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

Navajo Health Foundation-Sage Memorial Hospital, Inc., Plaintiff, v. Alex Azar, Secretary, U.S. Department of Health and Human Services, et al. Defendants.	Civil Action No. 1:20-cv-01185-JB-JFR

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR IMMEDIATE INJUNCTIVE RELIEF OR IN THE ALTERNATIVE A TEMPORARY RESTRAINING ORDER & PRELIMINARY INJUNCTION (Doc. 9)

I. INTRODUCTION

Defendants hereby oppose the request by Plaintiff Navajo Health Foundation Sage Memorial Hospital, Inc. (Plaintiff or Sage) for an order requiring the Secretary of the U.S. Department of Health and Human Services (DHHS) to "renew" or extend an expired contract with Sage under Title I of the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. §§ 5301 *et seq*., and to fund Sage's health care delivery program for Navajo tribal members and other beneficiaries of the Indian Health Service (IHS), an agency of the DHHS, who are in the Ganado, Arizona service area.

The Court should reject Sage's request because the IHS acted lawfully, in accordance with its obligations under the ISDEAA, and Sage has not met its burden of demonstrating substantial likelihood of success on the merits or any exigencies that would support granting such extraordinary relief. The IHS lawfully determined that Sage's May 29, 2020 submission was not a "proposal" under the ISDEAA. Specifically, Sage's May 29, 2020 submission does

not meet the threshold requirement of a proposal and therefore is insufficient and not subject to 25 U.S.C. § 5321, including the declination process included therein. In its response to Sage's May 29, 2020 submission, the IHS also argued, in the alternative, that it was mandated by law to decline Sage's ISDEAA contract based on the Navajo Nation's refusal to provide Sage authority to submit an ISDEAA proposal or to contract under the ISDEAA, which is a legal prerequisite to contracting with the IHS under the ISDEAA.

The legal issue in this case is a straightforward: the ISDEAA requires that a tribal organization have a tribal resolution authorizing it to contract with the IHS on behalf of a Tribe in place before it is able to contract with the IHS. Here, Sage did not have a tribal authorization in place at the time its previous authorization expired on September 30, 2020. As such, the IHS did what is *required* by the law – it did not enter into an Indian Self-Determination contract with Sage.

Despite Sage's attempts to paint this matter as a repeat of previous litigation, the circumstances have changed immensely. Tribal authorization was not at issue in the prior litigation. Rather, in the prior litigation, the IHS alleged that Sage mismanaged its IHS funds, primarily as a result of its executive management contract with Razaghi Healthcare, which Sage vehemently denied. Here, the Navajo Nation refused to provide a resolution authorizing Sage's May 29, 2020 submission, in part because of the very concerns raised in the previous litigation and ongoing since that time. Sage is now in litigation with Razaghi Healthcare, in which it essentially admits that the IHS's allegations in the previous litigation were true, and alleges that several million dollars in federal funding were fraudulently misspent:

> "From June 1, 2017 (and before) through August 2018, RH [Razaghi Healthcare] utilized its near complete control over the administration of Sage to systematically bill [Sage] for personal expenditures of Razaghi, bill [Sage] for services to third parties who did not in

> fact render services to [Sage] but instead rendered services to RH; and bill [Sage] for services that were not actually rendered by RH but reimbursed by [Sage]. RH's near total control over the administration of [Sage's] finances enabled RH to illegally bill [Sage] for inappropriate and illegal services, which are identified in Invoices which were e-mailed to [Sage] on a monthly basis for years."

Ex. J at 22, ¶ 40.

Further, Sage alleges that the fraud began in 2011 and continued through 2018[1] – thus, prior to commencement of the previous litigation between the IHS and Sage, continuing through the litigation, through the settlement discussions with the federal government, and through the ultimate settlement wherein the federal government paid $122 million.[2] Moreover, Sage's current CEO, Christi El Meligi, and current COO, Natrisha Delgai, were employees of Razaghi Healthcare, while concurrently serving as Sage's CEO and COO, from 2013 through 2018, while this alleged fraud occurred. *See* El Meligi, ¶ 2. Yet, Sage continues to employ them as the CEO and COO of Sage, while at the same pursuing district court litigation alleging their former employer committed fraud and misspent millions in federal funds.

In addition, Sage alleges that this case involves the same regulatory provisions at issue in the previous litigation. Not so. Those regulations provide that the Secretary has limited bases to decline a successor annual funding agreement if it is substantially the same as the prior annual funding agreement and will not review a renewal of a term contract for declination issues if there is no "material and substantial change" proposed to the scope or funding of the programs,

[1] Sage Memorial Hospital's proposed first amended complaint alleges that in March, 2011, multiple different schemes to defraud Sage Memorial Hospital (Sage) began. Ex. J at 19.

[2] Sage makes numerous references to the terms of the settlement agreement that was entered into between Sage and Defendants to settle the prior litigation. This violated the settlement agreement, in which the parties agreed that the settlement agreement "shall not be cited or otherwise referred to, in any other proceedings, whether judicial or administrative in nature, in which the parties or counsel for the parties have or may acquire an interest, except as is necessary to effect the terms of this Settlement Agreement." Defendants cite to a term of the settlement agreement below to "effect the terms of" the settlement agreement to ensure that Sage uses the settlement funds for health care purposes, as required by the agreement.

functions, services, or activities (PFSAs). 25 C.F.R. §§ 900.32-33. The regulations cannot require the IHS to enter into a renewal contract when the statute mandates that a tribal resolution must be in place to contract with the IHS.

In this case, Sage concedes it did not have a valid tribal authorization in place at the expiration of its contract. President Nez, in an exercise of self-determination, vetoed the legislation authorizing Sage to contract with the IHS. Ex. E. In a September 30, 2020 press release explaining his action, he wrote that there were:

> ….allegations of questionable spending, unaccounted funds, the diversion of federal funds for questionable purposes, and other issues stemming from the tenure of the previous CEO. This matter must be fully vetted because we are entrusting this entity with the health and well-being of our Navajo people. We respectfully request the members of the Navajo Nation Council to reconsider the reauthorization of this contract with the highest level of due diligence to ensure that Sage Memorial Hospital is in compliance and in a position to deliver quality health care for our Navajo citizens.[3]

Sage ultimately was able to obtain a resolution, but not until October 20, 2020. Nonetheless, there was no valid tribal authorization in place for an FY 2021 contract when Sage submitted its materials on May 29, 2020, when the IHS made its final decision on September 30, 2020, and through the date it submitted a new contract proposal on October 21, 2020.

After Sage obtained the resolution on October 20, 2020, it submitted a new contract proposal on October 21, 2020. The IHS is within its statutory window to take action on this new proposal and thus any decision by this Court would be premature. Both by statute and regulation, the IHS has 90 days to review and award or decline that proposal. 25 U.S.C. §

[3] *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), Ex. E at 1.

5321(a)(2); 25 C.F.R. § 900.16. To order immediate injunctive relief on this new contract proposal during the 90-day period would subvert the statutory scheme, is unreviewable because it is outside the scope of the Government's waiver of sovereign immunity, and would fail to conserve judicial resources. The 90-day review period is particularly important here because it will allow the IHS to provide technical assistance to Sage to address serious financial management issues to ensure Sage complies with applicable federal law, and to ensure that federal funds are used for their intended purposes.

In its pending motion for immediate injunctive relief (Motion), Sage has failed to demonstrate any likelihood of success on its argument that the IHS violated the ISDEAA or its implementing regulations. Sage has also failed to show any exigencies that would support granting such extraordinary relief before a trial on the merits. For these reasons, Defendants respectfully request that the Court deny Plaintiff's Motion in its entirety.

II. STATUTORY BACKGROUND

The principal mission of the IHS is to provide health care for American Indians and Alaska Natives throughout the United States. In 1975, Congress passed the ISDEAA, which, among other things, allows federally recognized tribes, as well as tribal organizations who are authorized by a Tribe, to contract with the IHS to plan, conduct, and administer one or more of the programs, functions, services, or activities (PFSAs) that the IHS had previously operated. 25 U.S.C. § 5321(a)(1).

The "self-determination" contracting process under Title I of the ISDEAA begins when a Tribe or tribal organization submits a proposal, approved and accompanied by tribal resolution, to the IHS. 25 U.S.C. §§ 5321(a)(1), (2); 5329(c)(f)(1). A Tribe may designate a tribal organization, defined in 25 U.S.C. § 5304(*l*), to submit a contract on its behalf; however, the

approval of the Tribe(s) is a prerequisite to IHS contracting with the tribal organization. *Id.* Further, the resolution is a required attachment to the ISDEAA contract proposal. 25 U.S.C. § 5329(a); 25 U.S.C. § 5329(c)(1)(f)(1). It also has an accompanying Annual Funding Agreement (AFA) that is must be negotiated annually. *See id. at* § 5324(c).

When an authorized tribal organization submits "a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract," the ISDEAA provides that the Secretary "shall, within ninety days after receipt of the proposal, approve the proposal and award the contract" (or within an authorized extension of that time) unless the Secretary gives notice of declination based on defined criteria. 25 U.S.C. § 5321(a)(2); *see also* 25 C.F.R. § 900.16 ("Secretary has 90 days after receipt of a proposal to review and approve the proposal and award the contract or decline the proposal"). During this period, the IHS and a tribal organization negotiate the tribal organization's proposal with the goal of avoiding a declination. Yazzie Decl. ¶ 1.

Despite Sage's interpretation of 25 C.F.R. §§ 900.32 and 33, the ISDEAA mandates that renewal contracts are subject to the declination criteria and 90-day review period. 25 U.S.C. § 5321(a)(2). Moreover, both 25 C.F.R. §§ 900.32 and 33 clearly allow declinations in specified circumstances, and neither section purports to override the 90-day review and negotiation period provided for in 25 U.S.C. § 5321(a)(2) and 25 C.F.R. § 900.16.

Furthermore, if there is a lapse in a tribal organization's authority from the authorizing Tribe, during which those PFSAs must return to IHS, then the tribal organization must submit a new initial contract proposal. 25 C.F.R. § 900.6.[4] In addition, an initial contract proposal is subject to the requirements set forth at 25 C.F.R. §900.8.

[4]. *See* DOI/HHS Internal Agency Procedures Handbook, Chapter 14, § II(C), available at https://www.ihs.gov/sites/ihm/themes/responsive2017/display_objects/documents/pc/IAP_Handbook_Under_Title%

III. STATEMENT OF FACTS

On May 29, 2020, the Navajo Area Indian Health Service (NAIHS) received what Sage construed as its Title I contract renewal proposal for fiscal years 2021-2023. In response, on June 9, 2020 NAIHS sent a "15 day letter," which is specifically authorized by the regulations, *see* 25 C.F.R. § 900.15, and requested that Sage provide an authorizing resolution from the Navajo Nation that authorized Sage to contract with the IHS during the proposed contract term. Ex. B at 1. NAIHS indicated that the proposal identified resolution CJN-35-05, but that resolution's authorization to Sage expired September 30, 2020, before the effective date for the renewal contract. Ex. A at 1. On June 11, 2020, Sage responded via email, and acknowledged that the IHS would not be able to "sign any new documents until it receives this resolution." Ex. C at 1.

On August 4, 2020, Sage filed a Motion for Leave to File a First Amended Complaint in litigation it brought against Razaghi Healthcare. Exhibit J. The IHS was alarmed to learn that, contrary to Sage's denial of any wrongdoing during the previous litigation between Sage and the IHS, Sage was now alleging long-term fraudulent use of its funds since 2011. Sage alleged that in 2011, Razaghi Healthcare entered into a management contract with Sage for management services at Sage which "placed management completely in the hands of Razaghi and [Razaghi Healthcare]. Upon information and belief, this was when multiple different schemes to defraud Sage Memorial began through the use of mail and interstate wires." Ex. J at 19 ¶ 30.[5]

20I_ISDEAA.pdf (explaining procedures for the agency's resuming of PFSAs after a Title I contract has been allowed to expire).

[5] Contrary to Sage's assertions in this case that the improper activity alleged in the IHS's August 24, 2020 letter to Navajo Nation leadership occurred before the IHS and Sage entered into a settlement agreement in October, 2017, as noted above, Sage alleges from June 1, 2017 (and before) through August 2018, Razaghi Healthcare utilized its near complete control over the administration of Sage to systematically bill Sage for: personal expenditures of Razaghi; for services to third parties who did not in fact render services to Sage but instead rendered services to Razaghi

The complaint further alleges that Razaghi Healthcare illegally billed Sage for inappropriate and illegal services, which are identified in invoices which were e-mailed to Sage on a monthly basis *for years*. *Id*. at 22 ¶40. The complaint further alleges that Razaghi Healthcare used its role as Contract CEO for, and its complete control over the administration of, Sage to improperly and illegally obtain money from Sage. *Id.* at 34 ¶ 76. In addition, Razaghi Healthcare allegedly stole $10.8 million from Sage in August, 2018 under the guise of a contract dispute. *Id.* at 56-58 ¶¶ 86-88.

Upon becoming aware of these allegations, the IHS felt it incumbent to share this information with the Navajo Nation, particularly since the IHS was aware that the Navajo Nation was considering whether to renew Sage's authorization to contract with the IHS.[6]

When Sage failed to provide an authorizing resolution by the close of business on September 30 2020, the IHS issued a declination. Although Sage's legal counsel later forwarded a copy of Resolution No. CS-79-20 at 6:06 pm MST, that resolution required the approval of the Navajo Nation President before it could become effective because it was emergency legislation. 2 N.N.C. §§ 221(B), 1005(C)(10); *see also* Ex. E. The Navajo Nation President vetoed that legislation later that same evening, citing a need for the Council to fully vet Sage's management

Healthcare; and bill Sage for services that were not actually rendered by Razaghi Healthcare but reimbursed by Sage. *Id.* at 22 ¶ 40.

[6] Despite Sage's complaints that IHS did not include Sage in IHS's discussion with the Navajo Nation, in fact, the IHS is directed to engage in a government-to-government relationship with Tribes. *See, e.g.,* 25 U.S.C. § 1602(5)-(6); Memorandum of President of the United States, Government-to-Government Relations With Native American Tribal Governments, 59 Fed. Reg. 22,951, 22,952 (Apr. 29, 1994) ("head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally recognized tribal governments" and "shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments"). This government-to-government relationship is particularly important where there are credible allegations that at least some members of the Sage board of directors and its current management have caused significant damage to Sage Memorial Hospital and the Navajo Nation members who rely on the hospital for their health care services.

structure and practices before reauthorizing Sage as a tribal organization. Ex. E at 1. Thus, as of the end of the day on September 30, 2020, Sage's previous resolution had expired and Sage did not have a valid tribal resolution in place.

On October 2, 2020, the IHS issued a press release, informing the Ganado Area service population that the IHS could no longer contract with Sage, and notifying patients where and how they could access IHS health care services. Sage Ex. 8.

On October 21, 2020, Sage submitted a new contract proposal with new tribal resolution, NABIO 44-20. In an email transmitting the contract proposal, Sage's legal counsel stated "I attach a contract proposal including the following documents . . . Navajo Nation Council Resolution NABIO 44-20 (Attachment 1 to the Contract)." Sage Ex. 10 at 1.

In response to the October 21 proposal, IHS sent a 15-day letter to Sage, pursuant to 25 C.F.R. § 900.8, requesting the information required by that provision. In addition, to confirm the validity of the resolution, the IHS requested a copy of the HEHS Committee's recommendation of approval for the tribal resolution, which was required under Navajo Nation law. Sage Ex. 12 at 2.

On November 6, the IHS had a telephone conference with Sage. Sage requested that the IHS enter into an extension of the previous contract. However, the IHS had not yet received confirmation that the tribal resolution was valid; it would have been unlawful for the IHS to agree to a contract extension if Sage lacked proper authorization from the Navajo Nation.

On Tuesday, November 10, 2020, the HEHS Committee confirmed to the IHS that it had recommended approving Sage to contract with the IHS under the ISDEAA. Yazzie Decl., ¶ 9. On that same day, Sage sent the IHS an "intent to sue" letter, notifying the IHS that unless the

IHS awarded the FY 2021 contract by November 12, 2020, it would initiate legal action. Sage Ex. 15.

On November 13, 2020, the IHS responded to Sage's November 10, 2020 "intent to sue" letter. Sage Ex. 16. The IHS indicated that based on information from the HEHS, it appeared Sage had a valid tribal resolution, thus it was ready to commence negotiations. *Id.* at 1. The IHS stated that negotiations "would allow the parties an opportunity to address the issues raised in Sage's ongoing lawsuit against [Razaghi Healthcare and] to safeguard Federal funds and ensure they are used for their intended purpose." *Id.* at 2-3.

On November 16, the IHS and Sage had contract negotiations. The IHS offered to enter into a short-term contract under the ISDEAA, so long as Sage would agree to certain contractual provisions to address the ongoing financial management problems. Yazzie Decl., ¶10. Sage's legal counsel refused that offer during the negotiations. However, later that same day Sage's legal counsel requested the proposed contractual provisions in writing so the Sage Board of Directors could review at an emergency board meeting. The IHS responded in writing, proposing: a transition plan for the CEO and COO positions; a revision in the Sage Board of Directors selection process; and quarterly reports on executive and top management compensation. Ex. F at 1. The IHS also offered technical assistance to implement these proposals. *Id.*

The Sage Board of Directors held an emergency board meeting on Friday, November 20 to discuss the IHS's proposed contract provisions. Later that same day, the Sage Board of Directors requested a meeting with the IHS without attorneys on Monday, November 23. Yazzie Decl., ¶ 11. Navajo Area IHS Director Roselyn Tso and IHS contracting officer Marquis Yazzie met with the Sage Board on Monday, November 23 for several hours and had a productive

meeting. *Id.* The IHS believes that if the parties were allowed further time to negotiate the October 21 proposal, as is required by the ISDEAA, it would be able to reach a resolution and enter into an ISDEAA contract with Sage.

IV. LEGAL ARGUMENT

A. This Case Does Not Meet the Equitable Grounds for a TRO or Preliminary Injunction, Nor Qualify It for a Statutory Injunction

Preliminary relief is "never awarded as of right" because it is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To obtain preliminary relief, a movant must establish: 1) a substantial likelihood of prevailing on the merits; 2) irreparable harm unless the injunction is issued; 3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and 4) that the injunction, if issued, will not adversely affect the public interest. *Diné Citizens Against Ruining Our Env't*, 839 F.3d 1276, 1281 (10th Cir. 2016). Because the government is a party, the third and fourth factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

These prerequisites do not establish a balancing test; rather, as the Tenth Circuit clarified in *Diné Citizens*, each must be satisfied independently, and the strength of one cannot compensate for the weakness of another. 839 F.3d at 1282 ("Under *Winter*'s rationale, any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible."). Moreover, preliminary relief that alters the status quo, mandates action rather than prohibits it, or "afford[s] the movant all the relief that it could recover at the conclusion of a full trial on the merits," is "specifically disfavored." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1259 (10th Cir. 2005) (internal quotation marks omitted).

B. Preliminary Relief Is Inappropriate

Here, Sage seeks immediate injunctive relief to compel the Secretary to award and fund a self-determination contract and AFA for FY 2021. Such relief constitutes a mandatory preliminary injunction, which would also disturb the status quo (i.e., that Sage's prior contract and AFA expired by their own terms on September 30, 2020) and would afford Sage substantially all the relief it seeks and would render a trial on the merits largely or completely meaningless. Under Tenth Circuit precedent, a preliminary injunction under these circumstances is disfavored.

C. Sage Is Unlikely to Succeed On the Merits of Its Claims

Sage's claims are unlikely to succeed. First, the IHS's September 30 decision regarding Sage's May 29, 2020 submission was clearly justified, because Sage lacked authorization from the Navajo Nation, a prerequisite to even make a contract proposal under the ISDEAA, much less enter into an ISDEAA contract. Second, due to a lapse in authorization to contract, Sage's October 21 proposal is subject to the requirements of an initial contract proposal, in accordance with 25 C.F.R. § 900.6, and a 90-day review period which allows the parties to engage in negotiations. As such, 25 C.F.R. §§ 900.32 and 33 do not apply. Furthermore, even if the October 21, 2020 is a renewal proposal, which Defendants dispute, renewal proposals remain subject to review and negotiation for the 90-day period established by Congress. Moreover, even if 25 C.F.R. §§ 900.32 and 33 apply, which Defendants dispute, the proposed AFA is not substantially the same and the proposed contract contains material and substantial changes. Lastly, at this point, there has been no agency decision with respect to the October 21 proposal that the Court could review.

1. Sage's May 29, 2020 Submission Lacked a Supporting Resolution from the Navajo Nation, Precluding IHS from Awarding a Contract

In construing the ISDEAA, the starting point is its text. *Chickasaw Nation v. United States*, 208 F.3d 871, 876 (10th Cir. 2000). "If the terms of the statute are clear and unambiguous, they are controlling absent rare and exceptional circumstances."

The ISDEAA requires that the Tribe or Tribes benefitting from a proposed contract first authorize that proposed contract. 25 U.S.C. § 5321(a). This requirement equally applies to a new contract, a proposal to amend an existing contract, or a proposal to renew a contract. The ISDEAA provides:

> **§ 5321. Self-determination contracts**
>
> **(a) *Request by tribe*; authorized programs**
>
> (1) The Secretary is directed, *upon the request of any Indian tribe by tribal resolution*, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof . . . .
>
> (2) *If so authorized by an Indian tribe* under paragraph (1) of this subsection, *a tribal organization may submit a proposal* for a self-determination contract, or a proposal to amend *or renew* a self-determination contract, to the Secretary for review.

25 U.S.C. § 5321(a)(1) and (2) (emphasis added). Thus, the plain language of the ISDEAA mandates that tribal authorization, as evidenced by a tribal resolution, is a prerequisite to the submission of a proposal.

Further, without a tribal resolution, an entity may not be "controlled, sanctioned, or chartered by" a Tribe's governing body, and thus does not meet the ISDEAA's definition of a "tribal organization." *Id.* § 5304(*l*). The IHS can only contract under the ISDEAA with tribal organizations. Although Sage, and the IHS, have been undergoing the distinct challenge of providing health care services in the midst of a global pandemic, there is no exception to these plain requirements for exigent circumstances.

The implementing regulations also emphasize that a tribal resolution is a mandatory prerequisite. The regulations provide that an "initial contract proposal must contain . . . [a] copy of the authorizing resolution from the Indian tribe(s) to be served." 25 C.F.R. § 900.8(d). Additionally, 25 U.S.C. § 5329(a) requires that ISDEAA contracts "contain, or incorporate by reference" the provisions of the model contract set forth in 25 U.S.C. § 5329(c). One such mandatory term provides that the resolution of the "Indian tribe(s) *authorizing the contracting of the programs, services, functions, and activities identified in this Contract* is attached to this Contract as attachment 1." 25 U.S.C. § 5329(c)(1)(f)(1) (emphasis added). Here, Sage referenced Resolution CJN-35-05 in the contract it proposed on May 29. The resolution did not authorize Sage to contract after September 30, 2020, which Sage acknowledged. Further, the emergency resolution adopted by the Navajo Nation Council on September 30 reauthorizing Sage as a tribal organization, the resolution explicitly required ratification by the Navajo Nation President, consistent with 2 N.N.C. § 1005(C)(10). Sage Ex. 4 at 3. But the Navajo Nation President never ratified the resolution; instead, he vetoed it. Ex. E. Sage's May 29 submission proposing a contract beginning October 1, 2020 therefore lacked any supporting resolution from the Navajo Nation, as required by the ISDEAA. Because Sage's May 29 submission did not meet the threshold requirement of a "proposal," it was not subject to 25 U.S.C. § 5321, including the declination process included therein.[7] Nor does 25 C.F.R. § 900.32, the regulatory provision relied on by Sage, apply. That provision only applies to an "*Indian tribe or tribal organization's*

[7] *See San Pasqual Band of Mission Indians v. Salazar*, No. 09-1716, 2010 WL 11594793 (D.D.C. 2010) ("A plain reading of the statute makes clear that declination procedures are only triggered 'upon the request of any Indian tribe by tribal resolution.'"); *Navajo Nation and Bd. of Dirs. of Shiprock Alt. Sch., Inc. v. Office of Indian Educ. Programs*, IBIA 04-20-A (considering a similar statute and finding that in the case of "a tribal organization that submits a proposal, the Secretary is only required to consider it on the merits if the applicant can show that it constitutes a 'tribal organization' . . . . To hold otherwise would unnecessarily trigger obligations on the part of the Secretary toward a group which, in essence, has not demonstrated that it has standing to submit the proposal").

proposed successor annual funding agreement." 25 C.F.R. § 900.32 (emphasis added). Sage was neither an Indian tribe nor an authorized tribal organization with respect to its May 29 submission. Because the declination procedures did not apply, Sage is not entitled to the "option to initiate an action in a Federal district court" with regard to the September 30 decision. 25 U.S.C. § 5321(b)(3).

Even if the May 29 submission constituted a valid, authorized (renewal) proposal, however, the IHS properly declined it. The ISDEAA conditions submission of a contract proposal on authorization by an Indian Tribe. *See* 25 U.S.C. 5321(a)(2); 25 U.S.C. § 5329(c)(1)(f)(1). Sage's May 29, 2020 submission lacked a resolution authorizing Sage to contract during the proposed term of the contract; as such, Sage's submission includes PFSAs "that cannot be properly completed by the proposed contract" and "that cannot lawfully be carried out by the contractor." 25 U.S.C. § 5321(a)(2)(C), (E). The IHS therefore lawfully declined the proposed contract.

Sage argues that the implementing regulations at 25 C.F.R. §§ 900.32 and 900.33 required IHS to enter into Sage's May 29, 2020 submission on the grounds that the contract and AFA were substantively identical to Sage's prior contract and AFA. Sage Motion, p. 17. However, a tribal resolution is prerequisite for Sage to be able to submit a contract proposal and AFA and for IHS to have the authority to enter into an ISDEAA contract. The regulations cannot be read to override this clear statutory requirement.[8]

[8] "It is a basic tenet that 'regulations, in order to be valid, must be consistent with the statute under which they are promulgated.'" *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013) (quoting *United States v. Larionoff*, 431 U.S. 864, 873 (1977). "Weight must be given to the administrator's interpretation of applicable statutes. However, where the regulation in question is plainly inconsistent with the statute and operates in a manner which frustrates Congressional intent, it can be given no force and effect and must be declared invalid." *Salazar v. Hardin*, 314 F. Supp. 1257, 1258–59 (D. Colo. 1970).

Further, even if those regulatory requirements apply, which Defendants dispute, there was such a material and substantial change – the absence of tribal authorization, which is a required attachment to the contract proposal. The resolution of the "Indian tribe(s) authorizing the contracting of the programs, services, functions, and activities identified in this Contract *is attached to this Contract as attachment 1*." 25 U.S.C. § 5329(c)(1)(f)(1) (emphasis added). Sage's contract went from having an attachment 1 to having no attachment 1; i.e., from having a tribal authorization to having no tribal authorization. There can be no more material and substantial change than that. That change meant Sage went from being legally authorized to contract to not being legally authorized to contract. Moreover, this change goes to the heart of Indian self-determination: the Navajo Nation determines who will contract on its behalf, not Sage.

2. The October 21, 2020 Proposal Is Not Ripe for Adjudication

When a tribal organization submits "a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract," the ISDEAA provides that the Secretary "shall, within ninety days after receipt of the proposal, approve the proposal and award the contract" unless the Secretary gives notice of declination based on defined criteria. 25 U.S.C. § 5321(a)(2); *see also* 25 C.F.R. § 900.16 ("Secretary has 90 days after receipt of a proposal to review and approve the proposal and award the contract or decline the proposal"). During this period, the IHS and a tribal organization typically negotiate the tribal organization's proposal with the goal of avoiding a declination. Yazzie Decl. ¶ 1. *See* 25 U.S.C. §§ 5325(c)(2), 5325(a)(3)(B) (ensuring that the parties have the opportunity to renegotiate annually). To order immediate injunctive relief in this case would turn the statutory scheme on its head and set a precedent encouraging tribal organizations to race to the courthouse doors rather than engage in

good faith negotiations. This would not only frustrate judicial economy by inviting litigation over matters where a potential declination could be avoided during the statutory negotiation period, it would also exceed Congress's command in 25 U.S.C. § 5331(a).

Section 5331(a) authorizes "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). There is no declination finding to reverse here with respect to the October 21 proposal, nor an "approved self-determination contract." In support of its motion, Plaintiff cites *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 545 (D.D.C. 2014), *Navajo Health Found.-Sage Mem'l Hosp., Inc. v. Burwell*, 100 F. Supp. 3d 1122 (D.N.M. 2015) ("*Sage I*"), and *Navajo Health Found.-Sage Mem'l Hosp., Inc. v. Burwell*, 256 F. Supp. 3d 1186 (D.N.M. 2015) ("*Sage II*"). But in none of these cases did courts enjoin the IHS to award a proposed contract during the 90-day statutory negotiation period. Rather, those cases involved injunctions related to declination decisions that the IHS had already issued. *Pyramid Lake*, 70 F. Supp. 3d at 539; *Sage I*, 100 F. Supp. 3d at 1141; *Sage II*, 256 F. Supp. 3d at 1199.

More fundamentally, setting aside whether section 5331(a) even authorizes immediate injunctive relief in these circumstances, the October 21 proposal is also not ripe for adjudication. "Ripeness is a justiciability doctrine designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the

challenging parties." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003).[9] By statute, the IHS has until January 19, 2021 to award or decline Sage's October 21 proposal. There is thus no final agency action for the Court to reverse, and good faith negotiation during the statutory negotiation may eliminate any controversy for the Court to even adjudicate.

3. 25 C.F.R. §§ 900.33 and 900.32 Do Not Apply to the October 21 Proposal and Do Not Eliminate the Statutory Negotiation Period

After obtaining a tribal resolution from the Navajo Nation dated October 20, 2020, Sage submitted a new contract proposal on October 21, 2020. At this point, there had been no ISDEAA contract and AFA between the IHS and Sage for almost three weeks (October 1 through October 21, 2020). As a result, the legal authority and responsibility to provide health care services to the Ganado area service population rested with the IHS, and the IHS took steps to provide those services and make expenditures of its appropriation accordingly. Yazzie Decl., ¶ 6. Sage has been providing services as well, but voluntarily and not under any ISDEAA contract.

Once the IHS received Sage's October 21, 2020 proposal, the IHS took immediate steps to ascertain the validity of the resolution because the resolution did not indicate approval by the HEHS committee. Yazzie Decl., ¶¶ 8-9. In addition, the IHS requested that Sage submit the documents and information required for a new contract proposal, in accordance with 25 C.F.R. § 900.8.

[9] "Determining whether administrative action is ripe for judicial review requires [a court] to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Id.* at 808 (citation omitted). Under the fitness for judicial decision prong, a court consider "whether 'the issue is a purely legal one,' whether 'the agency decision in dispute was final,' whether the court would 'benefit from further factual development of the issues presented,' and whether 'judicial intervention would inappropriately interfere with further administrative action.'" *Renewable Fuels Ass'n v. United States Envtl. Prot. Agency*, 948 F.3d 1206, 1241 (10th Cir. 2020) (citation omitted).

Sage objected, arguing that the regulations at 25 C.F.R. §§ 900.33 and 900.32 require the IHS to immediately award the contract without the 90 days to review and negotiate the contract and AFA, as mandated by the ISDEAA at 25 U.S.C. § 5321(a)(2). Motion at 18-19. Sage is wrong. Contrary to its assertions that the twenty day gap where Sage had no legal authority to contract with the IHS has "no legal difference" (Sage Motion, p. 2), in fact, it does. That lapse in legal authorization required Sage to submit a new contract proposal, including the documents and information set forth 25 C.F.R. § 900.8. The regulations provide that an "*Initial contract proposal* means a proposal for programs, functions, services, or activities that the Secretary is authorized to perform but which the Indian tribe or tribal organization is not now carrying out." 25 C.F.R. § 900.6 (underlining added). There is no dispute between the parties that Sage did not have legal authority to contract with the IHS, and had no ISDEAA contract with the IHS, from October 1 through October 21, 2020. As a result, only the IHS had the authority to perform those PFSAs, and Sage was not carrying out those PFSAs during that time period. Consequently, Sage was required to submit a new contract proposal in order to transfer the PFSAs back to Sage.

Although a new contract proposal was mandated by the regulations, in Sage's case, it was particularly appropriate, given the alleged long term fraudulent activity spanning several years and the alleged loss of millions in federal funds. As explained in IHS's November 13, 2020 letter, "Not only are negotiations required by the ISDEAA and its implementing regulations, but they would allow the parties an opportunity to address the issues raised in Sage's [lawsuit against Razaghi Healthcare and] to safeguard Federal funds and ensure they are used for their intended purpose." Sage Exhibit 16 at 1-2. Moreover, this is exactly what the Navajo Nation President

requested and expected in vetoing the emergency legislation on September 30 which would have authorized Sage to contract with the IHS. Ex. E at 1.

Furthermore, Sage's contention that 25 C.F.R. §§ 900.32 and 900.33 required IHS to enter into Sage's October 21, 2020 submission on the grounds that the contract and AFA were substantively identical to Sage's prior contract and AFA is premature as well as inaccurate. These provisions do not apply to a new contract proposal. Moreover, both sections clearly allow declinations in specified circumstances, and neither section purports to override the 90-day review and negotiation period provided for in 25 U.S.C. § 5321(a)(2) and 25 C.F.R. § 900.16. In fact, the statute and regulations are explicit that the 90-day review period applies whether the October 21 proposal was rightfully a renewal or new contract proposal.

In this case, Sage's October 21 submission does not constitute a "renewal proposal," a prerequisite for section 900.33 to apply. The regulations require a tribal organization to "submit a renewal proposal (or notification of intent not to renew) or an annual funding agreement proposal *at least 90 days before the expiration date of the contract or existing annual funding agreement*." 25 C.F.R. § 900.12 (emphasis added). Sage's prior contract expired on September 30, and Sage submitted its proposal on October 21.

Even if section 900.33 applies, however, the statute and regulations give the IHS 90 days to award or decline the proposal, and the October proposal does not appear to be substantially the same such that the IHS may well have grounds to issue a full or partial declination consistently with section 900.33. For example, even though Sage did not submit its proposal until October 21, its proposed contract and AFA would take effect retroactively to October 1, thereby entitling Sage to retroactive funding. But since October 1, IHS has been providing services for the patients who formerly received services from Sage under the contract that expired September 30.

Yazzie Decl. ¶ 6. This was not the case with the prior contract, where Sage had been providing services under contract continuously. Sage's unilateral revision of the contract to provide retroactive funding for a period of time when Sage was not providing health care under an ISDEAA contract is a material and substantial change. In addition, it violates the ISDEAA which provides that an ISDEAA contract "shall become effective upon the date of the approval and execution by the Contractor and the Secretary" unless the parties agree on another date. 25 U.S.C. § 5329(c)(1)(b)(2). Therefore, the parties would need to negotiate the amount of funds that were already expended by IHS and cannot be awarded to Sage—a negotiation that not only makes the 90-day negotiation period particularly important here but also may result in a valid declination. In addition, the new resolution referenced in Sage's October 21 proposal, which states Sage is authorized as a tribal organization starting October 1, was not adopted until October 20.[10] Sage Ex. 9 at 3. This too represented a departure from the previous contract; the resolution referenced in that contract had been adopted prior to the contract's effective date. Ex. A at 1, 3. To retroactively award Sage full funding for the period when IHS has been providing services would thus constitute a "material and substantial change to the scope or funding" of the contract. 25 C.F.R. § 900.33. Similarly, it would result in a "different proposed funding amount" and create a "disagreement over the availability of appropriations." *Id.* § 900.32.

[10] Under long-established principles of the law of agency, a principal's ratification of an agent's action cannot impose substantial duties and/or liability on a third party. *See* Restatement of the Law of Agency, 2d, § 4.02; see also *C. H. Elle Construction Co. v. Western Casualty and Surety Co.*, 294 F.2d 459, 463 (9th Cir. 1961) (insurance company cannot be "charged with a liability through the retroactive operation of a process of ratification of an authority which was not existent on the date in question"); *Pape v. Home Ins. Co.*, 139 F.2d 231 (2d Cir. 1943) ("ratification does not date back to destroy intervening rights of third persons or otherwise to achieve an inequitable result"). Thus, the October 20 resolution cannot render IHS's September 30 decision invalid, nor require IHS to award the October 21 proposal retroactively to October 1.

D. Sage has not shown it will be irreparably harmed

In addition, Sage's assertion of irreparable injury is unsupported. The Tenth Circuit has held that a plaintiff satisfies the irreparable harm requirement by demonstrating "a significant risk he or she will experience harm that cannot be compensated after the fact by monetary damages." *Greater Yellowstone Coal v. Flowers.* 321 F.3d 1250, 1258 (10th Cir. 2003).[11] Here, each of Sage's allegations of irreparable harm is unsupported speculative, remediable by damages, or does not constitute harm at all.

First, without any evidence or support whatsoever, Sage alleges that and the patients served by Sage are facing immediate and irreparable injury from IHS's refusal to award Sage a renewal contract and successor funding agreement. But there is no evidence or support for that assertion. In fact, their assertions are contradicted by their own evidence. *See* Sage Motion, p. 11, Sage Ex. 7; El Meligi Decl. ¶ 17.

Sage alleges that it faces "dire financial consequences" if this Court does not award a preliminary injunction. Sage Motion, p. 22. However, as Sage noted and as is a public record, Sage received $122 million in the settlement of the previous litigation.[12] Sage was required to use the settlement funds "for the reasonable costs for health care services." Sage alleges that it

[11] "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman v. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). "[M]erely serious or substantial" harm is not irreparable harm. *Prairie Band of Potawatomi Indians v. Pierce,* 253 F.3d 1234, 1250 (10th Cir. 2001). The purpose of a preliminary injunction is not to remedy past harm but to protect a plaintiff from irreparable injury that will surely result without its issuance. *Heideman,* 348 F.3d at 1189 (noting that a preliminary injunction will not issue without a showing of "a clear and present need for equitable relief to *prevent irreparable harm*" (emphasis added). In determining whether a plaintiff has made the requisite showing, a court further assesses "whether such harm is likely to occur before the district court rules on the merits." *Greater Yellowstone Coal,* 321 F.3d at 1260. If "a trial on the merits can be conducted before the injury would occur there is no need for interlocutory relief." *Id.* (quoting 11A Wright, Miller, & Kane, *Federal Practice and Procedure*, § 2948.1, at 139-40).

[12] As noted above, the parties are prohibited from citing or referring to the terms of the settlement agreement in any other proceedings, whether judicial or administrative in nature, "except as is necessary to effect the terms of this Settlement Agreement." Defendants cite to a term of the settlement agreement herein to "effect the terms of" the settlement agreement to ensure that Sage uses the settlement funds for health care purposes, as is required by the agreement.

has used $4.5 million for development and planning of a new replacement facility. Sage Motion, p. 22. However, that leaves $117 million of the settlement funds. It is difficult to imagine how it could be facing "dire financial consequences" at this time, given that it has $117 million remaining that must be used for health care services. Further, if those funds are not available "for the reasonable costs for health care services," then the Government will need to determine if Sage is in breach of the settlement agreement.

Furthermore, Sage's allegations of irreparable harm regarding having to use reserve funding for operations; purchasing from non-federal sources; and loss of grant, loan repayment, and CHEF funds, are all speculative and remediable by monetary damages. IHS funding to Sage will resume to Sage if the Court orders it following a decision on the merits, or if IHS and Sage enter into a contract during the 90-day negotiation period.[13]

E. Preliminary relief would harm the public interest, and Plaintiff has not shown its potential injury outweighs the Government's

Finally, to prevail on its motion for preliminary injunctive relief, Plaintiff must show "that the threatened injury outweighs the harms that the preliminary injunction will cause the government or that the injunction, if issued, will not adversely affect the public interest." *Aposhian v. Barr*, 958 F.3d 969, 990 (10th Cir. 2020). "These factors 'merge' when the government is the opposing party." *Id.* at 990-91 (quoting *Nken*, 556 U.S. at 435).

A preliminary injunction in this case would effectively eliminate the 90-day negotiation period that Congress established in 25 U.S.C. § 5321(a)(2). This is not in the public interest.

[13] Sage's claim that it may lose eligibility for grant funding is speculative, and the temporary loss of access for its employees to participate in an IHS loan repayment program would be restored once it enters into a contract with IHS, either following negotiations or a decision on the merits. Sage suffers no harm from not being able to access the Catastrophic Health Emergency Fund during the period it lacks a contract with IHS. That Fund reimburses certain Purchased/Referred Care (PRC) expenses that exceed $25,000. *See* https://www.ihs.gov/PRC/catastrophic-health-emergency-fund-chef/. But Sage is not currently obligated by contract to operate a PRC program for IHS beneficiaries, and the IHS is actually operating the program, so Sage should not be incurring any expenses eligible for reimbursement.

Moreover, Sage itself has essentially admitted that federal funds were fraudulently misspent for years. Requiring the IHS to enter into a contract with Sage when Sage refuses to agree to any provisions that will ensure Sage complies with federal law and ensures that IHS funds will be used for their intended purpose, will not serve the public interest.[14]

V. CONCLUSION

For the foregoing reasons, Sage's request for immediate injunctive relief should be denied. Sage has not satisfied its burden to demonstrate that injunctive relief is warranted. The relief Sage seeks should only be granted, if at all, if Sage prevails on the merits in the underlying dispute.

Respectfully submitted,

/s/ Paula R. Lee 12/1/20

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[14] The IHS, as a federal agency, has a duty not only to serve its beneficiaries, but also to protect the public fisc. *See Brock v. Pierce County*, 476 U.S. 253, 259-60 (1986) (generally recognizing that public agencies by their very nature represent the public interest and, as such, have a duty to protect both the public fisc and the integrity of the government programs they represent).

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2020, I filed the foregoing pleading (Defendants' Opposition to Plaintiff's Motion for Immediate Injunctive Relief) electronically through the CM/ECF system which caused the following parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic Filing:

Lloyd Miller at Lloyd@sonosky.net

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s/ Paula R. Lee 12/1/20

Paula R. Lee

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