

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

RED LAKE BAND OF CHIPPEWA  
INDIANS,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,

Defendants

Civil Action No. 1:06CV01826 (CKK)

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
ON COUNTS I AND III, AND FOR  
PARTIAL SUMMARY JUDGMENT ON COUNT II**

Plaintiff Red Lake Band of Chippewa Indians, pursuant to Fed. R. Civ. P. 56 and LCvR 7(h), respectfully moves the Court for summary judgment on Counts I and III of its Complaint and for partial summary judgment on Count II. The grounds for this Motion are more fully set out in the attached Memorandum of Points and Authorities and Statement of Material Facts as to Which There is No Genuine Dispute, together with the exhibits thereto.

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
ON COUNTS I AND III, AND FOR  
PARTIAL SUMMARY JUDGMENT ON COUNT II**

Plaintiff Red Lake Band of Chippewa Indians ("Tribe") submits this Memorandum of Points and Authorities in Support of its Motion for Summary Judgment on Counts I and III of its Complaint and for Partial Summary Judgment on Count II.

**INTRODUCTION**

This case concerns the Government's repeated, cavalier disregard of contractual commitments it made to the Tribe in a Compact of Self-Governance and associated Multi-Year Funding Agreement pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C § 450, et seq. ("ISDEAA" or the "Act").

**FACTS**

The Tribe is a federally-recognized Indian tribe. (Plaintiff's Statement of Material Facts ("SOF") ¶ 1). On or about January 14, 1997, the Tribe and the United States entered into a Compact of Self-Governance ("Compact") pursuant to the ISDEAA. (SOF ¶ 5; Appendix of Exhibits ("App. Ex.") A). The purpose of the Compact is to transfer control to the Tribe over

funding and decision-making for certain federal programs, services, functions and activities as an effective way to implement the federal policy of government-to-government relations with Indian tribes. (SOF ¶ 6). Pursuant to Article II, Section 3 of the Compact, the Secretary of the Interior or an authorized representative "shall provide to the Tribe the total amount specified in the Annual Agreement incorporated by reference in [the Compact]." (SOF ¶ 7).

On or about November 15, 2004, the Tribe and the United States entered into a Multi-Year Funding Agreement ("Agreement") for 2005-2010 pursuant to the Compact and an attached "Self Governance 2005 Annual Funding Agreement – Reprogramming Request" ("2005 Reprogramming Request"). (SOF ¶ 10; App. Ex. B). The Agreement was executed on behalf of the United States by the Director of the Office of Self-Governance (the "OSG"), which is responsible for administering the tribal self-governance program for the Department of the Interior ("Department"), including Bureau of Indian Affairs ("BIA") programs. (SOF ¶ 3; App. Ex. B, p. 6). The Agreement provides for the Tribe to assume responsibility for various programs, functions, services, and activities specified in the Agreement and the 2005 Reprogramming Request. (SOF ¶ 12; App. Ex. B § 2). In return, "the Secretary [of the Interior] shall make available to the Tribe the total amount of funds negotiated as they are identified in the attached REPROGRAMMING REQUEST for Calendar Year 2005." (SOF ¶ 13; App. Ex. B § 5). The Agreement became effective in 2005 and has a termination date of December 31, 2010. (SOF ¶ 11).

**A. Breaches of the BIA's Commitments for Funding Operations of the Tribe's Juvenile Detention Facility**

In the late 1990s, the Department assumed responsibility to request funds for staffing and operating juvenile detention facilities on Indian reservations, including those facilities constructed with Department of Justice ("DOJ") grant funds. The Tribe used DOJ and BIA grant

funds to design two detention facilities comprising parts of the Red Lake Law Enforcement Complex: a Phase I facility housing medium and minimum security adults and juveniles, and a Phase III facility housing minimum security juveniles in a rehabilitative setting. (SOF ¶ 8). The Tribe then constructed both the Phase I and Phase III facilities using DOJ grant funds. (SOF ¶ 9).

Thereafter, the Tribe and the United States entered into the Agreement. Attached to and incorporated into the Agreement was the 2005 Reprogramming Request that set forth, by line item and program title, the funds to be provided by the United States to the Tribe for 2005. (SOF ¶¶ 10, 14; App. Ex. B). Funding for both the adult and the juvenile detention facilities was addressed in line item 177, which covered "Law Enforcement – NON TPA"<sup>1</sup> and specified that a total of \$4,582,036 would be provided to the Tribe.<sup>2</sup> (SOF ¶ 15; App. Ex. B). This was by far the largest amount for any single line item.

A detailed footnote to this line item – footnote 25 – covered several different substantive issues and set forth additional agreements between the parties with respect to law enforcement funding. It provided that:

The Assistant Secretary – Indian Affairs and the Tribe agree that this amount represents original and historical base-transferred amounts of \$1,413,500 from TPA Law Enforcement – Agency, \$5,283 from TPA Law Enforcement Area, and \$18,799 from Law Enforcement Area, in addition to \$95,000 in base eligible funding from the FY 1999 Law Enforcement Initiative, \$94,000 in base eligible funding from the FY 2000 Law Enforcement Initiative, and \$224,000 in base eligible funding from the 2001 Law Enforcement Initiative. The Assistant Secretary – Indian Affairs agrees to do everything in his power to ensure these amounts are not reduced, and that Self-Governance tribes are treated on an equal

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<sup>1</sup> "TPA" is an acronym for Tribal Priority Allocations, a budget category. Law Enforcement is located within a budget category sometimes called "Other Recurring" or "NON TPA."

<sup>2</sup> The Reprogramming Request contained a number of footnotes to various line items that provided additional information or commentary. In some instances, the footnotes simply set forth the Tribe's position that the funding amount for that particular line item was insufficient and inadequate to meet the needs of the service population. Other footnotes were more lengthy and contained additional substantive agreements between the Tribe and the United States.

footing with BIA Law Enforcement with regard to any additional Law Enforcement funds distributions. The Red Lake Band requests an additional \$1 million for operation of Law Enforcement. Any new law enforcement program funding is to be determined and added to the AFA [the Agreement] based on national distribution methodology developed by the BIA. The OSG and BIA also agree that it [sic] will keep the Tribe closely informed about all activities pertaining to Public Safety and Justice, so that the Tribe can participate to the fullest degree. The OSG and BIA agree that the \$1.555 million obtained in FY 2002 for detention funding is for staffing the Tribes [sic] new [adult] detention facility, and the Tribe cannot staff this facility for just one year. The BIA agrees to assist the Tribe in obtaining \$1,218,482 for operations funding for the Tribes [sic] juvenile correction facility in CY 2005, and to request this amount in the next Presidents [sic] budget. With regard to any new initiatives pertaining to Homeland Security, it is mutually agreed that Red Lake Law Enforcement shall be eligible to participate at the same level as BIA Law Enforcement in any new programs and funding increases. (emphasis added)

(SOF ¶ 16). The \$1,218,482 for funding operations of the Tribe's juvenile detention facility in CY 2005 was part of the \$4,582,036 total funding specified in line item 177. (SOF ¶ 15).

At the time the 2005 Reprogramming Request was negotiated and executed, in the fall of 2004, the next President's budget was for Fiscal Year 2006. (The President's budget for FY 2006 was submitted to Congress on February 7, 2005). (SOF ¶ 21). Thus, the Government's commitment with respect to the juvenile correction facility addressed annual funding of \$1,218,482 in each of Calendar Year 2005 and Fiscal Year 2006.

The Government failed to provide – or to obtain or assist the Tribe in obtaining -- \$1,218,482 in program operations funding for the juvenile facility in CY 2005. (SOF ¶¶ 17-20). The head of the BIA's Office of Justice Services, Christopher Chaney, testified that the BIA did not provide any assistance to the Tribe in obtaining staffing and program operations funding for the facility in CY 2005. (SOF ¶ 18). Patrick Ragsdale, Director of the BIA, stated that he is not aware of any such efforts. (SOF ¶ 19). And Kenneth Reinfeld, the Acting Director of the OSG and the person who had executed the 2005 Reprogramming Request on behalf of the United States, testified that he personally did not make any such efforts. (SOF ¶ 20).

Likewise, the Government did not include a request for \$1,218,482 for the Tribe's juvenile facility in the President's budget for FY 2006. (SOF ¶ 22).

Meanwhile, in January 2006 the Tribe and the Government completed bilateral negotiations on a Fourth Amendment to the Agreement and an associated "Self Governance 2006 Annual Funding Agreement - Reprogramming Request" ("2006 Reprogramming Request"). (SOF ¶ 24). Pursuant to standard procedure, the Tribe's Chairman executed the Fourth Amendment to the Agreement and the 2006 Reprogramming Request on January 19, 2006, after negotiations were concluded, and then submitted them to the BIA for execution. (SOF ¶ 28).

Line item 176 of the 2006 Reprogramming Request addressed "Law Enforcement – NON TPA." It specified that a total of \$4,554,258 would be provided to the Tribe. (SOF ¶ 25). The same footnote 25 was appended to this line item as in the 2005 Reprogramming Request. This footnote was identical to the previous one except for two changes. First, the sentence regarding funding for the juvenile correction facility was updated to state that "The BIA agrees to assist the Tribe in obtaining \$1,218,482 for operations funding for the Tribes [sic] juvenile correction facility in CY 2006, and further agrees to request \$1,599,225 for operation of the Tribes [sic] juvenile corrections facility in the Presidents [sic] FY 2007 budget." Second, a new final sentence was added to the footnote which provided that "The BIA and OSG agree that the Red Lake Reservation be designated as a high crime area, and that the Tribe shall receive extraordinary consideration for high crimes area funding, in light of the March 21, 2005 shooting incident at Red Lake High School."<sup>3</sup> (SOF ¶ 26).

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<sup>3</sup> In this highly publicized incident, commonly referred to as the "Red Lake High School massacre," a 16-year-old Red Lake Indian shot and killed seven people on the Reservation school campus, comprising five students, one teacher and an unarmed security guard, and wounded multiple others. The shooting ended when the gunman exchanged fire with police, then retreated to a classroom where he took his own life. The gunman had previously killed his paternal grandfather and the grandfather's girlfriend. (SOF ¶ 27).

After receiving the 2006 Reprogramming Request from the Tribe, Mr. Reinfeld, the Acting Director of the OSG, struck out by hand two sentences in footnote 25 and added the hand-written notation that "These sentences are not agreed to by the Secretary." (SOF ¶ 30). The two sentences were the new final sentence to the footnote and the updated sentence stating that "The BIA agrees to assist the Tribe in obtaining \$1,218,482 for operations funding for the Tribes [sic] juvenile correction facility in CY 2006, and further agrees to request \$1,599,225 for operation of the Tribes [sic] juvenile corrections facility in the Presidents [sic] FY 2007 budget." (SOF ¶ 30). Mr. Reinfeld executed the Fourth Amendment to the Agreement and the 2006 Reprogramming Request on or about January 23, 2006, and sent them back to the Tribe. (SOF ¶ 29). The Tribe never agreed to the unilateral changes to footnote 25 to the 2006 Reprogramming Request made by Mr. Reinfeld. (SOF ¶ 31).

The Department's budgets for FY 2005 and FY 2006 included significant, general funding increases for staffing and operations of Indian country detention facilities. (SOF ¶ 32). Congress appropriated \$180,063,000 for BIA's Public Safety and Justice law enforcement and detention programs for FY 2005 (including \$2,328,000 for the Indian Police Academy), an increase of \$7,568,000 over what was appropriated for the same purposes in FY 2004. (SOF ¶ 33). The President's budget for FY 2006 requested \$192,265,000 (including \$2,378,000 for the Indian Police Academy) for BIA's Public Safety and Justice law enforcement programs, including funding for the operation of detention services, programs, and facilities (SOF ¶ 34). Congress increased this FY 2006 funding by an additional \$1.1 million, appropriating a total of \$193,377,000, an increase of \$13,314,000 over what was appropriated for the same purposes in FY 2005. (SOF ¶ 35).

On February 17, 2006, counsel for the Tribe submitted to Mr. Reinfeld at the OSG a certified claim for damages arising from the Department's breaches of the Agreement, namely failing to obtain or assist the Tribe in obtaining \$1,218,482 in programs operation funding for the Tribe's juvenile corrections facility in CY 2005 and failing to include or request \$1,218,482 in programs operation funding for the facility in the FY 2006 budget. (SOF ¶ 38). BIA Director W. Patrick Ragsdale responded to this claim in a letter dated June 15, 2006, stating that "It is not possible to provide this funding without decreasing allocations for other law enforcement operations nationwide which would adversely impact other tribes. However, in compliance with the [Agreement], I am instructing OLES to make a renewed effort to assist the Tribe in finding sources for operational funding (\$1,218,482) for the Tribe's new juvenile facility." (SOF ¶ 39). No such funding was ever forthcoming. (SOF ¶ 40).

**B. Breach of the BIA's Obligation to Notify the Tribe of Additional Funding**

Section 17 of the Agreement and of the Fourth Amendment to the Agreement provides:

**Additional Funds** - If the Midwest Region Office of the BIA receives notice of the availability of any additional funding in any fiscal year for any purpose, including any unspent funds, that the Tribe is eligible to apply for or receive, then it must notify the Tribe as soon as possible about such funds so that the Tribe may access or apply for those funds. The Midwest Region Office commits to keeping the Tribe informed of the existence of funding immediately upon learning of its existence.

(emphasis in original). (SOF ¶ 41).

Likewise, Article IV, Section 4 of the Compact states, "The Tribe shall be eligible for new programs, activities, services and functions on the same basis as other tribes and the Secretary or his authorized representative shall advise the Tribe of the funding available for such programs." (SOF ¶ 42; App. Ex. A).



In September 2006, the BIA Midwest Regional Office received and distributed approximately \$200,000 in FY 2006 year-end funds to five of the thirty-five Indian tribes and tribal organizations within the BIA Midwest Region. (SOF ¶ 43). The Tribe was not informed about the availability of these funds until weeks after they were distributed. (SOF ¶ 44). The Tribe did not receive any of these year-end funds. (SOF ¶ 45).

One month after the BIA distributed these year-end funds, on October 18, 2006, the Tribe was informed by the BIA Midwest Regional Office that the BIA Central Office had made a decision to distribute the year-end funds only to tribes having contracts under Title I of P.L. 93-638 (codified at 25 U.S. §§ 450f), and not to tribes – like the Tribe – having contracts under Title IV of P.L. 93-638 (codified at 25 U.S. §§ 458cc). (SOF ¶ 46). BIA Director Ragsdale testified that he does not dispute that self-governance tribes – like the Tribe -- were eligible to receive the end-of-year money. (SOF ¶ 47). He testified that "Self-governance tribes were eligible for funds, but my understanding is is [sic] that the money had to be obligated within a very short period of time and the Bureau's mechanism through the Office of Self-Governance could not mechanically do that. So the self-governance tribes were excluded from that – from that potential allocation." (SOF ¶ 48).

**C. Breach of the BIA's Obligation to Provide a Pay Cost Report to the Tribe**

Footnote 15 to the 2006 Reprogramming Request addresses the issue of pay cost adjustments for Tribal employees and provides in relevant part:

The BIA will make every effort to treat Red Lake Tribal employees the same as all other Tribal and Federal employees for purposes of pay cost adjustments in FY 2006. ... Further, the BIA and OSG agree to provide to the Tribe by April 1, 2006, a detailed Pay Cost analysis for the years 2003-2006, showing what the Tribe was eligible to receive each year based upon Pay Cost data the Tribe provided, the actual amount received, and the shortfall or unfunded amount. This analysis will include Law Enforcement. The analysis will separately show the

total amounts received each year for Self Governance tribes, contracting tribes, and BIA programs, as well as the total amounts the BIA was eligible to receive for these programs based upon data it compiled. The above information has been requested by the Tribe to verify whether Red Lake, other Self Governance tribes, contracting tribes, and BIA programs were treated the same way with regard to the distribution of Pay Costs for the years 2003-2006.

(emphasis added). (SOF ¶ 49).

The Department failed to provide a detailed Pay Cost analysis to the Tribe by April 1, 2006, and has yet to provide it to the Tribe. (SOF ¶ 50).<sup>4</sup>

#### **D. BIA's Obligation to Provide Pay Cost Funding to the Tribe**

As set forth above, footnote 15 to the 2006 Reprogramming Request provides that "[t]he BIA will make every effort to treat Red Lake Tribal employees the same as all other Tribal and Federal employees for purposes of pay cost adjustments in FY 2006 ...." But, although all of the BIA's fixed costs, including pay costs, were funded for FY 2006, the Tribe believes that the BIA did not fully fund the Tribe's pay costs. This is the basis for Count IV of the Complaint.

In discovery, Defendants have stated that, upon review of the estimated pay cost increases effective in FY 2006, the BIA believes that an error was made and that the Tribe will be owed an additional distribution. (SOF ¶ 51).<sup>5</sup> This issue, however, cannot be resolved until the Government provides the Tribe with the detailed Pay Cost analysis for the years 2003-2006. The Government's ongoing breach of its duty to provide this analysis prevents a determination of whether the Government is also breaching its obligation to provide the requisite funding so that Tribal employees are treated the same as Federal employees for purposes of pay cost adjustments in FY 2006. Since a pay cost adjustment, once it is properly applied, impacts pay rates and

<sup>4</sup> Defendants stated in their discovery responses dated October 24, 2007, that the Department anticipated it would be able to complete the Pay Cost analysis and provide additional funds to the Tribe based on that analysis within 60 days, *i.e.* by December 24, 2007. (SOF ¶ 52). This would have been almost 21 months late. Another six months later, *i.e.* some 27 months after the due date, the analysis still has not been provided to the Tribe.

<sup>5</sup> See footnote 4 above.

adjustments in successive years, the Pay Cost analysis to be provided by the Government could lead the Tribe to seek relief for 2003 and for each of the following years and to amend its complaint for that purpose.

## **ARGUMENT**

### **A. Standard for Summary Judgment**

Pursuant to Fed. R. Civ. P. 56(c), a party seeking summary judgment must demonstrate on the basis of its evidentiary submissions “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). While the court must draw all justifiable inferences in favor of the non-moving party, Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520 (1991), the non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). “[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. at 247-48.

Summary judgment is appropriate where the dispute concerns the proper interpretation of a public contract, a question of law. Olympus Corp. v. United States, 98 F.3d 1314, 1316 (Fed.Cir. 1996). Here there is no genuine issue as to any material fact and the Tribe is entitled to judgment as a matter of law on its breach of contract claims. See Holcomb v. Powell, 433 F.3d 889, 895 (D.C. Cir. 2006).

### **B. BIA's Breaches of Its Promises for Funding Operations of the Juvenile Facility (Count I)**

The Compact, together with the Agreement and the 2005 Reprogramming Request, constitutes a contract. “For the purposes of [25 U.S.C. § 450m-1 – the ISDEAA provision which

authorizes civil actions for contract disputes and claims], the term 'contract' shall include compacts and funding agreements entered into under this part." 25 U.S.C. § 458aaa-10(a).

The Supreme Court has recently emphasized that funding promises made in contracts under the ISDEAA are every bit as binding as other contractual promises.

Congress, *in respect to the binding nature of a promise*, meant to treat alike promises made under the Act and ordinary contractual promises (say, those made in procurement contracts). ... Further, the Act says that if the Government refuses to pay, then contractors are entitled to 'money damages' in accordance with the Contract Disputes Act."

Cherokee Nation of Oklahoma v. Leavitt, 543 U.S. 631, 639 (2005) (emphasis in original).

In addition, the Supreme Court noted that, "as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of 'insufficient appropriations,' even if the contract uses language such as 'subject to the availability of appropriations,' and even if an agency's total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made." Id. at 637 (emphasis in original). As the Federal Circuit stated succinctly, "[t]he Secretary d[oes] not have the discretion to breach his contracts with [a tribe]." Thompson v. Cherokee Nation of Oklahoma, 334 F.3d 1075, 1088 (Fed. Cir. 2003), aff'd sub nom. Cherokee Nation of Oklahoma v. Leavitt, 543 U.S. 631 (2005).

Congress amended the ISDEAA in 1988 specifically to address tribal funding problems regarding administrative costs of federal programs subject to self-determination contracts. Samish Indian Nation v. United States, 419 F.3d 1355, 1366 (Fed. Cir. 2005). The Act must be construed "to advance its remedial purpose, namely, removing the financial burden incurred by tribes and tribal organizations when implementing federal programs under self-determination contracts." Id. at 1367; see also Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1462 (10th Cir.

1997). This same rule applies in construing contracts entered into under the ISDEAA – the contract must be liberally construed for the benefit of the tribe. See 25 U.S.C. § 450l.<sup>6</sup>

In this case, the contract committed the BIA to provide \$4,582,036 to the Tribe for law enforcement in Calendar Year 2005, including \$1,218,482 for operating the juvenile correction facility. The footnote to this commitment added that "[t]he BIA agrees to assist the Tribe in obtaining \$1,218,482 for operations funding for the Tribes [sic] juvenile correction facility in CY 2005, and to request this amount in the next Presidents [sic] budget." As discussed above, this devolves into two distinct promises: (1) to provide \$1,218,482 for operations funding for the juvenile facility in CY 2005, and (2) to request \$1,218,482 for operations funding for the facility in the President's budget for FY 2006. The Government failed to perform both of these promises.

#### **1. BIA's failure to provide funding for CY 2005**

The Agreement provides that "the Secretary [of the Interior] shall make available to the Tribe the total amount of funds negotiated as they are identified in the attached REPROGRAMMING REQUEST for Calendar Year 2005." (SOF ¶ 13; App. Ex. B § 5). The total amount of funds negotiated and identified for law enforcement in line item 177 of the 2005 Reprogramming Request was \$4,582,036. Yet the Government failed to provide this amount to the Tribe; the Government provided some \$1,218,482 less. This funding shortfall was a breach of contract.

The Government's failure is not excused by footnote 25, which stated that "[t]he BIA agrees to assist the Tribe in obtaining \$1,218,482 for operations funding for the Tribes [sic]

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<sup>6</sup> In 1994 Congress amended the ISDEAA and specified a model self-determination agreement to be used between the Government and Indian Tribes. Congress mandated that each self-determination contract entered into under the ISDEAA shall contain, or incorporate by reference, the provisions of the model agreement. 25 U.S.C. § 450l(a). The model agreement, in turn, provides that "[e]ach provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor [i.e. the Tribe]." 25 U.S.C. § 450l(c).

juvenile correction facility in CY 2005 [.]” This footnote does not negate the funding commitment made in line item 177. See Segar v. Mukasey, 508 F.3d 16, 24 (D.C. Cir. 2007) (footnote cannot be construed to read text out of a contract). Nor does it render the Government's obligation elective or discretionary in nature. Bilateral contracts should not be interpreted so as to place one party at the mere will or mercy of the other. S.A. Healy Co. v. United States, 576 F.2d 299, 305 (Ct.Cl. 1978). Thus, the courts have refused to subject government contractors "to the 'mere will or mercy' of the procuring agency, insofar as the duty to make reasonable budget requests is concerned." Id. And, as discussed above, "[t]he Secretary d[oes] not have the discretion to breach his [ISDEAA] contracts with [a tribe]." Thompson v. Cherokee Nation of Oklahoma, 334 F.3d at 1088.

At a minimum, the footnote language must be construed as a promise that the Government would make its best efforts to obtain the specified funding for the Tribe. Every contract contains an implied covenant of good faith and fair dealing, and the United States, when it enters into contracts, is subject to this covenant. First Nationwide Bank v. United States, 431 F.3d 1342, 1349 (Fed.Cir. 2005). This covenant "requires a party to respect and implement the contract in accordance with its terms...." Id. at 1350. Good faith requires a party to make its best efforts to perform the contract. See Hughes Communications Galaxy, Inc. v. United States, 47 Fed.Cl. 236, 239 (2000) (the "best efforts" standard has been held to be equivalent to that of good faith).

In this case, the Government plainly failed to make its best efforts to obtain the funding for the Tribe. In fact, the Government made no efforts to obtain the funding. Accordingly, the Government breached its contract. See Mergentime Corp. v. WMATA, 2006 WL 416177 at \*78 (D.D.C. 2006) (even if construction schedule was nothing more than a set of "best efforts" dates,

contractor flunked its obligation to make its best efforts to meet the schedule). The Tribe is entitled to recover damages for this breach of contract.<sup>7</sup>

"Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed." Restatement (Second) of Contracts § 347, cmt. a (1981). Accordingly, in a situation where a defendant breached a "best efforts" obligation, a damages award can be based on the quantity of revenue that plaintiff reasonably anticipated that the defendant's best efforts would have produced. See Lexington Products Ltd. v. B.D. Communications, Inc., 677 F.2d 251, 253 (2d Cir. 1982). Here, the Tribe reasonably anticipated that the Government's best efforts would result in obtaining the promised amount of funding. The Government evidently agreed, since it undertook the commitment. Thus, \$1,218,482 is the proper quantum of damages.<sup>8</sup>

## **2. BIA's failure to request funding in the FY 2006 budget**

The second promise the Government made to the Tribe was that it would request \$1,218,482 for operations funding for the Tribe's juvenile facility in the President's budget for FY 2006. This promise was not qualified in any way. The Government failed to perform this promise, thereby breaching its contract with the Tribe.

Once again, the appropriate measure of damages is the amount of money that would place the Tribe in as good a position as it would have been in had the contract been performed.

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<sup>7</sup> Pursuant to 25 U.S.C. § 450m-1, a tribal contractor may secure damages in a District Court or an order requiring the agency to pay amounts required by the tribe's contract. See S. Rep. No. 100-274 at 34 (1988), reprinted in 1988 U.S.C.C.A.N. 2620, 2653. In this case, the relief the Tribe seeks is more in the nature of damages than specific performance.

<sup>8</sup> In addition, the Tribe is entitled to receive interest on its damages, calculated from February 17, 2006. 41 U.S.C. § 611.



The undisputed evidence plainly establishes that, had this funding been requested in the President's budget, as promised, the money would have been appropriated by Congress. Not only did Congress appropriate all the lump sum funding for Indian law enforcement requested in the President's FY 2006 budget (\$192,265,000) but it increased that amount by an additional \$1.1 million. The Tribe is therefore entitled to damages in the amount of \$1,218,482.<sup>9</sup>

**C. BIA's Failure to Notify the Tribe of Additional Funding  
(Count II)**

The Agreement also provided that the Midwest Regional Office of the BIA would notify the Tribe immediately about the availability of any additional funding that the Tribe is eligible to apply for or receive. (SOF ¶ 41; Agreement § 17). It is undisputed that, in September 2006, the Midwest Regional Office received and then distributed approximately \$200,000 in end-of-fiscal-year funds to five other tribes and tribal organizations in the Midwest Region without advising the Tribe of their availability. In so doing, the Government breached its contractual obligation to the Tribe. As a result, the Tribe was precluded from the opportunity to obtain a share of this additional funding for which it was eligible.

The Tribe seeks partial summary judgment on the issue of liability with respect to this breach. Establishing the amount of damages may require a brief trial. The Tribe's damages may not be calculable with mathematical accuracy, but this is not required. See Restatement (Second) of Contracts § 352 cmt. a (1981). The Tribe need only provide a reasonable basis for computing damages even if it is approximate and, if need be, a jury verdict method can be used when no more reliable method is available. See Celeron Gathering Corp. v. United States, 34 Fed.Cl. 745, 753 (1996). "[S]ince [the Government] produced the damage, it must bear the uncertainty of proof." Perma Research and Development v. Singer Co., 542 F.2d 111, 116 (2d Cir. 1976).

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<sup>9</sup> The Tribe is also entitled to receive interest on these damages.



**D. BIA's Failure to Provide the Tribe With a Pay Cost Report  
(Count III)**

As recounted above, in January 2006 the Tribe and the Government completed negotiations on a Reprogramming Request for 2006 to be incorporated into the Agreement. The Tribe's representative executed this Reprogramming Request after it was completed and then submitted it to the BIA for execution. Mr. Reinfeld, the Acting Director of the OSG, executed this agreement on behalf of the Government on or about January 23, 2006. In so doing, he struck out two sentences in footnote 25 and added the notation that "These sentences are not agreed to by the Secretary." The two sentences related to operations funding for the Tribe's juvenile correction facility and to designating the Red Lake Reservation as a high crime area.<sup>10</sup> The Government thereby accepted and approved the Reprogramming Request for 2006 except for those two sentences. See 25 C.F.R. §§ 900.25 and 900.26.

Among the obligations which the Government agreed to undertake pursuant to this Reprogramming Request was to provide to the Tribe by April 1, 2006, a detailed Pay Cost analysis for the years 2003-2006, showing the amount the Tribe was eligible to receive each year based upon Pay Cost data the Tribe provided, the actual amount received, and the shortfall or unfunded amount. It is undisputed that the Government has not yet provided this Pay Cost analysis to the Tribe, more than two years after it was due.

Accordingly, the Tribe is entitled to specific performance of this contractual obligation. See 25 U.S.C. § 450m-1(a) (authorizing injunctive relief in actions under the ISDEAA); S. Rep. No. 100-274 at 34 (1988), reprinted at 1988 U.S.C.C.A.N. 2620, 2653 (the ISDEAA, as

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<sup>10</sup> The Government's declination of these provisions did not comport with applicable legal requirements and so was ineffective. See Cheyenne River Sioux Tribe v. Kempthorne, 496 F.Supp.2d 1059, 1067-68 (D.S.D. 2007). The Court need not address this issue, however, for purposes of the instant motion.

amended, "affords self-determination contractors the opportunity to secure injunctive relief ... for violations of the Self-Determination Act (or the terms of contracts under the Act)").

### **CONCLUSION**

For the foregoing reasons, Plaintiff's Motion for Summary Judgment on Counts I and III, and for Partial Summary Judgment on Count II should be granted. Judgment should be entered on behalf of the Tribe and against the Defendants as follows:

(i) on Count I, an award of money damages in the amount of \$2,436,964 plus interest calculated from February 17, 2006;

(ii) on Count II, a judgment that in September 2006 the Defendants breached their duty to notify the Tribe of the availability of approximately \$200,000 in end-of-fiscal-year funds that the Tribe was eligible to apply for and receive;

(iii) on Count III, injunctive relief ordering the Secretary to provide the Tribe forthwith a detailed pay cost analysis for the years 2003-2006.

June 18, 2008.

Respectfully submitted,

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By: /s/ Philip Baker-Shenk

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

RED LAKE BAND OF CHIPPEWA	)	
INDIANS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:06CV01826 (CKK)
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants	)	

**PLAINTIFF'S STATEMENT OF MATERIAL FACTS**  
**AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to LCvR 7(h) and 56.1, Plaintiff Red Lake Band of Chippewa Indians (the "Tribe"), by counsel, submits the following statement of material facts as to which there is no genuine issue in support of its Motion for Summary Judgment on Counts I and III, and for Partial Summary Judgment on Count II, filed herewith.

1. The Tribe is a federally recognized Indian tribe. (Answer, p. 1 at ¶ 1).
2. Defendant Dirk Kempthorne is Secretary of the U.S. Department of the Interior (the "Department") and has overall responsibility for administering the Department as well as overseeing its constituent agencies, including the Bureau of Indian Affairs (BIA), and managing certain Indian affairs and appropriations. (Answer, p. 2 at ¶ 2).
3. The Office of Self-Governance (the "OSG") is the office within the Department responsible for administering the Secretary's tribal self-governance program, including BIA programs. (Answer, p. 2 at ¶ 5).

4. Kenneth Reinfeld at times relevant to the Complaint functioned as the Acting Director of the OSG and was responsible for executing the functions and duties of the OSG. (Answer, p. 2 at ¶ 6).
5. On or about January 14, 1997, the Tribe and the United States entered into a Compact of Self-Governance ("Compact") pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C § 450, et seq. (App. Ex. A).<sup>1</sup>
6. The purpose of the Compact is to transfer control to the Tribe over funding and decision-making for certain federal programs, services, functions and activities as an effective way to implement the federal policy of government-to-government relations with Indian tribes. (App. Ex. A – Compact, Article I § 2(a)).
7. Pursuant to Article II, Section 3 of the Compact, the Secretary of the Interior or an authorized representative "shall provide to the Tribe the total amount specified in the Annual Agreement incorporated by reference in [the Compact]." (App. Ex. A – Compact, Article II § 3).
8. The Tribe used Department of Justice ("DOJ") and BIA grant funds to design two detention facilities comprising parts of the Red Lake Law Enforcement Complex: a Phase I facility housing medium and minimum security adults and juveniles, and a Phase III facility housing minimum security juveniles in a rehabilitative setting. (App. Ex. D – Deposition Transcript of John N. Rever, July 20, 2007, pp. 29:5-30:5; Ex. F; Ex. G at Grant Manager's Memorandum, Pt. I: Project Summary, p. 1 of 1, § 15; Ex. H).

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<sup>1</sup> A separate Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment on Counts I and III, and for Partial Summary Judgment on Count II is filed herewith. Record excerpts contained in the Appendix of Exhibits are cited herein as "App. Ex. \_\_\_."

9. The Tribe subsequently constructed both the Phase I and Phase III facilities using DOJ grant funds. (App. Ex. I – Deposition Transcript of Kenneth D. Reinfeld, Ph.D., August 21, 2007 ("Reinfeld Depo."), pp. 17:1-9, 19:11-20:2).
10. On or about November 15, 2004, pursuant to the Compact, the Tribe and the United States entered into a Multi-Year Funding Agreement ("Agreement") for 2005-2010 and an attached "Self Governance 2005 Annual Funding Agreement - Reprogramming Request" ("2005 Reprogramming Request") that set forth, by line item and program title, the funds to be provided by the United States to the Tribe for 2005. (App. Ex. B; Ex. I – Reinfeld Depo., pp. 36:14-17, 42:7-9).
11. The Agreement became effective in 2005 and has a termination date of December 31, 2010. (Answer, p. 3 at ¶ 12; App. Ex. B – Agreement, p. 5 at § 21).
12. The Agreement provides for the Tribe to assume responsibility for various programs, functions, services, and activities specified in the Agreement and the 2005 Reprogramming Request. (App. Ex. B – Agreement, p. 1 at § 2).
13. The Agreement further provides that "the Secretary [of the Interior] shall make available to the Tribe the total amount of funds negotiated as they are identified in the attached REPROGRAMMING REQUEST for Calendar Year 2005." (App. Ex. B – Agreement, p. 2 at § 5).
14. The 2005 Reprogramming Request set forth, by line item and program title, the funds to be provided to the Tribe for 2005. (App. Ex. B – 2005 Reprogramming Request).
15. Funding for both the adult and the juvenile detention facilities was addressed in line item 177 of the 2005 Reprogramming Request, which covered "Law Enforcement – NON TPA" and specified that a total of \$4,582,036 would be provided to the Tribe,

including \$1,218,482 for funding operations of the Tribe's juvenile detention facility in CY 2005. (App. Ex. B – 2005 Reprogramming Request, p. 2; Ex. M – Declaration of David Conner, ¶ 4).

16. A footnote to line item 177 – footnote 25 – provided that:

The Assistant Secretary – Indian Affairs and the Tribe agree that this amount represents original and historical base-transferred amounts of \$1,413,500 from TPA Law Enforcement – Agency, \$5,283 from TPA Law Enforcement Area, and \$18,799 from Law Enforcement Area, in addition to \$95,000 in base eligible funding from the FY 1999 Law Enforcement Initiative, \$94,000 in base eligible funding from the FY 2000 Law Enforcement Initiative, and \$224,000 in base eligible funding from the 2001 Law Enforcement Initiative. The Assistant Secretary – Indian Affairs agrees to do everything in his power to ensure these amounts are not reduced, and that Self-Governance tribes are treated on an equal footing with BIA Law Enforcement with regard to any additional Law Enforcement funds distributions. The Red Lake Band requests an additional \$1 million for operation of Law Enforcement. Any new law enforcement program funding is to be determined and added to the AFA [the Agreement] based on national distribution methodology developed by the BIA. The OSG and BIA also agree that it [sic] will keep the Tribe closely informed about all activities pertaining to Public Safety and Justice, so that the Tribe can participate to the fullest degree. The OSG and BIA agree that the \$1.555 million obtained in FY 2002 for detention funding is for staffing the Tribes [sic] new [adult] detention facility, and the Tribe cannot staff this facility for just one year. The BIA agrees to assist the Tribe in obtaining \$1,218,482 for operations funding for the Tribes [sic] juvenile correction facility in CY 2005, and to request this amount in the next Presidents [sic] budget. With regard to any new initiatives pertaining to Homeland Security, it is mutually agreed that Red Lake Law Enforcement shall be eligible to participate at the same level as BIA Law Enforcement in any new programs and funding increases.

(emphasis added). (App. Ex. B – 2005 Reprogramming Request, pp. 5-6 n. 25).

17. The Government did not provide the Tribe \$1,218,482 in program operations funding for the juvenile facility in CY 2005. (App. Ex. K – Deposition Transcript of W. Patrick Ragsdale, July 11, 2007 ("Ragsdale Depo."), p. 39:1-8; Ex. I – Reinfeld Depo., p. 41:1-5; Ex. E – Deposition Transcript of Christopher Chaney, August 30, 2007 ("Chaney Depo."), pp. 71:2-8, 80:9-14).

18. The head of the BIA's Office of Justice Services, Christopher Chaney, testified that the BIA did not provide any assistance to the Tribe in obtaining staffing and program operations funding for the facility in CY 2005. (App. Ex. E – Chaney Depo., p. 72:5-14).
19. Patrick Ragsdale, Director of the BIA, testified that he is not aware of any efforts by the BIA to obtain staffing and program operations funding for the Tribe's juvenile facility for CY 2005. (App. Ex. K – Ragsdale Depo., pp. 39:9-40:22).
20. Kenneth Reinfeld, the Acting Director of the OSG and the person who executed the 2005 Reprogramming Request on behalf of the United States, testified that he personally did not make any efforts to obtain staffing and program operations funding for the Tribe's juvenile facility for CY 2005. (App. Ex. I – Reinfeld Depo., p. 41:6-12).
21. At the time the 2005 Reprogramming Request was negotiated and executed, in the fall of 2004, the next President's budget was for Fiscal Year 2006. The President's budget for FY 2006 was submitted to Congress on February 7, 2005. (App. Ex. P; App. Ex. Q, p. 1).
22. The Government did not include a request for \$1,218,482 for the Tribe's juvenile facility in the President's budget for FY 2006. (App. Ex. E – Cheney Depo., p. 80:3-8; App. Ex. O - Defendants' Responses to Plaintiff's First Set of Interrogatories ("First Interrogatory Responses"), p. 5-6 at Response to Interrogatory No. 4).
23. The Government did not include a request for \$1,218,482 for the Tribe's juvenile facility in the President's budget for FY 2007. (App. Ex. E – Cheney Depo., p. 80:3-

8; App. Ex. O - First Interrogatory Responses, p. 5-6 at Response to Interrogatory No. 4).

24. In January 2006 the Tribe and the Government completed bilateral negotiations on a Fourth Amendment to the Multi-Year Funding Agreement for 2005-2010 ("Fourth Amendment") and an associated "Self Governance 2006 Annual Funding Agreement - Reprogramming Request" ("2006 Reprogramming Request"). (App. Ex. L – Fourth Amendment and attached 2006 Reprogramming Request; Ex. M – Declaration of David Conner, ¶ 6).
25. Line item 176 of this 2006 Reprogramming Request addressed "Law Enforcement – NON TPA" and specified that a total of \$4,554,258 would be provided to the Tribe. (App. Ex. L – 2006 Reprogramming Request, p. 2).
26. The same footnote 25 was appended to this line item as in the 2005 Reprogramming Request. This footnote was identical to the previous one except for two changes. First, the sentence regarding funding for the juvenile correction facility was updated to state that "The BIA agrees to assist the Tribe in obtaining \$1,218,482 for operations funding for the Tribes [sic] juvenile correction facility in CY 2006, and further agrees to request \$1,599,225 for operation of the Tribes [sic] juvenile corrections facility in the Presidents [sic] FY 2007 budget." Second, a new final sentence was added to the footnote which provided that "The BIA and OSG agree that the Red Lake Reservation be designated as a high crime area, and that the Tribe shall receive extraordinary consideration for high crimes area funding, in light of the March 21, 2005 shooting incident at Red Lake High School." (App. Ex. L – 2006 Reprogramming Request, p. 4 n. 25).



27. The reference to "the March 21, 2005 shooting incident at Red Lake High School" in the final sentence of footnote 25 referred to the highly-publicized incident, commonly referred to as the "Red Lake High School massacre," in which a 16-year-old Red Lake Indian shot and killed seven people on the Reservation school campus, comprising five students, one teacher and an unarmed security guard, and wounded multiple others. The shooting ended when the gunman exchanged fire with police, then retreated to a classroom where he took his own life. The gunman had previously killed his paternal grandfather and the grandfather's girlfriend. (Christopher Lee and Shankar Vedantam, Minn. Rampage Leaves 10 Dead; Dozens are Shot on Reservation, Most at School; Suspect, Grandfather Die, Washington Post, Mar. 22, 2005, at A1; Sylvia Moreno, Slain Guard Called a Hero for Actions at Minn. School, Washington Post, Mar. 24, 2005, at A1).
28. Pursuant to standard procedure, the Tribe's Chairman executed the Fourth Amendment to the Agreement and the 2006 Reprogramming Request on January 19, 2006, after negotiations were concluded, and then submitted them to the BIA for execution. (App. Ex. M – Declaration of David Conner, ¶ 6).
29. Kenneth Reinfeld, the Acting Director of the OSG, executed the Fourth Amendment to the Agreement and the 2006 Reprogramming Request on or about January 23, 2006, and sent them back to the Tribe. (App. Ex. L – Fourth Amendment, p. 6, and 2006 Reprogramming Request, p. 2; Ex. I – Reinfeld Depo., pp. 44:11-15, 49:5-7; Ex. M – Declaration of David Conner, ¶ 8).
30. After receiving the 2006 Reprogramming Request from the Tribe, Mr. Reinfeld, the Acting Director of the OSG, struck out by hand two sentences in footnote 25 and

added the hand-written notation that "These sentences are not agreed to by the Secretary." The two sentences were the new final sentence to the footnote and the updated sentence stating that "The BIA agrees to assist the Tribe in obtaining \$1,218,482 for operations funding for the Tribes [sic] juvenile correction facility in CY 2006, and further agrees to request \$1,599,225 for operation of the Tribes [sic] juvenile corrections facility in the Presidents [sic] FY 2007 budget." (App. Ex. L – 2006 Reprogramming Request, p. 4 n. 25; Ex. I – Reinfeld Depo., pp. 36:14-17, 38:22-39:9, 44:11-15, 45:9-46:15; Ex. M – Declaration of David Conner, ¶ 8).

31. The Tribe never agreed to the unilateral changes to footnote 25 to the 2006 Reprogramming Request made by Mr. Reinfeld. (App. Ex. M – Declaration of David Conner, ¶ 9).
32. The Department's budgets for FY 2005 and FY 2006 included significant, general funding increases for staffing and operations of Indian country detention facilities. (App. Ex. E – Chaney Depo., pp. 47:4-15, 48:12-17).
33. Congress appropriated \$180,063,000 for BIA's Public Safety and Justice law enforcement and detention programs for FY 2005 (including \$2,328,000 for the Indian Police Academy), an increase of \$7,568,000 over what was appropriated for the same purposes in FY 2004. (App. Ex. R).
34. The President's budget for FY 2006 requested \$192,265,000 (including \$2,378,000 for the Indian Police Academy) for BIA Public Safety and Justice law enforcement programs, including funding for the operation of detention services, programs, and facilities. (App. Ex. R).

35. Congress increased this FY 2006 funding by an additional \$1.1 million, appropriating a total of \$193,377,000, an increase of \$13,314,000 over what was appropriated for the same purposes in FY 2005. (App. Ex. S).
36. A lump sum of \$201,620,000 was requested in the President's budget for FY 2007 for BIA Public Safety and Justice law enforcement programs, including funding for the operation of detention services, programs, and facilities. (App. Ex. S).
37. Congress increased the funding over and above this requested amount, appropriating a total of \$204,454,000 for FY 2007, an increase of \$11,077,000 over what was appropriated for the same purposes in FY 2006. (App. Ex. T).
38. On February 17, 2006, counsel for the Tribe submitted to Mr. Reinfeld at the OSG a certified claim for damages arising from the Department's breaches of the Agreement, namely failing to obtain or assist the Tribe in obtaining \$1,218,482 in programs operation funding for the Tribe's juvenile corrections facility in CY 2005 and failing to include or request \$1,218,482 in programs operation funding for the facility in the FY 2006 budget. (Answer, p. 5 at ¶¶ 26-27; App. Ex. J – Defendants' Responses to Plaintiff's First Requests for Admission ("First RFA Responses"), pp. 15-16 at ¶¶ 24-25).
39. BIA Director W. Patrick Ragsdale responded to this claim in a letter dated June 15, 2006, stating that "It is not possible to provide this funding without decreasing allocations for other law enforcement operations nationwide which would adversely impact other tribes. However, in compliance with the [Agreement], I am instructing OLES to make a renewed effort to assist the Tribe in finding sources for operational funding (\$1,218,482) for the Tribe's new juvenile facility." (App. Ex. N, p. 2).

40. No federal funding for the Tribe's juvenile facility was ever provided for CY 2005, FY 2006, or FY 2007. (App. Ex. I – Reinfeld Depo., pp. 41:1-5, 43:13-19; Ex. E – Chaney Depo., pp. 80:9-17, 89:3-13; Ex. M – Declaration of David Conner, ¶ 5).

41. Section 17 of the Agreement and of the Fourth Amendment provides:

**Additional Funds** - If the Midwest Region Office of the BIA receives notice of the availability of any additional funding in any fiscal year for any purpose, including any unspent funds, that the Tribe is eligible to apply for or receive, then it must notify the Tribe as soon as possible about such funds so that the Tribe may access or apply for those funds. The Midwest Region Office commits to keeping the Tribe informed of the existence of funding immediately upon learning of its existence.

(emphasis in original). (App. Ex. B – Agreement, p. 4).

42. Article IV, Section 4 of the Compact states, "The Tribe shall be eligible for new programs, activities, services and functions on the same basis as other tribes and the Secretary or his authorized representative shall advise the Tribe of the funding available for such programs." (App. Ex. A – Compact, p. 12).

43. In September 2006, the BIA Midwest Regional Office received and distributed approximately \$200,000 in FY 2006 year-end funds to five of the thirty-five Indian tribes and tribal organizations within the BIA Midwest Region. (Answer, p. 6 at ¶ 34; App. Ex. O – First Interrogatory Responses, p. 9-10 at Response to Interrogatory No. 7).

44. The Tribe was not informed about the availability of these funds until weeks after they were distributed. (Answer, p. 6 at ¶ 37).

45. The Tribe did not receive any of these year-end funds. (App. Ex. J – First RFA Responses, p. 21 at ¶ 37; Ex. K – Ragsdale Depo., pp. 63:6-14, 65:6-10).

46. One month after the BIA distributed these year-end funds, on October 18, 2006, the Tribe was informed by the BIA Midwest Regional Office that the BIA Central Office had made a decision to distribute the year-end funds only to tribes having contracts under Title I of P.L. 93-638 (codified at 25 U.S. §§ 450f), and not to tribes – like the Tribe – having contracts under Title IV of P.L. 93-638 (codified at 25 U.S. §§ 458cc). (Answer, p. 7 at ¶ 39).
47. BIA Director Patrick Ragsdale testified that he does not dispute that self-governance tribes – like the Tribe – were eligible to receive the end-of-year money. (App. Ex. K – Ragsdale Depo., pp. 63:6-14, 64:11-19).
48. Mr. Ragsdale testified that "Self-governance tribes were eligible for funds, but my understanding is is [sic] that the money had to be obligated within a very short period of time and the Bureau's mechanism through the Office of Self-Governance could not mechanically do that. So the self-governance tribes were excluded from that – from that potential allocation." (App. Ex. K – Ragsdale Depo., p. 64:1-7).
49. Footnote 15 to the 2006 Reprogramming Request addresses the issue of pay cost adjustments for Tribal employees and provides in relevant part:

The BIA will make every effort to treat Red Lake Tribal employees the same as all other Tribal and Federal employees for purposes of pay cost adjustments in FY 2006. ... Further, the BIA and OSG agree to provide to the Tribe by April 1, 2006, a detailed Pay Cost analysis for the years 2003-2006, showing what the Tribe was eligible to receive each year based upon Pay Cost data the Tribe provided, the actual amount received, and the shortfall or unfunded amount. This analysis will include Law Enforcement. The analysis will separately show the total amounts received each year for Self Governance tribes, contracting tribes, and BIA programs, as well as the total amounts the BIA was eligible to receive for these programs based upon data it compiled. The above information has been requested by the Tribe to verify whether Red Lake, other Self Governance tribes, contracting tribes, and BIA programs were treated the same way with regard to the distribution of Pay Costs for the years 2003-2006.

(emphasis added). (App. Ex. L – 2006 Reprogramming Request, p. 3 n. 15).

50. The Department failed to provide a detailed Pay Cost analysis to the Tribe by April 1, 2006, and has yet to provide it to the Tribe. (Answer, p. 8 at ¶ 47; App. Ex. I – Reinfeld Depo., pp. 70:9-71:13; Ex. M – Declaration of David Conner, ¶ 10).

51. Defendants have stated that, upon review of the estimated pay cost increases effective in FY 2006, the BIA believes that an error was made and that the Tribe will be owed an additional distribution. (App. Ex. O – First Interrogatory Responses, pp. 10-11 at Response to Interrogatory No. 8).

52. The Defendants stated in their discovery responses dated October 24, 2007, that the Department "anticipates that it will be able to provide the determination [of the amount of the additional distribution] and the additional funds within 60 days[,]" i.e. by December 24, 2007. (App. Ex. O – First Interrogatory Responses, pp. 10-11 at Response to Interrogatory No. 8).

June 18, 2008.

Respectfully submitted,

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