2014-1529

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

THE YUROK TRIBE,

Appellant,

v.

U.S. DEPARTMENT OF INTERIOR

Appellee.

Appeal from the Civilian Board of Contract Appeals,
Docket No. 3519-ISDA, Judge Stephen M. Daniels

BRIEF OF APPELLEE U.S. DEPARTMENT OF INTERIOR

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STATEMENT OF RELATED CASES

Pursuant to Fed. Cir. R. 47.5, appellee's counsel states that this is appellant's first appeal concerning this matter. We are unaware of any other appeal in or from the same proceeding to have been previously before this or any other appellate court under the same or similar title. We are unaware of any other cases pending in this or any other court that will directly affect or be directly affected by the Court's decision in this pending appeal.

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STATEMENT OF THE ISSUES

(1) Whether the Indian Self-Determination And Education Assistance Act of 1975, 25 U.S.C. §§ 450-458ddd-2, (ISDA), requires contracts authorized under section 450f(a)(1) (self-determination contracts) to transfer services to a tribe's control that the Bureau of Indian Affairs (BIA) would otherwise provide to the tribe's members.

(2) Whether BIA must receive a legally sufficient self-determination contract proposal from a tribe before section 450f(a)(2)'s acceptance procedures are triggered.

STATEMENT OF THE CASE

I. Nature Of The Case

This case involves a claim brought in the Civilian Board of Contract Appeals (board) by the Yurok Tribe (Tribe) – a federally recognized Indian Tribe headquartered in Klamath, California, on the Yurok Indian Reservation (Reservation) – seeking specific performance of an alleged self-determination contract with BIA. The Tribe alleged that a self-determination contract was formed between itself and BIA by operation of law under Title I of ISDA when BIA did not respond to the Tribe's alleged self-determination contract proposal in accordance with section 450f(a)(2). The Tribe's alleged proposal sought funding from BIA to allow the Tribe to provide to its members certain law enforcement and judicial services on the Reservation.

II. Statement Of Facts And Course Of Proceedings Below

The Tribe is solely responsible for performing law enforcement functions on the Reservation. JA69.[1] While BIA historically patrolled the Reservation, with emphasis on enforcing Federal fishing regulations, BIA no longer does so and has ceased to provide public safety services to the Tribe's members. *Id*. The Tribe receives approximately $420,000 annually from BIA for "Criminal

[1] "JA __" refers to the Joint Appendix.

Investigations/Police Service" through the Tribe's annual funding agreement issued under ISDA's Title IV self-governance provisions. JA69.

On October 12, 2011, the Tribe sent a letter to the Director of the Office of Self-Governance seeking funding for the Yurok Department of Public Safety and the Yurok Tribal Court. JA12, 71. The Office of Self-Governance administers the Department of Interior's (DOI) Self-Governance Program pursuant to Title IV of ISDA. For law enforcement services and infrastructure, the Tribe sought $5,534,270 in annual funding and a one-time allocation of $2 million. JA12. For judicial services and infrastructure, the Tribe sought $1,509,251 in annual funding and a one-time allocation of $7,634,456. JA13. On October 28, 2011, BIA responded by letter to the Tribe seeking clarification as to whether the Tribe was seeking a self-determination contract pursuant to Title I of ISDA, or inclusion of programs and funding in a self-governance annual funding agreement pursuant to Title IV. JA35. BIA administers self-determination contracts pursuant to Title I of ISDA. On November 3, 2011, the Tribe and BIA convened a meeting during which, the Tribe alleges, it "reiterated . . . that the October 12, 2011 letter was a Title I funding request." JA72. The Tribe further alleges that BIA "did not request a written response to its October 28, 2011 letter, and the Tribe did not provide one." *Id.*

On February 1, 2012, the Tribe sent a letter to BIA stating that because BIA had not responded to its October 12, 2011 letter within ninety days, a Title I self-determination contract was created by operation of law pursuant to section 450f(a)(2). JA42-43, 72. The Tribe requested that BIA issue the contract and associated funding. JA43, 72. BIA responded to the Tribe on February 8, stating that the intent of the Tribe's October 12, 2011 letter was not clear and did not satisfy the requirements for a self-determination contract proposal, and that the Tribe had not clarified its request during the parties' meeting. JA44-46, 72. The Tribe responded on February 15, asserting that the intent of its request was clear, there had been no miscommunication, and reiterated that a self-determination contract was created by operation of law. JA47-49, 72.

On March 14, 2013, the Tribe submitted to BIA a contract claim pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 7104 *et seq*., seeking performance of an alleged self-determination contract formed when BIA did not respond to the Tribe's October 12, 2011, letter in accordance with section 450f(a)(2). JA59-60, 73. BIA responded to the Tribe's claim on July 25, 2013, explaining that the claim was premature because there was no contract to which it could relate. JA61, 73. BIA asserted that because the agency was not providing any of the requested law enforcement and judicial services to the Tribe's members, there were no services to

transfer to the Tribe through the alleged self-determination contract and, therefore, no such contract could be formed. JA64.

The Tribe appealed BIA's claim denial to the board on August 30, 2013. JA4. BIA moved to dismiss the Tribe's complaint for lack of jurisdiction on the grounds that no contract existed between the parties. JA2. The board dismissed the Tribe's complaint on February 4, 2014. JA2. In doing so, the board concluded that a self-determination contract was not created by operation of law because "[t]he Tribe's October [12,] 2011 letter is not clear in intent and lacks many of the details plainly required for a contract proposal" by ISDA and its regulations. JA5. The board further reasoned that a self-determination contract could not be awarded for the services detailed in the Tribe's letter because ISDA authorized the transfer of existing BIA-provided services to tribes and BIA was not providing any of the sought services for the Tribe's members. JA6. Finally, the board explained that because the Tribe had made a non-frivolous allegation of a contract but had "failed to prove an element of the cause of action," the complaint should be dismissed for failure to state a claim upon which relief could be granted rather than for lack of jurisdiction. JA7.

The Tribe moved for reconsideration, which the board denied on April 14, 2014. JA9. In doing so, the board reiterated that the uncontested facts showed that "the Tribe had not submitted to BIA a proposal sufficient to trigger the regulatory

requirement that if the Secretary does not decline a proposal within ninety days of receipt, the proposal is deemed approved and a contract must be awarded." JA10. The board also emphasized that "[a] perfectly phrased request could not have resulted in a contract because there was nothing for BIA to transfer to the Tribe" as required by ISDA.[2] JA10.

This appeal followed.

SUMMARY OF THE ARGUMENT

The record demonstrates that the board correctly dismissed the Tribe's complaint seeking specific performance of an alleged self-determination contract with BIA. The alleged contract could not be formed because (1) there were no BIA-provided law enforcement or judicial services to transfer to the Tribe's control as required by ISDA; and (2) the Tribe never submitted a legally sufficient self-determination contract proposal to BIA.

Although BIA had furnished money to the Tribe that the Tribe utilized to provide certain law enforcement services to its members, the furnishing of money to a tribe so that the tribe may provide a service to its members is not the equivalent under ISDA of BIA providing the service itself. Because there were no BIA-provided services to transfer to the Tribe, no self-determination contract could

[2] The Tribe had also filed a related appeal with the Interior Board of Indian Appeals. That board stayed proceedings pending resolution of the Tribe's appeals before the Civilian Board of Contract Appeals and this Court. *See* IBIA Docket No. 13-136, JA97-102.

be formed as ISDA limits self-determination contracts to services that BIA would "otherwise provide" to a tribe's members. The Tribe's arguments that ISDA does not limit self-determination contracts to existing BIA-provided services where BIA retains the authority to provide the service are without merit because (1) while section 450f(a)(1) establishes the subject boundaries for services that may be included in a self-determination contract, and law enforcement and judicial services generally fall within those boundaries, the requirement that the services to be transferred are "otherwise provided" by BIA remains; (2) the Tribe's argument renders section 450f(a)(2)(D) inoperative, meaningless or void because BIA could never decline a proposal for a new service on the basis that the amount of funds sought by a tribe exceeded the amount BIA would have otherwise furnished for the service – which the statute plainly allows; and (3) the only authority that the Tribe offers to support its contention was effectively overruled by a subsequent appellate decision, which held that self-determination contracts only transfer existing services to tribes' control.

Further, the Tribe's October 12, 2011 letter was not a contract offer and the Tribe never submitted to BIA a legally sufficient self-determination contract proposal. Nothing in ISDA displaces the fundamental contract principle that an offer to contract must be unambiguous in its intent so as to justify BIA's understanding that the acceptance procedures of section 450f(a)(2) had been

triggered. The Tribe's letter to BIA was ambiguous in its intent because it can reasonably be read as a request to compact for the services described therein supported by a self-governance funding agreement under Title IV of ISDA. At most, the letter is patently ambiguous as to whether the Tribe sought a self-determination contract under Title I or a self-governance funding agreement under Title IV. Whether BIA subsequently became aware of the Tribe's actual intent is not relevant because section 450f(a)(2) is triggered only by the "receipt" of a "proposal." To be a legally sufficient contract proposal under ISDA and general contract principles must be in writing and unambiguous in intent. BIA never received such a proposal from the Tribe and, therefore, section 450f(a)(2)'s acceptance procedures were never triggered.

For these reasons, as will be fully set-forth below, the Court should affirm the board's decision.

ARGUMENT

I. Standard Of Review

The Court's "standard of review is governed by the Contracts Disputes Act, which provides that 'the decision of the agency board on any question of law shall not be final or conclusive . . . .'" *Lear Siegler Servs., Inc. v. United States*, 457 F.3d 1262, 1265-66 (Fed. Cir. 2006) (citing 41 U.S.C. § 7107(b)). "Statutory and regulatory constructions are questions of law, which [the Court] review[s] *de*

novo." *Id*. at 1266. "The interpretation of a government contract is also a question of law, which [the Court] review[s] *de novo* on appeal." *Id*. "Nonetheless, [the Court] give[s] the Board's legal conclusions 'careful consideration due to the board's considerable experience in construing government contracts.'" *Id*. (citing *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1577 (Fed. Cir. 1994)).

II. The Alleged Self-Determination Contract Could Not Be Formed Because There Were No BIA-Provided Law Enforcement Or Judicial Services To Transfer To The Tribe's Control

A. BIA Was Not Providing The Tribe's Members The Services That Are The Subject Of The Alleged Self-Determination Contract

Although the Tribe acknowledges that it "alone is largely responsible for performing law enforcement functions on the Reservation," JA69; App.'s Br. at 7, it nevertheless asserts that BIA was providing such services for the benefit of the Tribe's members within the meaning of ISDA at the time of the alleged formation of the self-determination contract. App.'s Br. at 23-24. The Tribe argues that BIA's furnishing of funds to the Tribe, which it utilized to cover the salaries and training of various law enforcement personnel, constituted the provision of a program or service under ISDA. *Id*. The Tribe is incorrect, and the board properly rejected the Tribe's equation of BIA's furnishing of money to the Tribe to assist the Tribe's provision of law enforcement services to its members, with BIA providing the law enforcement services itself. JA6.

The Tribe's argument flips ISDA on its head. The goal of ISDA was to end Federal domination of Indian programs and services and to promote Indian self-governance. *See* 25 U.S.C. § 450(a)(1). The mechanism ISDA employs to achieve that goal is the self-determination contract, whereby a program or service being provided by BIA to a tribe's members is transferred to the tribe's control. *See* 25 U.S.C. § 450b(j). In exchange, BIA furnishes the tribe the amount of funds that the agency itself expends to perform the program or service. *See* 25 U.S.C. § 450j-1(a)(1). Thus, under ISDA, the cause of Indian self-determination is furthered when BIA is *only* furnishing money to a tribe through a self-determination contract and the tribe itself is providing to its members the program or service that is the subject of the contract. *See Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1058 (10th Cir. 2011) ("These [self-determination] contracts effectively *transfer responsibility* for various programs from federal agencies to the tribes themselves, while *maintaining federal funding* of the programs" (emphasis added).).

Here, the only act that the Tribe asserts that BIA performed at the time of the alleged formation of the self-determination contract was furnishing the Tribe money that the Tribe utilized to provide certain law enforcement services to its members. JA69; App.'s Br. at 23-24. As such, BIA was not itself providing a program or service to the Tribe as contemplated by ISDA because the mere furnishing of money to a tribe is the law's contemplated end-state for the

Government's reduced role in certain Indian affairs. *See* 25 U.S.C. § 450a(b) (stating that, through ISDA, Congress is committed to "a meaningful Indian self-determination policy which will permit an *orderly transition from* the Federal domination of programs for, and services to, Indians . . ." (emphasis added).).

In its brief, the Tribe asserts that "[n]othing in ISDA limits [self-determination contracts] to services directly performed by the Secretary," and the Tribe refers to a passage in ISDA's legislative history that suggests that a tribe may enter into a self-determination contract to provide a service to its members that the Secretary currently provides on a national, rather than local level. App.'s Br. at 24 (citing S. Rep. No. 100-274 at *25). But the Tribe's reference to this legislative history misses the point: BIA is not *performing* for the Tribe – whether locally on the Reservation or through some national program – *any* of the law enforcement or judicial services that are contemplated under the alleged self-determination contract. JA69 ("The Tribe alone is largely responsible for performing law enforcement functions on the Reservation."). Rather, BIA was only furnishing money to the Tribe that the Tribe utilized to provide certain law enforcement functions. *Id*. Under ISDA, if BIA is only furnishing money to a tribe, then it is not providing the program or service to the tribe's members.

Finally, the money BIA furnished to the Tribe was related to law enforcement services that BIA had previously transferred to the Tribe through an

ISDA agreement. Specifically, as BIA explained to the Tribe, "[b]ecause BIA provided direct law enforcement/natural resources (fisheries) enforcement to the Tribe, these services were *transferred* to the Tribe, as was the corresponding funding, which now flows through the Tribe's annual funding agreement." JA45 (emphasis original). Thus, the money BIA furnished to the Tribe is related to services that BIA no longer provides to the Tribe's members.[3]

B. Because There Were No BIA-Provided Services To Transfer To The Tribe, No Self-Determination Contract Could Be Formed

The board ruled that the alleged self-determination contract could not be awarded for the services described in the Tribe's October 12, 2011 letter because BIA was not at that time providing any of those services for the benefit of the Tribe's members. JA6. The board correctly interpreted ISDA, as the law requires

[3] The record shows that the Tribe's alleged self-determination contract proposal sought funding for law enforcement and judicial services that are fundamentally different from, and far more expansive in nature and kind than, the law enforcement services that the Tribe used BIA-furnished monies to support. Specifically, BIA furnished the Tribe $420,000 annually which the Tribe used to pay the salaries of three patrol officers, two game wardens, one police chief, and one administrative assistant. JA69; App.'s Br. at 6. By contrast, the Tribe's alleged self-determination contract proposal sought: (1) $7,043,521 in annual funding – a 1,677 percent increase from what BIA had been furnishing – to support the addition of thirty-one law enforcement personnel and Tribal Court operations; and (2) a one-time allocation of $9,634,456 to procure officer residence facilities in remote locations, a court facility, Tribal Justice Center and Library, Correction and Alternative Detention centers, and transitional housing for tribal members receiving inpatient treatment for alcohol and substance abuse. JA12-26; App.'s Br. at 9-10.

a self-determination contract to transfer programs or services to a tribe's control that BIA would have otherwise provided to the tribe in the absence of the contract.

1. ISDA Limits Self-Determination Contracts To Programs Or Services That BIA Would Otherwise Provide To The Tribe's Members

In a similar case, the United States Court of Appeals for the Ninth Circuit in *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell*, 729 F.3d 1025 (9th Cir. 2013), addressed a tribe's challenge to BIA's declination of a self-determination contract proposal seeking money to increase law enforcement on the tribe's reservation. *Id*. at 1034. BIA had not been providing law enforcement services to the tribe and the agency therefore declined the requested contract pursuant to section 450f(a)(2)(D), which allows BIA to do so if the proposed cost would exceed the amount currently being spent by BIA on the program or services. *Id*. BIA explained that "the Tribe requested more money for the program than BIA is currently spending on the program," *i.e*., zero dollars, because "there was no currently existing BIA program that the Tribe sought to take over." *Id*. In upholding BIA's declination decision, the Ninth Circuit concluded that

> The ISDA allows the Tribe to take control of existing programs and obtain the funds that [BIA] would otherwise have spent on those programs. Where there is no existing BIA program, there is nothing that the BIA would have spent on the program, and therefore nothing to transfer to the Tribe.

Id. at 1028. The Ninth Circuit's interpretation of ISDA is correct.

Section 450b(j) defines "self-determination contract" to mean a contract "between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which *are otherwise* provided to Indian tribes and their members pursuant to Federal law . . ." (emphasis added). The terms "are otherwise" mean that in the absence of the self-determination contract, BIA would be providing the program or service to the requesting tribe. *See Seneca v. United South And Eastern Tribes*, 318 Fed. App'x. 741, 742 (11th Cir. 2008) (explaining that under a self-determination contract, "the tribe or organization takes on responsibility for programs or services to Indian populations that otherwise *would have been* provided by the Federal government" (emphasis added).). Here, absent the alleged self-determination contract, BIA would not otherwise be providing the subject law enforcement and judicial services to the Tribe because, as the Tribe acknowledges, it "alone is largely responsible for performing law enforcement functions on the Reservation." JA69; App.'s Br. at 7.

In addition, section 450j-1(a)(1) requires that "[t]he amount of funds provided under the terms of self-determination contracts . . . shall not be less than the appropriate Secretary *would have otherwise* provided for the operation of the programs or portions thereof for the period covered by the contract" (emphasis added). The terms "would have otherwise" mean that in the absence of the requested self-determination contract, BIA would be funding the agency's

provision of the program or service to the requesting tribe. As the Ninth Circuit explained,

> While [section 450j-1(a)(1)] does not state the words 'currently allocating,' the phrase the statute does include – 'would have otherwise provided' – leads to the same result. The Secretary is only required to fund the contract with the amount that the BIA would have otherwise spent on the program.

Los Coyotes, 729 F.3d at 1036; *see also Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 583 F.3d 785, 788 (Fed. Cir. 2009) (explaining that "[t]he government is required to provide self-determination contractors with the same amount of funding that *would have been appropriated* for the tribal programs if the government had *continued* to operate the programs directly . . . " (emphasis added).). Here, absent the alleged self-determination contract, BIA would not be furnishing funds for the subject law enforcement and judicial services because BIA was not otherwise providing these services to the Tribe's members.[4] JA69; App.'s Br. at 6 (stating

[4] ISDA's legislative history confirms that self-determination contracts transfer existing Government programs or services to a tribe. In the section titled "Implementation of the Policy of Indian Self-Determination," the Senate Committee on Indian Affairs reported that ISDA "uniquely requires the Secretary of the Interior and the Secretary of Health and Human Services to *continue providing direct services* until such time as a tribe freely chooses to contract to operate *those services*. At that point, the Secretaries are required to *transfer* resources and control over those programs to the tribe." S. Rep. 100-274, *6 (emphasis added); *see also Arctic Slope*, 583 F.3d at 788 (explaining that "*[t]ransfers* of federal programs to tribal control under the ISDA are accomplished through 'self-determination contracts' under which a tribe agrees to *take over administration* of a federal program . . . " (emphasis added).).

that "BIA has since ceased to provide these public safety officer services, however.").

2. The Tribe's Argument That ISDA Does Not Limit Self-Determination Contracts To Existing BIA-Provided Services Is Without Merit

The Tribe asserts that whether BIA had previously been providing the subject law enforcement and judicial services to the Tribe does not matter because ISDA authorizes BIA through section 450(f)(a)(1) to transfer to a tribe through a self-determination contract control of law enforcement and judicial services. App.'s Br. 18-22. The Tribe's argument is without merit because even though BIA is generally authorized to transfer law enforcement and judicial services to a tribe's control, ISDA still requires that the services "are otherwise provided" by BIA in the absence of the contract.

a. While Section 450f(a)(1) Establishes The Subject Boundaries For Services That May Be Included In A Self-Determination Contract, The Requirement That The Services Be "Otherwise Provided" By BIA Remains

The provisions of section 450f(a)(1) "help delineate the *boundaries* of programs that are 'for the benefit of Indians because of their status as Indians,' . . . . " *Navajo Nation v. Dept. of Health & Human Servs.*, 325 F.3d 1133, 1137 (9th Cir. 2003) (en banc) (quoting 25 U.S.C. § 450f(a)(1)(E)) (emphasis added). Such boundaries are required because there are certain programs or services that

the Government provides for the benefit of tribes that must remain the Government's responsibility. *See* 25 U.S.C. § 450j(g) (stating that "the Secretary shall not make any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals."); *id*. § 450f(a)(2)(E) (allowing BIA to decline a self-determination contract proposal where the contract is for a program "that cannot lawfully be carried out by" the requesting tribe); H. Rep. 93-1600, *7790 (agency legislative report stating that "[c]learly, we should not contract the function of approving transactions involving lands or funds held in trust by the Secretary since nothing in [the proposed legislation] would alter the fact that these responsibilities remain with the United States.").

While the Tribe is correct that ISDA generally includes law enforcement and judicial functions within the boundaries for proper subjects of a self-determination contract, it remains that ISDA requires that the subject program or service to be transferred is "otherwise provided" by BIA to the requesting tribe. *See* 25 U.S.C. §§ 450b(j), 450j-1(a)(1); *Los Coyotes*, 729 F.3d at 1034 (explaining that ISDA "governs existing programs and does not create new ones."). Here, even though the subject law enforcement and judicial services of the alleged self-determination contract appear to be services included within the boundaries for such contracts, BIA would not have "otherwise provided" the services to the Tribe and, therefore, no contract was created.

Furthermore, the Tribe's argument renders section 450f(a)(2)(D) inoperative, meaningless, or void. Section 450f(a)(2)(D) authorizes BIA to decline a contract proposal where "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a)" – *i.e.*, in excess of what BIA "would have otherwise provided" for the operation of the program. 25 U.S.C. § 450j-1(a)(1). If BIA is not otherwise providing the subject program to a requesting tribe, then *any* amount of funds proposed under the contract would be in excess of what BIA would otherwise provide for the program. Yet, under the Tribe's reading of ISDA, BIA could never rely upon section 450f(a)(2)(D) to decline a contract proposal for a new law enforcement or judicial service because, as the Tribe argues, a self-determination contract proposal "is contractible so long as it refers to programs and services of the type that the Secretary is '*authorized*' to provide to '*any Indian tribe*.'" App.'s Br. at 19 (emphasis original). "A cardinal principle of interpretation requires [a court] to construe a statute so that no provision is rendered inoperative or superfluous, void or insignificant." *Asiana Airlines v. F.A.A.*, 134 F.3d 393, 398 (D.C. Cir. 1998) (quotations omitted). The Ninth Circuit explained that "[i]f the ISDA does not limit the contract amount to the *current level of funding*, then

§ 450f(a)(2)(D) becomes meaningless – a result we must avoid." *Los Coyotes*, 729 F.3d at 1036 (emphasis added).[5]

b. The Tribe's Reliance On *Hopland Band of Pomo Indians v. Norton*, 324 F. Supp. 2d 1067 (N.D. Cal. 2004), Is Misplaced Because The Ninth Circuit In *Los Coyotes* Effectively Overruled The Portion of *Hopland* Upon Which The Tribe Relies

The Tribe relies upon the United States District Court for the Northern District of California's decision in *Hopland* in asserting that it does not matter under ISDA whether BIA is providing the subject law enforcement services to the Tribe's members because the agency retains the authority to do so. App.'s Br. at

[5] Section 450f(a)(2)(D) is critical to ISDA's statutory scheme because it affords BIA the necessary discretion in allocating limited resources among the many tribes that the agency supports. As the Ninth Circuit observed, "[t]hat there is no existing BIA law enforcement program on the Los Coyotes Reservation is a result of the agency's decision to allocate resources elsewhere. The allocation of those resources is an exercise of agency discretion." *Los Coyotes*, 729 F.3d at 1028. Indeed, BIA's decisions on how to allocate its law enforcement budget are a zero-sum exercise. "BIA must prioritize how its limited law enforcement budget is spent. There are over 550 federally recognized tribes . . . , and the BIA provides funding for over 200 law enforcement programs." *Id.* at 1031. For instance, a decision to furnish the Tribe in this case the $7,043,521 in annual funding and $9,634,456 in one-time allocations that it seeks through the alleged self-determination contract proposal, *see* note 3, *supra*, would necessarily impact BIA's ability to fund law enforcement and judicial services that are a priority for other tribes. As BIA explained to the Tribe, "[t]he entire annual budget for the Office of Justice Services, Division of Tribal Justice Support, to fund 184 tribal courts and Courts of Indian Offices, is generally about $25 million. These funds are already obligated to other tribes. Thus, granting [the Tribe's] proposal would result in a reduction of funding to other tribes, which is prohibited by 25 C.F.R. § 900.32." JA62 (footnote 4).

20-22. In *Hopland*, a tribe appealed BIA's declination of a self-determination contract proposal for law enforcement services on the tribe's California reservation. *Hopland*, 324 F. Supp. 2d at 1068-70. California is a "Public Law 280" state – a law that "granted states like California the exclusive jurisdiction to enforce their criminal laws on Indian lands to the same degree as elsewhere" *Id.* at 1076 (citing 18 U.S.C. § 1162(a)). BIA denied the tribe's contract proposal partly on the basis that "since California is a Public Law 280 state, the BIA did not provide law enforcement services to tribes within the state . . . ." *Id*. at 1070. The district court rejected this ground for BIA's declination decision, concluding that Public Law 280 did not "void[] the government's jurisdiction to enforce federal law on California tribal lands." *Id*. at 1077. BIA did not appeal the district court's decision. However, to the extent that the district court in *Hopland* ruled that it does not matter under ISDA whether BIA is providing a law enforcement service to a requesting tribe so long as BIA retains the authority to do so, the Ninth Circuit effectively overturned that ruling in *Los Coyotes*.

In *Los Coyotes*, BIA had declined the California tribe's requested self-determination contract for law enforcement services under section 450f(a)(2)(D) because "there was no currently existing BIA program that the Tribe sought to take over." *Los Coyotes*, 729 F.3d at 1034. In its declination letter to the tribe, BIA explained that "'[t]he principal reason for this is that, as you know, California is a

[Public Law] 280 state, and so the cost of law enforcement on Indian reservations is borne by the State, not the BIA.'" *Id*. (bracketed text original). In addition,

> BIA clarified that it was *not arguing that it was unable to enforce federal laws in Indian Country in California*, but rather that the BIA "does not spend any money for law enforcement on Indian reservations in the State."

Id. (emphasis added). BIA therefore took the position directly contrary to the holding in *Hopland*: although the agency retained authority to enforce Federal laws on the tribe's reservation, the proposed self-determination contract should be declined because it sought services that BIA was not then providing to the tribe's members. The Ninth Circuit upheld BIA's declination decision, emphasizing that

> The Tribe was attempting to create a new BIA program, which they have been trying to do for decades; however, their current attempt *utilizes a statute that governs existing programs and does not create new ones*.

Id. at 1034 (emphasis added). Accordingly, the district court's decision in *Hopland* overruling BIA's declination decision because the agency retained

authority to enforce Federal law on the tribe's reservation is no longer valid in the Ninth Circuit following *Los Coyotes*.[6]

c. The Tribe Could Not Receive An Increase In Funding Pursuant To Section 450j-1(b)(5) Because BIA Was Not Expending Funds To Provide The Requested Services Itself, And The Tribe Does Not Have An Existing Self-Determination Contract Under Which Funding Could Be Increased

Finally, the Tribe characterizes its October 12, 2011 letter as seeking to increase the amount of funds it was receiving from BIA, which, according to the Tribe, is a permissible request under section 450j-1(b)(5). App.'s Br. at 23-24. The Tribe is wrong for two reasons. First, while section 450j-1(b)(5) permits tribes to request increases to the amount that BIA expends to provide the service itself, it remains a requirement that, as explained above, BIA "would have otherwise provided" the requested service in the absence of the self-determination contract. 25 U.S.C. § 450j-1(a)(1). Here, BIA was not providing the requested law

[6] In its brief, the Tribe attempts to distinguish *Los Coyotes* by first asserting that the procedural posture and arguments were different because *Los Coyotes* involved a tribe's challenge to a timely BIA declination decision. App.'s Br. at 34-35. Be that as it may, the Ninth Circuit's conclusion that ISDA requires there to be an existing program or service to transfer under a self-determination contract was central to the court's holding that BIA properly declined the tribe's proposal under section 450f(a)(2)(D). *Los Coyotes*, 729 F.3d at 1036. The Tribe also asserts that "*Los Coyotes* is factually distinct . . . because BIA had never expended monies for law enforcement services on the Los Coyotes reservation." App.'s Br. at 36. This fact is not relevant – as we explained in section II.A, the mere furnishing of money to a tribe so that the tribe may provide a service to its members is not the equivalent under ISDA of BIA itself providing the service to the tribe's members.

enforcement and judicial services to the Tribe and, therefore, there was no section 450j-1(a)(1) amount for BIA to increase.

Second, the $420,000 that BIA had furnished to the Tribe related to law enforcement services that BIA had long-since transferred to the Tribe's control and ceased providing itself. JA45 ("Because BIA provided direct law enforcement/natural resources (fisheries) enforcement to the Tribe, the services were *transferred* to the Tribe, as was the corresponding funding, which now flows through the Tribe's annual funding agreement" (emphasis original).). Importantly, the Tribe's annual funding agreement under which it receives the $420,000 was issued under ISDA's Title IV self-governance provisions. JA62 ("Yurok is a Title IV tribe."). These provisions, which will be explained more fully below, are separate and distinct from ISDA's Title I self-determination provisions, *compare* 25 U.S.C. § 450-450n *with id*. § 458aa-gg, and section 450j-1(b)(5) has no applicability to annual funding agreements issued under Title IV. The Tribe does not allege that it currently has a Title I self-determination contract with BIA related to law enforcement and judicial services under which it seeks an increase of funding pursuant to section 450j-1(b)(5). This fact distinguishes this case from *Seneca Nation of Indians v. United States Department of Health and Human Services*, 945 F. Supp. 2d 135 (D.D.C. 2013), upon which the Tribe relies, App.'s Br. at 23-24, because the tribe in *Seneca Nations* sought an increase of funding to

an *existing* Title I self-determination contract. *See Seneca Nation*, 945 F. Supp. 2d. at 136 (explaining that "The Seneca Nation of Indians administers its own healthcare system through a self-determination contract with the Indian Health Service under [ISDA].").

III. The Tribe's October 12, 2011 Letter Was Not A Contract Offer And The Tribe Never Submitted To BIA A Legally Sufficient Self-Determination Contract Proposal

A. Nothing In ISDA Displaces The Fundamental Contract Principle That An Offer To Contract Must Be Unambiguous In Its Intent

The common law of contracts applies to Government contracts "except to the extent that statute and regulation . . . supersede the common law by substantive alterations or by added procedures." *Enron Fed. Solutions, Inc. v. United States*, 80 Fed. Cl. 382, 396 (2008) (citing *Torncello v. United States*, 681 F.2d 756, 762 (Ct. Cl. 1982)); *accord Boston Edison Co. v. United States*, 64 Fed. Cl. 167, 175 (2005) (stating that "common law contract principles supply the substantive legal framework" for the court's assessment of disputes over the terms of the Standard Contract under the Nuclear Waste Policy Act of 1982.). Here, while ISDA sets forth the basic terms of self-determination contracts, *see* 25 U.S.C. § 450*l*, and the content of a tribe's proposal for, and procedures for BIA's acceptance of, a contract proposal, *see id*. § 450f(a), the common law of contracts governs the parties' relationship unless otherwise displaced by those statutory terms and procedures. *Accord Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2186

(2012) (applying "longstanding principles of Government contracting law" in holding "that the Government must pay each tribe's contract support costs in full" under the terms of self-determination contracts.).

Under the common law, "[t]he requisite elements of a contract with the government are . . . mutual intent, including an unambiguous offer and acceptance; consideration; and authority on the part of the government representative to bind the government." *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379-80 (Fed. Cir. 2003); *see also Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). "As a threshold condition for contract formation, there must be an objective manifestation of voluntary, mutual assent." *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003) (citing Restatement (Second) of Contracts § 18 (1981)).

> To satisfy its burden to prove such a mutuality of intent, a plaintiff must show, by objective evidence, the existence of an offer and a reciprocal acceptance . . . . Such an offer is made by 'the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

Id. (citing Restatement § 24 and Williston on Contracts § 4:13, at 367 (4th ed. 1990)).

Here, while section 450f(a)(2) establishes that BIA's acceptance of a self-determination contract proposal may occur through an operation of law, the Tribe's

offer must nevertheless be made in a manner that justifies BIA in understanding that the requirements of section 450f(a)(2) have been triggered. *See* Williston, § 4:16 ("As a general principle, an offeree cannot actually assent to an offer unless the offeree knows of its existence."). No such proposal was ever presented to BIA.

B. The Tribe's October 12, 2011 Letter To BIA Was Ambiguous In Its Intent And Therefore Did Not Trigger BIA's Obligation to Respond Under Section 450f(a)(2)

First, although the subject of the Tribe's letter was "Title I Request for the Yurok Department of Public Safety and the Yurok Tribal Court," the Tribe addressed the letter to the Director of the Office of Self Governance. JA12. The Office of Self-Governance and BIA are separate entities within the Office of the Assistant Secretary-Indian Affairs. The Office of Self-Governance "is responsible for implementation of the Tribal Self-Governance Act of 1994, including development and implementation of regulations, policies, and guidance in support of self-governance initiatives."[7] The Tribal Self-Governance Act operated as an amendment to ISDA and is included in the law as Title IV. *See* Pub. L. 103-413; 25 U.S.C. §§ 458aa-458hh. "The goal of the Tribal Self-Governance Act is to transfer control over programs, services, functions, and activities traditionally provided by [DOI] to participating tribes in an effort to promote tribal self-governance." *Shirk v. United States ex rel Dep't. of Interior*, 2010 WL 3419757, at

[7] *See* Office of Self-Governance, http://bia.gov/WhoWeAre/AS-IA/OSG/.

*1 (D. Ariz. 2010). "The [Tribal Self-Governance] Act furthers that goal by authorizing the Secretary of the Interior to negotiate annual funding agreements with participating tribes." *Id*. (citing 25 U.S.C. § 458cc(a)). Thus, the Tribe's alleged self-determination contract offer was addressed to an office with responsibility for agreements under a different statutory authority than Title I of ISDA.

Second, the Tribe's letter stated that the Tribe "is submitting this *letter of interest* for program inclusion and funding under Title I of [ISDA]." JA12 (emphasis added). The terms "letter of interest" have particular legal significance under the Tribal Self-Governance Act implementing regulations. Specifically, 25 C.F.R. § 1000, "Annual Funding Agreements Under the Tribal Self-Government Act Amendments to [ISDA]," Subpart G, "Negotiation Process for Annual Funding Agreements," Subsection 169, "How does a Tribe/Consortium initiate the information phase?" instructs that "[a] Tribe/Consortium initiates the information phase by submitting a *letter of interest* to the bureau administering a program that the Tribe/Consortium may want to include in its [annual funding agreement]." 25 C.F.R. § 1000.169 (emphasis added). Thus, the Tribe characterized its letter in a manner that signified an intention to initiate the negotiation process with the Office of Self-Governance for an agreement under Title IV of ISDA.

Third, the Tribe stated that "[t]he purpose of this letter is to request the authorization to *compact* law enforcement and related services . . ." JA12 (emphasis added). The word "compact" is also a term of particular legal significance within the Tribal Self-Governance Act:

> Self-Governance Compacts were created by the Tribal Self-Governance Act and allow tribes to negotiate a single funding agreement that gives the tribes broad discretion to administer a variety of programs. The Compacts give the tribes a block of funding that they can allocate as they see fit, thus allowing tribes in Public Law-280 states to allocate a portion of their funds to law enforcement, even if the BIA would not have otherwise funded law enforcement on the reservation.

Los Coyotes, 729 F.3d at 1031 n.3 (citations omitted). The Tribe proceeds throughout its letter and accompanying tribal resolution to characterize its request as seeking a "compact" to receive funding for the specified purposes. *See* JA15 (recounting that "[a]s a result of a successful grant award in FY2000 the Tribe formed the YDPS. The Tribe requested to the BIA to *compact* funds for law enforcement services. The Tribe started their *compacted* law enforcement program with five (5) offices . . ." (emphasis added); JA16 (stating that "there has been no increase in *compact* funds from the BIA" (emphasis added).); JA27 (tribal resolution authorizing "Title I *Compact* Request" (emphasis added).); JA28 ("[t]he Yurok Tribe respectfully submits a Title I *compact* request" (emphasis added).). Nowhere in the letter is the term "contract" used.

Finally, the Tribe's letter states that it is seeking "an annual allocation of funding *under* the Tribe's *Annual Funding Agreement*." JA21 (emphasis added). As with the terms "letter of interest," and "compact," the terms "annual funding agreement" have a specific legal significance under the Tribal Self-Governance Act. While self-determination contracts are awarded pursuant to Title I of ISDA, only self-governance funding agreements may be awarded pursuant to Title IV. "Under the self-government arrangement, tribes negotiate [annual funding agreements] each year for the disbursement of program funds." *Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103, 106 (D.D.C. 2009) (citing 25 U.S.C. §§ 458aa-cc and 25 C.F.R. §§ 100.91-.104); *see* 25 U.S.C. § 458cc(a) (stating that "[t]he Secretary shall negotiate and enter into an annual written funding agreement with the governing body of each participating tribal government . . . ."). Throughout its letter, the Tribe characterizes its request as seeking "annual funding" to support the specified programs and services. *See, e.g.*, JA12 ("[t]he YDPS respectfully makes the following *annual funding* and infrastructure request . . ." (emphasis added).); JA13 ("[t]he YTC respectfully makes the following *annual funding* and infrastructure request . . ." (emphasis added).); JA20 ("Background for Critical Need for *Annual Funding* for the Yurok Tribal Court" (emphasis added)); JA21 ("YTC requires essential *annual funding* to carry out the justice system responsibilities for the YIR" (emphasis added).); JA25

("[i]n conclusion, the Tribe has provided the fiscal, policy and legal justification for the effective *annual funding* request in this letter" (emphasis added).).

By addressing its letter to the Office of Self-Governance, which is responsible for Tribal Self-Government Act agreements, and utilizing throughout its letter terminology with specific legal significance under Title IV of ISDA, the Tribe's letter can reasonably be read as a request to compact for the specified law enforcement and judicial services supported by an annual funding agreement authorized under the self-governance provisions of ISDA. Indeed, "Yurok is a Title IV tribe." JA62. "If more than one meaning is reasonably consistent with the contract language, then the contract term is ambiguous." *Grumman Data Sys. Corp. v. Dalton*, 88 F.3d 990, 997 (Fed. Cir. 1996). Accordingly, the Tribe did not submit an unambiguous offer to BIA and the Tribe's letter could not justify an understanding by BIA that the section 450f(a)(2) acceptance procedures for self-determination contact proposals had been triggered. *See First Commerce Corp.*, 335 F.3d at 1379-80 ("[t]he requisite elements of a contract with the government are . . . mutual intent, including an *unambiguous offer* and acceptance . . ." (emphasis added).).

The Tribe argues that its October 12, 2011 letter was clear in its intent because "the letter contained the majority of the categories of information required by the regulations of a Title I contract proposal." App.'s Br. at 25 (citing 25

C.F.R. § 900.8). Yet, the Office of Self-Governance instructs tribes to include similar information in a "letter of interest" to negotiate an annual funding agreement under Title IV. *See* 25 C.F.R. § 1000.170 (stating that "[a] letter of interest should identify the following: (a) As specifically as possible, the program a Tribe/Consortium is interested in negotiating under an [annual funding agreement]."). The Tribe also emphasizes that "the letter explicitly self-identified as a Title I proposal." App.'s Br. at 26. While the letter does reference Title I of ISDA, the Tribe, as explained above, utilizes throughout the letter terminology exclusive to, and with specific legal meaning under, Title IV – *i.e.*, "letter of interest," "compact," and "annual funding agreement." Indeed, the Tribe addressed the letter to the office with responsibility for Title IV agreements – not Title I – and stated that the conditions on the Reservation "justify an annual allocation of funding *under* the Tribe's *Annual Funding Agreement*." JA21 (emphasis added).

"As a threshold condition for contract formation, there must be an objective manifestation of voluntary, mutual assent. To satisfy its burden to prove such mutuality of intent, a plaintiff must show, by objective evidence, the existence of an offer and reciprocal acceptance." *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003) (citations omitted). The undisputed facts show that the Tribe cannot satisfy this burden. The Tribe's October 12, 2011 letter can reasonably be

read as a request to compact under Title IV for the services described therein. At most, the Tribe's references to Title I render its intent patently ambiguous when the letter is read in its entirety. It is a basic contract law requirement that an offer be unambiguous. The Tribe's letter did not satisfy this requirement, and the letter therefore did not trigger the acceptance procedures in section 450f(a)(2).

C. Whether BIA Subsequently Became Aware Of The Tribe's Intent Is Not Relevant Because Section 450f(a)(2) Is Triggered Only By The Receipt Of A Proposal And The Tribe Never Submitted A Legally Sufficient Proposal To BIA

The Tribe argues that even if its October 12, 2011 letter were ambiguous in its intent, the nature of its request was subsequently made clear to BIA through various communications by February 15, 2012, and because BIA did not formally decline the Tribe's request within ninety days following that date, a self-determination contract was created by operation of law. App.'s Br. at 26-28. The Tribe's argument is without merit because even accepting its allegations that BIA subsequently became aware of the nature of the Tribe's request, it remains that the Tribe never submitted a legally sufficient proposal, and section 450f(a)(2)'s acceptance procedures were therefore never triggered.

1. A Self-Determination Contract Proposal Must Be In Writing And Unambiguous In Its Intent

Section 450f(a)(2) states that "within ninety days after receipt of the proposal" BIA must respond accepting or declining the proposal, otherwise the

requested self-determination contract is deemed accepted by operation of law. The issue, then, is whether BIA ever received a "proposal" from the Tribe. The record shows that BIA did not.

ISDA requires that a self-determination contract proposal be in writing. *See* 25 U.S.C. § 450f(a)(2) (setting forth the contents that the "contractor shall include" in its proposal); 25 C.F.R. § 900.8 (same). While the statute and regulations characterize a tribe's self-determination contract request as a "proposal" rather than an "offer," those terms are interchangeable. *See, e.g., Grumman Data Sys. Corp. v. United States*, 28 Fed. Cl. 803, 807 n.5 (1993) (explaining that "[i]n a negotiation, potential contractors, known as 'offerors,' submit their contract offers, known as 'proposals,' in response to the government's solicitation, known as a 'request for proposals.'" (citing 48 C.F.R. § 15.100 –15.1005)). Accordingly, "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *N.L.R.B. v. Amax Coal Co., a Div. of Amax, Inc.*, 453 U.S. 322, 329 (1981). The common law requires a proposal to be unambiguous. *Mola Dev. Corp. v. United States*, 74 Fed. Cl. 528, 543 (2006) ("Unambiguous mutuality of intent to contract is a precondition for contract formation."). While section 450f(a)(2) establishes the basic technical contents of a tribe's proposal, nothing in the statute displaces the

fundamental common law requirement that a contract proposal be unambiguous so as to justify BIA's understanding that section 450f(a)(2)'s acceptance procedures had been triggered.

Thus, a legally sufficient self-determination contract proposal must be (a) in writing and (b) unambiguous in intent.[8] The Tribe cannot point to any document in the record that satisfies these two requirements.

2. The Tribe Never Submitted A Legally Sufficient Self-Determination Contract Proposal To BIA

As explained above, the Tribe's October 12, 2011 letter can be read as a request to compact under Title IV for the described law enforcement and judicial services described therein and is, at most, patently ambiguous as to whether the Tribe sought a contract under Title I or a compact under Title IV. The Tribe acknowledged in its complaint that it did not clarify its intent by resubmitting the proposal. JA72 (asserting that BIA "did not request a written response to its October 28, 2011 letter, and the Tribe did not provide one."). Whether BIA was subsequently made aware of the Tribe's actual intent for submitting the October 12, 2011 letter, as the Tribe alleges, is not relevant. Section 450f(a)(2)'s acceptance procedures are only triggered "after receipt of the proposal." A self-

[8] Given the severe consequences section 450f(a)(2) imposes upon BIA in the event the agency does not timely respond to a self-determination contract proposal, the necessity of requiring a proposal to satisfy these two basic requirements is clear.

determination contract "proposal" must be in writing and unambiguous in intent. BIA never received a legally sufficient "proposal" as defined by ISDA and general contract principles and, therefore, section 450f(a)(2)'s acceptance procedures were never triggered.

The Tribe asserts that BIA's regulations did not relieve the agency from responding to the Tribe's alleged proposal where the proposal was technically deficient. App.'s Br. at 28-29. This argument is without merit because it presupposes the existence of a legally sufficient "proposal" so as to justify BIA's understanding that section 450f(a)(2)'s acceptance procedures had been triggered. As explained above, no such proposal was ever submitted to BIA. The Tribe further asserts that in accordance with the cannon that statutes enacted for the benefit of Indian tribes should be construed liberally in favor of tribes, the Court should construe ISDA in the Tribe's favor and conclude that a self-determination contract was created. App.'s Br. at 30-31. The Tribe does not specify what statutory or regulatory provision the Court should construe in its favor, the construction that should be applied, or how that construction results in a conclusion that a contract was formed. In any event, section 450f(a)(2) is clear that its acceptance procedures are triggered only upon BIA's receipt of a legally sufficient proposal. As explained above, no such proposal was ever submitted by the Tribe.

Finally, the Tribe argues that BIA made an impermissible "threshold determination that the Tribe's Title I proposal was not worthy of a response," thereby ignoring "the statutory and regulatory declination scheme." App.'s Br. at 33. Again, the Tribe's argument presupposes the existence of a legally sufficient self-determination contract proposal that was submitted so as to justify BIA's understanding that ISDA's statutory and regulatory declination scheme had been triggered. As explained above, no such proposal was ever submitted by the Tribe and its argument is therefore without merit.[9]

CONCLUSION

For the foregoing reasons, the Court should affirm the board's decision.

[9] In dismissing the Tribe's complaint the board considered information outside of the Tribe's pleading. Should the Court conclude that the appropriate course was for the board to view BIA's motion to dismiss as a motion for summary relief, the Court should nevertheless affirm the board's judgment. "This [C]ourt reviews judgments, not opinions." *Fromson v. Advance Offset Plate, Inc.*, 755 F.2d 1549, 1556 (Fed. Cir. 1985). The facts upon which the board based its ruling and upon which we rely in this brief are not disputed and, therefore, application of the summary relief standard to the record in this case would lead to the same result.

Respectfully submitted,

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January 27, 2011

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