*l*), for purposes of contracting with IHS for the provision of healthcare services to Navajo people, El-Meligi Decl. ¶¶ 4, 9. 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. *Id.*

III. Prior Litigation History

Sage has been contracting with IHS since 2009 to provide healthcare services to the Navajo people residing in the Ganado Service Area. *Id.* ¶ 4. But beginning in 2013, IHS began an ongoing campaign to undermine Sage's self-determination contract. As a result, Sage suffered through four years of litigation to protect its rights under the ISDEAA and to ensure quality care for its patients. On every significant legal issue, IHS lost and ultimately paid \$122.5 million in money damages and agreed to injunctive relief running through FY 2020.

When the litigation began, it only involved two years' worth of renewal contracts and

successor funding agreements—all illegally “declined” by IHS. Yet even after this Court granted summary judgment in favor of Sage and ordered IHS to award Sage’s renewal contracts and successor AFAs, *see Sage II*, 256 F. Supp. 3d at 1236-37, 1247, IHS continued to unlawfully decline Sage’s AFAs for FY 2016 and FY 2017. In granting Sage summary judgment, the Court made unmistakably clear that 25 C.F.R. § 900.33 prohibits IHS from declining a renewal contract that does not “contain a ‘material and substantial change to the scope or funding’” of Sage’s programs from its preceding contract, *see Sage II*, 256 F. Supp. 3d at 1234-36, and that 25 C.F.R. § 900.32 similarly prohibits IHS “from declining a successor AFA proposal that is ‘substantially the same’ as its predecessor,” *id.* at 1224-25.²

Following these and other rulings adverse to IHS, on October 2, 2017, Sage and IHS entered into a settlement agreement under which IHS agreed to pay Sage \$122.5 million in damages and to enter into a three-year renewal contract for FY 2018-2020. The settlement also required that Sage provide IHS financial reports every four months for a three-year period. El-Meligi Decl. ¶ 5. Since that time, Sage has continued to provide quality services to its beneficiaries and to comply with all of the terms and conditions of its contracts and settlement agreement with IHS.

IV. Sage’s FY 2021-2023 Renewal Contract

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. Ex. 1 at 1. The renewal contract included the same programs and the same annual funding as Sage’s FY 2018-2020 contract and FY 2020 AFA. *See* Ex. 1 at 1, 11-24 (FY 2021-2023 contract showing minor

² *See also Sage III*, 220 F. Supp. 3d at 1255, 1266 (awarding Sage summary judgment and reversing IHS’s declination of Sage’s proposed FY 2016 AFA); Pl.’s 2d Suppl. to 2d Am. Compl., *Navajo Health Found.-Sage Mem’l Hosp., Inc v. Burwell*, No. 1:14-cv-958-JB-GBW (D.N.M. Nov. 15, 2016), ECF No. 257 (regarding unlawful declination of Sage’s FY 2017 successor AFA).

changes in redline). 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.” *Id.* at 1. Sage also noted 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.* The 15-year-old Navajo Nation authorizing Resolution No. CJN-35-05, which named Sage as a “tribal organization” for purposes of contracting with IHS, was set to expire at the end of the fiscal year, September 30, 2020. El-Meligi Decl. ¶ 9.

Meanwhile, the COVID-19 pandemic devastated the Navajo Nation, which became the epicenter of the Nation’s worst infection and death rate.³ IHS healthcare facilities within the Nation were overwhelmed, ill-equipped, and ill-prepared to respond, in part because the ratio of hospital beds to population on the Navajo Nation is only one-third the rate for the rest of the United States. Worse yet, hospitals within the Nation are critically understaffed and medical workers faced extraordinary shortages of personal protective equipment (PPE).⁴ To date, the virus has killed over 600 people in the Navajo Nation. *See* Navajo Nation COVID-19 Dashboard, <https://www.ndoh.navajo-nsn.gov/COVID-19/Data> (last updated Nov. 17, 2020). The virus’s

³ 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>. 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. *See* Walker, *supra*.

⁴ Walker, *supra* note 3; *see also* Kenzi Abou-Sabe et al., ‘Hit us at our core’: Vulnerable Navajo Nation fears a second COVID-19 wave, NBC News, Aug. 3, 2020, <https://www.nbcnews.com/specials/navajo-nation-fears-second-covid-19-wave/index.html>.

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 from March 16 until August 16, 2020, and the Navajo Nation President issued several emergency orders in an effort to mitigate the spread of the virus. *See* El-Meligi Decl. ¶ 9.⁵

For Sage, the COVID-19 pandemic brought about drastic changes to its service delivery model. At the same time, 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. El-Meligi Decl. ¶ 9. When in the summer of 2020 local Chapters began to reopen their agendas to non-COVID-related topics and resume normal business, Sage obtained supporting resolutions from all the Navajo Chapters that it serves. *Id.* On August 17, 2020, Sage met with the Navajo Nation Health, Education, and Human Services Committee ("HEHSC"), a standing committee of the Navajo Nation Council (the governing body of the Navajo Nation) to discuss reauthorizing Sage as a tribal organization by tribal resolution. *Id.*

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. Ex. 2 at 1. IHS sent that letter to the Navajo Nation President, the Navajo Nation Legislative Council Speaker, and the HEHSC Committee Chair and Vice-Chair. Ex. 2 at 5. IHS did not provide a copy of the letter to Sage. El-Meligi Decl. ¶ 10. Much of the "improper activity" that IHS referenced in its letter involved issues that were a matter of public record, had led to the litigation IHS lost in *Sage I* to *Sage IV*, and had occurred before IHS entered into its 2017 settlement with Sage and at a time

⁵ 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.

when the government had already investigated and dismissed all claims of wrongdoing against Sage's current leadership. *Id.* (Many of these issues were summarized by the 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 was receiving reports every four months on Sage's finances for a three-year period, it omitted that IHS has never raised any objections to those financial reports, and it omitted that Sage had consistently passed Joint Commission accreditation for the quality of its health care organization. El-Meligi Decl. ¶¶ 3, 5-6, 10.

The letter also noted a lawsuit initiated *by Sage*—not by IHS—alleging misappropriation of funds against certain employees of the former management company that Sage previously hired to help operate its campus. Ex. 2 at 1. The letter asserted that this lawsuit showed misconduct by Sage, but ignored that immediately upon discovering the misappropriation Sage terminated its contract with the management company, hired professionals to investigate the incident, and took aggressive actions to recoup the funds. IHS also omitted that, in meetings spanning approximately two weeks immediately following the discovery of the misappropriation, Sage notified IHS, the Navajo Nation Department of Justice, the Navajo Nation HEHSC, and the local Ganado Chapter President at the time. El-Meligi Decl. ¶¶ 7, 10. Although IHS was informed of the issue nearly *two years earlier*, the August 24 letter also omits that neither IHS nor the federal government has intervened in Sage's litigation or taken any public action to support Sage in its recovery efforts. *Id.* ¶ 7.

On September 18, 2020, Defendants Tso and Yazzie met in Executive Session with the Navajo Nation HEHSC—once again, without any notice to Sage. *Id.* ¶ 11. Defendants Tso and Yazzie informed the Council members, falsely, that Sage's authorizing resolution did not need to be in place by October 1, 2020, because there was an “alternative method” IHS could use to work

with Sage while the resolution went through the legislative process. *Id.*

On September 30, 2020, after being informed of that meeting, Sage contacted Defendants Tso and Yazzie directly and asked for a call to discuss the “alternative method” these Defendants had discussed with the Council. *Id.* Defendant Yazzie and IHS attorney Paula Lee participated in the call, but now insisted there was no “alternative method” they were aware of and that IHS would refuse to award a contract if no resolution was in place by October 1, 2020. *Id.*

Despite IHS’s efforts to undermine Sage’s relationship with the Navajo Nation and to prevent Sage from securing an authorizing resolution, later on September 30, 2020, the Navajo Nation Council passed an emergency resolution approving and reauthorizing Sage as a tribal organization under the ISDEAA for purposes of contracting with IHS as of October 1, 2020. Ex. 4 (Resolution No. 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.” *Id.* § 2(D). Counsel for Sage emailed IHS at 3:37 p.m. MST on September 30 to notify IHS that the resolution had passed. Ex. 3 (timestamp on email is AKST). At 5:21 p.m. MST that same day, and despite having received notice that the Navajo Nation had enacted its authorizing resolution, IHS issued a letter *refusing* to award Sage’s proposed contract renewal. Ex. 5 at 1 (timestamp on email is AKST).

IHS’s letter first claimed that Sage’s May 29 submission did not qualify as a proposal under the ISDEAA after all, despite IHS having in all respects treated it as a proposal for the preceding four months. *Id.* at 2, 4-5. In the alternative, IHS asserted it was declining the proposal under 25 U.S.C. § 5321 on the grounds that Sage lacked an authorizing resolution from the Navajo Nation

for the contract period, *id.* at 5, even though at the precise time IHS took action a Navajo Resolution was in place and IHS knew it.

Sage responded immediately, explaining that in all prior agency communications IHS had consistently treated Sage's May 29 proposal as a contract renewal proposal. Ex. 6 at 1-2. Sage also reiterated that the Navajo Nation Council had now adopted a resolution extending Sage's authorization to contract as of October 1, 2020, through September 30, 2040. *Id.* at 3. Sage further explained that renewal contracts that propose no substantive changes are exempt from the declination process, so that IHS lacked authority to decline Sage's renewal proposal under 25 C.F.R. § 900.33. *Id.*

After issuing its decision, IHS representatives met behind closed doors with the Navajo Nation Office of President and Vice President on September 30. El-Meligi Decl. ¶ 14. Whatever was said, later that same evening Navajo Nation President Jonathan Nez and Vice-President Myron Lizer vetoed emergency Resolution CS-79-20, citing the need for further time to vet the proposal.⁶

V. Sage's Post-Decision Efforts

Despite IHS's actions, on October 2, 2020, IHS asked Sage if it would continue to provide services to IHS beneficiaries, and Sage agreed to do so. Ex. 7. However, the very next day, and without any notice to Sage, IHS on October 3, 2020 issued a press release notifying beneficiaries in the Ganado Service Area that they could no longer access health care at Sage. Ex. 8. IHS never provided a copy of this notice to Sage until October 28, 2020. Ex. 11.

⁶ See Press Release, Navajo Nation Office of the President and Vice President, *Audit issues and lack of due diligence cited in veto of resolution for the reauthorization of Sage Memorial Hospital, Inc. contract* (Sept. 30, 2020), <https://www.navajonnsn.gov/News%20Releases/OPVP/2020/Sep/FOR%20IMMEDIATE%20RELEASE%20-%20Audit%20issues%20and%20lack%20of%20due%20diligence%20cited%20in%20veto%20of%20resolution%20for%20the%20reauthorization%20of%20Sage%20Memorial%20Hospital%20Inc%20contract.pdf>.

Unaware of these developments, Sage continued to work with the Navajo Nation to obtain an authorizing resolution. On October 16, 2020, the Navajo Nation Council again passed a resolution reauthorizing Sage as a tribal organization under ISDEAA, and the Speaker of the Council signed the resolution on October 20, 2020. Ex. 9 (NABIO-44-22). The authorization was made retroactive to October 1, 2020. *Id.* § 3(A). The next day Sage resubmitted its renewal contract to IHS, now accompanied by the new authorizing resolution. Ex. 10. Although IHS on November 5, 2020 alleged that NABIO-44-20 had been adopted illegally, Ex. 12 at 2; *see also* Ex. 14, on November 13, 2020, IHS backed down and admitted the Resolution was lawful. Ex. 16 at 1. Also on November 5th, IHS requested extensive documentation from Sage relating to Sage's October 21 submission, acting as if Sage's submission constituted an entirely new contract that is subject to the documentation and declination process set forth in 25 C.F.R. § 900.8. Ex. 12 (requesting, for example, Sage's "full name, address and telephone number," Sage's "articles of incorporation," and other information already in IHS's possession). Sage had already provided all the requested § 900.8 information when it first contracted with IHS in 2009, and Sage had provided all required renewal information in its renewal contract proposal. El-Meligi Decl. ¶ 25.

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. *Id.* 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 given the change in Navajo Resolution numbers. *Id.* IHS added that only after Sage furnished all of the requested supporting documentation would IHS engage with Sage about scheduling negotiation dates. *Id.* 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 next contract to ensure there would be no continuing lapse in

patient care. IHS declined to commit to any interim contract extension. *Id.* ¶¶ 25-26.

On November 9, 2020, Sage provided to IHS all of the documentation IHS had requested. In doing so, Sage protested that it was not required to do so for a renewal contract and again requested that IHS immediately award the renewal contract. Ex. 13. That same day, IHS rejected Sage's request for a short-term contract extension, insisting the Navajo Resolution was possibly illegal. Ex. 14 ("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.").

On November 10, 2020, Sage sent a demand letter notifying IHS that unless IHS awarded the FY 2021 contract by November 12, 2020, Sage would initiate legal action and seek immediate injunctive relief against IHS. Ex. 15. Late November 13, 2020, IHS responded that it had satisfied itself that the Navajo Resolution was valid and that IHS was therefore now prepared to "commence . . . contract negotiations" with Sage while reserving until January 19, 2021 to make a final determination on whether to actually contract with Sage. Ex. 16 at 1. IHS reiterated its position that Sage is not entitled to a renewal contract. It also declared that any new contract would contain substantively different terms that IHS would demand to address its perception of past financial management shortcomings. *Id.* at 1, 3. IHS followed this letter with an email asking Sage to transfer sensitive patient information to other IHS facilities. Ex. 17.

On November 16, 2020, Sage emailed IHS a copy of its Complaint, ECF No. 1, and notified IHS that it would be filing this Motion for Immediate Injunctive Relief. Ex. 18. Sage offered to withdraw its lawsuit if IHS would negotiate a new contract the week of November 16 and enter into a 30-day renewable contract while negotiations proceeded. *Id.* Sage reiterated that its priority is continuity of care and emphasized that a short-term solution would eliminate the need to develop an entirely new referral system. *Id.* IHS agreed to begin negotiations but rejected any interim

contracting solution. Ex. 19.⁷ This Motion followed.

STANDARD OF REVIEW

I. Statutory Injunction Under The ISDEAA

Congress in the ISDEAA authorized a statutory injunction “to compel [IHS] to perform a duty provided under [the ISDEAA] or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 5321(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).” 25 U.S.C. § 5331(a). “[I]t is not the role of the courts to balance the equities between the parties [where] Congress has already balanced the equities and has determined that, as a matter of public policy, an injunction should issue where the defendant is engaged in . . . any activity which the statute prohibits.” *Star Fuel Marts, LLC v. Sam’s E., Inc.*, 362 F.3d 639, 652 (10th Cir. 2004) (alterations in original) (citation omitted). Accordingly, when IHS violates the ISDEAA, immediate injunctive relief is available without proof of harm or balancing of equities. *See Sage I*, 256 F. Supp. 3d at 1163; *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 545 (D.D.C. 2014).

More generally, the ISDEAA and its regulations must “be liberally construed for the benefit of Indian tribes and tribal organizations to effectuate the strong Federal policy of self-determination.” 25 C.F.R. § 900.3(b)(11). Additionally, “any ambiguities . . . [must] be construed in favor of the Indian tribe or tribal organization so as to facilitate and enable the transfer of [programs] authorized by the [ISDEAA].” *Id.*; *see also Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 194 (2012) (citing § 450l(c) (now § 5329(c), model agreement § 1(a)(2)) and noting “The Government, in effect, must demonstrate that its reading is clearly required by the statutory language.”); 25 U.S.C. § 5321(g) (“[E]ach provision of [the ISDEAA] . . . shall be liberally

⁷ As of this filing, a call with IHS is scheduled for Thursday November 19, 2020. El-Meligi Decl. ¶ 26.

construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe.”). This standard reflects the fact that Congress in the ISDEAA stated “its intent to circumscribe as tightly as possible the discretion of the Secretary.” *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996), *amended* (Aug. 6, 1996).

II. Temporary Restraining Order and Preliminary Injunction

The purpose of a temporary restraining order (“TRO”) and a preliminary injunction “is merely to preserve the relative positions of the parties until a trial on the merits can be held.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). “The requirements for a TRO issuance are essentially the same as those for a preliminary injunction order,” *Legacy Church, Inc. v. Kunkel*, 455 F. Supp. 3d 1100, 1131-32 (D.N.M. 2020), with the primary difference that a TRO “may issue without notice to the opposing party” and it “is of limited duration,” *Guidance Endodontics, LLC v. Dentsply Int’l, Inc.*, 633 F. Supp. 2d 1257, 1267 (D.N.M. 2008); *see* Fed. R. Civ. P. 65(b). Thus, to obtain either form of preliminary relief, a plaintiff must show: (1) “that he is likely to succeed on the merits,” (2) “that he is likely to suffer irreparable harm in the absence of preliminary relief,” (3) “that the balance of equities tips in his favor,” and (4) “that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

The Tenth Circuit considers three types of preliminary injunctions to be disfavored: “(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits.” *N.M. Dep’t of Game & Fish v. U.S. Dep’t of the Interior*, 854 F.3d 1236, 1246 n.15 (10th Cir. 2017) (quoting *Fish v. Kobach*, 840 F.3d 710, 723-24 (10th Cir. 2016)). To receive a “disfavored” injunction, the movant “must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of the harms.” *Id.* (quoting

O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 976 (10th Cir. 2004)).

ARGUMENT

I. Sage Is Entitled To Immediate Injunctive Relief.

Sage is entitled to immediate injunctive relief under § 5331(a) because IHS's failure to award Sage's renewal contract and AFA was unlawful. Nothing further is required in the case of a statutorily authorized injunction. Congress understood that a statutory injunction is an extreme remedy, yet it specifically authorized this remedy because it was "necessary to give self-determination contractors viable remedies for compelling . . . IHS compliance with the Self-Determination Act," noting these "strong remedies" were "required because of [IHS's] consistent failures over the past decade to administer self-determination contracts in conformity with the law." S. Rep. No. 100-274, at 37 (1987).

Where, as here, "Congress has already balanced the equities and has determined that, as a matter of public policy, an injunction should issue where the defendant is engaged in . . . any activity which the statute prohibits," Sage need not demonstrate the traditional equitable grounds for obtaining the requested "immediate" injunction. *Star Fuel Marts*, 362 F.3d at 652. Instead, Sage need only show that IHS's actions likely violate the ISDEAA. *See Pyramid Lake Paiute Tribe*, 70 F. Supp. 3d at 545 ("Because the IDEAA specifically provides for both injunctive and mandamus relief to remedy violations of the Act . . . the Tribe need not demonstrate the traditional equitable grounds for obtaining the relief it seeks." (citation omitted)); *Red Lake Band of Chippewa Indians v. U.S. Dep't of Interior*, 624 F. Supp. 2d 1, 25 (D.D.C. 2009) (granting specific performance of ISDEAA contract); *Susanville Indian Rancheria v. Leavitt*, No. 2:07-CV-259-GEB-DAD, 2008 WL 58951, at *10-11 (E.D. Cal. Jan. 3, 2008) (equitable relief under ISDEAA does not require the same showing as an ordinary equitable injunction).

Sage proposed a renewal contract and successor AFA on May 29, 2020. As the Court concluded in *Sage II*, by law IHS was required to award that renewal contract and the accompanying successor AFA if they were substantively identical to the prior contract and AFA. 256 F. Supp. 3d at 1224, 1234; *see* 25 C.F.R. §§ 900.33, 900.32. IHS has “no discretion” to decline the proposal, as IHS seeks to do here. *Sage II*, 256 F. Supp. 3d at 1224. And if for any reason IHS believes there is some deficiency in the terms of the contract, IHS has a statutory duty to provide technical assistance to cure the deficiency. 25 U.S.C. § 5321(b). At no time did IHS do so here.

Sage’s FY 2021-2023 renewal contract is substantially the same as its prior FY 2018-2020 contract. The only changes in the renewal contract were to update dates, correct typographical errors and formatting, and update the Navajo Nation resolution number. *See* Exs. 1, 10 (showing redline of minor changes). None of these changes constitute a “material and substantial change to the scope or funding of a [program],” 25 C.F.R. § 900.33, and IHS therefore had no discretion to refuse to award the contract, *see Sage II*, 256 F. Supp. 3d at 1235 (“minor amendments” to update the renewal contract and “to fix a few typographical errors” do not constitute “modifications . . . that speak to the scope and funding of Sage Hospital’s [programs]”). Similarly, Sage’s FY 2021 successor AFA included the exact same funding amount as its FY 2020 AFA, and the only changes were to update the dates and correct typographical errors. Because the FY 2021 AFA was “substantially the same” as the prior AFA, IHS was required to award it. 25 C.F.R. § 900.33; *see Sage II*, 256 F. Supp. 3d at 1235 (concluding “[t]he text of the 2014 AFA is substantively identical to the text of the 2013 AFA,” and therefore IHS’s “duty is clear” and the AFA must be approved).

IHS responds that the May 29 proposal was not a valid proposal because it “lack[ed] any supporting resolution from the Navajo Nation.” Ex. 5 at 5. To be sure, a new authorizing resolution was required to replace expiring Resolution No. CJN-35-05. But a worldwide pandemic was underway and progress on securing that resolution would have to wait. Sage worked

throughout the summer to obtain a new resolution and kept IHS informed of its efforts. El-Meligi Decl. ¶ 9. Once the Navajo Nation government reopened in late August, Sage immediately met with the Navajo Nation HEHSC to pursue the matter. *Id.*

But IHS, instead of supporting those efforts, launched a concerted effort to sabotage Sage's renewal contract. It sent a secret letter to Navajo Nation leadership alleging "improper activity." Ex. 2. The activities addressed in that letter were not only years old and a matter of public record; many of them had been rejected *by this Court* as a reason to interfere in Sage's ISDEAA contracting activities. IHS didn't stop there; IHS's next step was to meet with the HEHSC in a closed Executive Session where IHS misrepresented that a timely reauthorizing resolution wasn't necessary because there was an "alternative method" IHS could use to work with Sage. Yet when Sage asked IHS about this very "alternative method," IHS denied any such method existed. El-Meligi Decl. ¶ 11. When, despite IHS's efforts, the Council on September 30, 2020 enacted Resolution No. CS-79-20, Ex. 4, IHS forged ahead with a declination letter that asserted, quite falsely, that an authorizing resolution was lacking, Ex. 5 at 1, 5. That was untrue. Realizing its efforts to sabotage Sage may have failed, IHS then held a secret meeting with the President after which the President issued his veto. El-Meligi Decl. ¶ 14. IHS's actions were in bad faith and violated its obligations under the ISDEAA to *support* tribal self-determination and to provide technical assistance to tribal organizations it believes are in need. 25 U.S.C. §§ 5302, 5321(b), (f), 5329(c) (model agreement § 1(d)); 25 C.F.R. §§ 900.28, 900.3(b)(1).

But Sage was not deterred by IHS's misconduct. On October 20, 2020, the Navajo Nation Council reauthorized Sage as a tribal organization by Resolution No. NABIO-44-20, no veto occurred, and the next day Sage resubmitted its renewal contract and successor AFA to IHS. Ex. 10. Importantly, the Resolution authorization was expressly made retroactive to October 1, 2020 to prevent any lapse in coverage. Ex. 9 § 3(A). 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, 900.32. But IHS again refused to do so, this time contesting the validity of the Resolution itself. Ex. 12 at 2; Ex. 14. That was an affront to the sovereignty of the Navajo Nation, *see Wheeler v. U.S. Dep’t of Interior*, 811 F.2d 549, 551 (10th Cir. 1987) (“[W]hen a dispute is an intratribal matter, the Federal Government should not interfere.”), and a matter IHS eventually abandoned, Ex. 16 at 1.

IHS’s reliance on a three-week gap in Sage’s resolution authority from the Navajo Nation provides no basis for not applying 25 C.F.R. §§ 900.33 and 900.32, particularly when the operative Resolution was specifically made retroactive to October 1 so that there would be no gap. Surely nothing in §§ 900.33, 900.32 or other regulations demands a perfect continuity in resolution authority, and in the context of the facts presented here such a requirement would make no sense. Moreover, these regulations are to be “be liberally construed” for Sage’s benefit, with “any ambiguities” construed in Sage’s favor. 25 C.F.R. § 900.3(b)(11). Because IHS’s discretion under the ISDEAA is “circumscribe[d] as tightly as possible,” *Ramah Navajo Sch. Bd.*, 87 F.3d at 1344, IHS acted beyond its authority in refusing to award Sage’s renewal contract and successor AFA.

IHS’s last defense is to assert that in the past Sage has misused funds paid under its contract. But IHS’s only contemporary allegation of such misuse is Sage’s initiation of litigation against a former management company and its employees to recover funds *they* stole—an occurrence Sage promptly reported to IHS. That is the epitome of responsible accountability, not financial mismanagement. IHS asserts that it intends to utilize negotiations under the threat of declination to “ensure that IHS funds will be used for their intended purposes.” Ex. 16 at 3. But we have been here before. As the Court held in *Sage II*, “the ISDEAA provides a specific procedure for rescinding a contract where a tribe or tribal organization commits the malfeasance that the Defendants have accused Sage Hospital of committing”—but IHS must actually follow those

procedures. 256 F. Supp. 3d at 1233-34; *see* 25 U.S.C. § 5330; 25 C.F.R. §§ 900.246, 900.247. What IHS cannot do is use such allegations as a basis for refusing to award a substantively unchanged renewal contract and successor AFA. But perhaps most importantly, none of this concerns patient care, which should be of paramount importance to IHS. If it were, IHS would have renewed Sage’s contract and addressed financial matters through other avenues.

Because IHS violated the ISDEAA, Sage is entitled to “immediate injunctive relief” to compel the Secretary to award and fund Sage’s FY 2021-2023 renewal contract and FY 2021 successor AFA. *See Sage II*, 256 F. Supp. 3d at 1234, 1247; 25 U.S.C. § 5331(a). “Immediate” injunctive relief is particularly appropriate here, as IHS’s current attempt to undermine Sage’s contract is in direct conflict with the Court’s exposition of the law in *Sage II* and *Sage III*. These patent violations of the ISDEAA entitle Sage to the strongest available remedies. And they are necessary to give the word “immediate” real meaning; otherwise, an injunction at the end of a case would simply be “injunctive relief” without the immediacy Congress expected.

II. In the Alternative, Sage Is Entitled To A TRO And Preliminary Injunction.

Even if Sage were required to demonstrate the traditional equitable grounds for obtaining injunctive relief, Sage would be entitled to such relief because it can show likelihood of success on the merits, irreparable injury, a balance of hardships that tips in its favor, and that issuing an injunction is in the public interest.

A. Preliminary relief is appropriate.

An injunction is appropriate here because it would maintain the decade-long status quo that IHS disrupted on October 1st. Therefore, it is not disfavored. *See Sage I*, 100 F. Supp. 3d at 1169 (concluding the third category of disfavored injunctions is not relevant here). That status quo is a contractual relationship in which IHS provides Sage a specific amount of funding to provide specific healthcare services to the Navajo people. *See Dominion Video Satellite, Inc. v. EchoStar*

Satellite Corp., 269 F.3d 1149, 1155 (10th Cir. 2001) (The status quo is “the last uncontested status between the parties which preceded the controversy.” (citation omitted)). The court in *Sage I* concluded that a preliminary injunction in which IHS must continue funding Sage according to its renewal contract and successor AFA “does not alter the status quo” because it just requires IHS “to fund [Sage] and abide by the terms of its agreements with [Sage] as it has done since at least 2010.” 100 F. Supp. 3d at 1169-70.

An injunction requiring IHS to award and fund Sage’s contract would also not be “mandatory.” See *Guidance Endodontics*, 633 F. Supp. 2d at 1276 (concluding an injunction that would require “[o]nly the exact same contractual obligations [defendants] were previously performing” is not mandatory). The most important factor in this respect is whether “the Court will find itself having to constantly supervise the TRO” or injunction. *Id.* The court in *Sage I* concluded that an identical injunction is not mandatory because it “does not impose any additional duties” on IHS beyond what exists in its contract with Sage, and that enforcing a preliminary injunction would be “unlikely to place a heavy burden on the Court.” 100 F. Supp. 3d at 1170. Thus, this case should be considered under the normal standard for preliminary relief.

B. Sage is likely to succeed on the merits of its claims.

As discussed, *supra* § I, Sage is likely to succeed on the merits of its claims because IHS has violated the ISDEAA and its implementing regulations. IHS is required to renew Sage’s contract where there are no material and substantial changes to the scope or funding of Sage’s programs. 25 C.F.R. § 900.33. And IHS is required to award Sage’s successor AFA because that proposed AFA is substantially the same as the prior AFA. *Id.* § 900.32; see *Sage II*, 256 F. Supp. 3d at 1224-25, 1234-36; *Sage III*, 220 F. Supp. 3d at 1255, 1264. To the extent there was any ambiguity on IHS’s obligations here, that issue was squarely resolved in the prior litigation.

C. Sage will be irreparably harmed if IHS does not award its renewal contract.

IHS's failure to award the renewal contract is causing Sage immediate and irreparable injury. Although "irreparable harm 'does not readily lend itself to definition,'" *Fish*, 840 F.3d at 751 (citation omitted), this Court has found irreparable harm based on loss of goodwill, loss of customers, loss of future profits, loss of unique economic opportunities, and diminishment of competitive advantage in the marketplace, *see Guidance Endodontics*, 633 F. Supp. 2d at 1277-78. Further, in determining whether the harm alleged is irreparable, "[t]he court's discretion is to be exercised in light of the purposes of the statute on which plaintiff's suit is based." *Fish*, 840 F.3d at 751 (citation omitted). As discussed earlier, the failure of IHS to perform its duties under the ISDEAA is statutorily defined to be the kind of irreparable harm for which an injunction is to issue. *See* 25 U.S.C. § 5331(a). And under the Supreme Court's decision in *Winter*, a plaintiff must show "that irreparable injury is *likely* in the absence of an injunction." 555 U.S. at 22. Here, harm is not only likely—it is already occurring.

As in *Sage I*, "Sage faces a dire financial situation if the Court does not award a preliminary injunction." 100 F. Supp. 3d at 1171. Sage is facing the loss of approximately \$1.8 million per month, or over half of Sage's operating revenue, while Sage continues to perform its full array of healthcare services. El-Meligi Decl. ¶ 19. 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. *Id.* The hospital complex has long been planned to replace Sage's current facility, most of which was constructed in 1914 by a Presbyterian church. Construction of the new hospital was slated to begin on October 15, 2020, but is now on hold indefinitely because Sage's financing for the new hospital was contingent on Sage's revenue stream from its multi-year contract with IHS. *Id.* Sage has already invested approximately \$4.5 million into the development and planning of the facility. *Id.* 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. *Id.* Last year, Sage had to medivac approximately 5,000 patients to other hospitals because it was unable to provide these 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 Navajo people. *Id.* But with IHS funding cut off, the hospital project is at immediate risk of collapse. *Id.*

IHS's decision also leaves Sage and its professionals without FTCA coverage as of October 1, 2020. *Id.* ¶ 20. Prior to IHS's failure to award the renewal contract, Sage had automatic FTCA coverage for all its employees pursuant to 25 U.S.C. § 5321(d), all at no cost to Sage. Sage has also lost access to low-cost pharmaceuticals and other supplies from federal suppliers, including COVID-19 test kits and PPE. *Id.* ¶ 21. Sage must now purchase these supplies at a far higher cost from commercial vendors; these cost increases could be in the range of 300% to 400%, assuming the PPE can even be found. *Id.*

Sage has also lost access to other sources of IHS funding, including IHS's Catastrophic Health Emergency Fund ("CHEF"), which reimburses extraordinary medical costs associated with the treatment of disasters and catastrophic illnesses. *Id.* ¶ 22. Sage typically averages 12 to 20 cases per year that depend on CHEF reimbursement, with costs per patient ranging from over \$19,000 to close to \$1,000,000. *Id.* Additionally, Sage may no longer be eligible to apply for new and recurring IHS grant opportunities. *Id.* ¶ 24. Specifically, the Special Diabetes Program for Indians (SDPI) continuing grant application is due December 15, 2020. IHS, *SDPI Grant Program Continuation Application for 2021*, <https://www.ihs.gov/sdpi/sdpi-community-directed/application-reports/>. Sage currently provides comprehensive diabetes case management through the SDPI but if Sage does not have a contract with IHS in place by December 15 it likely

will not be eligible to renew its SDPI funding for FY 2021, and potentially for subsequent years. The last time SDPI was open for new applications was in 2016. El-Meligi Decl. ¶ 24. Tribal organizations like Sage that contract with IHS also have access to other benefits, like the IHS student loan repayment program. IHS, *Loan Repayment Program*, <https://www.ihs.gov/loanrepayment/>. Sage’s ability to recruit additional medical providers has been impacted because it is no longer able to offer those benefits. Sage has had at least one applicant in this period so far inquire about access to federal student loan repayment programs. El-Meligi Decl. ¶ 23.

But most importantly, IHS’s failure to award Sage’s renewal contract is causing irreparable harm to the Navajo people who Sage serves. The more than 25,000 Navajo people in the Ganado Service Area who receive health-care services at Sage are now being told by IHS to travel long distances to obtain their health care at IHS facilities in either Chinle, AZ, Gallup, NM, or Fort Defiance, AZ. *Id.* ¶ 17. IHS has also asserted that any patients who continue to receive health care at Sage are now “personally responsible” for the costs of that care. IHS has refused to compensate Sage for services it continues to provide IHS beneficiaries despite the cut-off of funding. *Id.*

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 because of IHS’s decision to discontinue contracting with Sage in the middle of a pandemic.

D. The balance of the equities weighs in favor of an injunction.

The next step is to “balance the irreparable harms we have identified against the harm to defendants if the preliminary injunction is granted.” *Fish*, 840 F.3d at 754 (citation omitted). IHS will not be harmed by an injunction because it will merely require IHS to continue “its decades-long relationship with Sage . . . for a short while until trial.” *Sage I*, 100 F. Supp. 3d at 1189.

Additionally, the government is required to pay for medical services to Sage’s patient population regardless of whether Sage provides them or IHS does, so there is no net financial loss to IHS from continuing its current relationship with Sage. 25 U.S.C. § 1602(1), (7). To the contrary, refusing to award Sage’s renewal contract *increases IHS’s administrative burden* because IHS must put new systems in place to handle referrals from Sage’s patients who require care at other IHS facilities or the private sector. Sage has sought to limit any harm by proposing a short-term contract extension while the parties negotiate the renewal contract, but IHS has refused. El-Meligi Decl. ¶¶ 25-26; Ex. 14. The balance of equities thus weighs strongly in favor of granting the relief requested.⁸

E. An injunction is in the public interest.

“There is generally no public interest in the perpetuation of unlawful agency action.” *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). Instead, “there is a substantial public interest ‘in having governmental agencies abide by the federal laws that govern their existence and operations.’” *Id.* (citation omitted). Here, an injunction is in the public interest because Sage “provides valuable high-quality healthcare services to members of the Navajo Nation,” and “[t]o force those patients to go to other facilities at much greater distances is not in

⁸ This motion is brought pursuant to 25 U.S.C. § 5331(a), not Federal Rule of Civil Procedure 65, so no bond should be required of Sage to obtain the relief specifically provided for in the ISDEEA. But if this Court instead considers Sage’s motion under Rule 65, this Court “has ‘wide discretion’ under Rule 65(c) in determining whether to require security,” *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003), and “may, therefore, impose no bond requirement,” *Legacy Church*, 455 F. Supp. 3d at 1133. A bond is particularly “unnecessary to secure a preliminary injunction ‘if there is an absence of proof showing a likelihood of harm.’” *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987) (citation omitted). As the Court concluded in *Sage I*, “[a]s the money will be used to preserve a hospital that provides medical care to Navajo Indians on the Navajo Nation, and the United States can recoup any funds that Sage Hospital expends for an impermissible purpose through its own suit, ordering a bond at this stage would be inappropriate.” 100 F. Supp. 3d at 1192.

the public interest.” *Sage I*, 100 F. Supp. 3d at 1190. This is especially true given the COVID-19 pandemic. Throughout the pandemic, the Navajo Nation has faced a consistent shortage of hospital beds and limited access to healthcare facilities for its citizens. *See Walker, supra* note 3. IHS’s refusal to award Sage’s renewal contract removes 25 hospital beds from the already limited system. El-Meligi Decl. ¶ 18. And the largest IHS hospital for the Navajo area, the Gallup Indian Medical Center, to which Sage patients are being referred, has long been plagued by accreditation issues, understaffing, and underfunding that left it particularly ill-equipped to respond to the COVID-19 pandemic.⁹ At the peak of the pandemic, providers at the Gallup Indian Medical Center were forced to reuse PPE, emergency tents were set up in the parking lot to serve patients, and patients were regularly flown to other facilities better equipped to care for them. *Id.* As infection rates escalate across the country, the Navajo Nation President has warned that the “health care system on the Navajo Nation cannot handle another large surge in cases.” *Id.* To help alleviate the continuing devastation caused by the COVID-19 pandemic, IHS should be striving to support all healthcare facilities in the Navajo Nation service area, not undermining the ability of these facilities to provide critically needed care.

CONCLUSION

For the foregoing reasons, immediate injunctive relief is warranted, and Sage respectfully requests that the Court issue an order compelling IHS to award and fund Sage according to the terms of the FY 2021-2023 renewal contract and FY 2021 AFA. In the alternative, Sage requests a temporary restraining order (TRO) pending the Court’s decision on whether to award an immediate statutory injunction or a preliminary injunction. Such a TRO and injunction should

⁹ *See* Dennis Wagner & Wyatt Grantham-Philips, ‘Still killing us’: The federal government underfunded health care for Indigenous people for centuries. Now they’re dying of COVID-19, USA Today, Oct. 26, 2020, <https://www.usatoday.com/in-depth/news/nation/2020/10/20/native-american-navajo-nation-coronavirus-deaths-underfunded-health-care/5883514002/>.

either (1) require IHS to award and fund the FY 2021-2023 renewal contract and FY 2021 AFA on a recurring monthly basis pending the disposition of this case on summary judgment, or (2) require IHS to extend the FY 2018-2020 contract on a recurring monthly basis.

Respectfully submitted this 18th day of November 2020.

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CERTIFICATE OF SERVICE

I CERTIFY that on the 18th day of November 2020, I filed the foregoing using CM/ECF and served it on the following parties via first class mail, postage prepaid, addressed as follows:

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