

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

NAVAJO NATION,	)	
a federally recognized Indian tribe,	)	
Navajo Nation Department of Justice,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:14-CV-01909 (TSC)
	)	
DEPARTMENT OF THE INTERIOR,	)	
	)	
and	)	
	)	
S.M.R. JEWELL, in her official capacity as	)	
Secretary, U.S. Department of the Interior,	)	
	)	
Defendants.	)	
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**DEFENDANTS’ CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION  
TO PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the United States Department of the Interior and S.M.R. Jewell, in her official capacity as Secretary of the Interior (“Defendants”), by and through undersigned counsel, respectfully move this Court to deny Plaintiff’s motion for summary judgment and grant Defendants’ motion for summary judgment. In support of this motion, Defendants respectfully refer the Court to the attached memorandum of points and authorities, to the exhibits filed herewith, to the exhibits filed with Plaintiff’s Complaint, and to the Joint Statement of Stipulated Facts.

DATED: April 3, 2015

Respectfully submitted,

BENJAMIN C. MIZER  
Acting Assistant Attorney General

ERIC R. WOMACK  
Assistant Branch Director

/s/ Elizabeth L. Kade  
ELIZABETH L. KADE  
(D.C. Bar No. 502980)  
Trial Counsel  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, N.W.  
Washington, D.C. 20530  
Telephone: (202) 616-8491  
Facsimile: (202) 616-8470  
E-mail: Elizabeth.L.Kade@usdoj.gov

Counsel for Defendants

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Secretary, U.S. Department of the Interior,	)	
	)	
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	)	

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**DEFENDANTS’ STATEMENT OF MATERIAL FACTS**

Pursuant to LCvR 7(h), the United States Department of the Interior and S.M.R. Jewell, in her official capacity as Secretary of the Interior (“Defendants”), by and through undersigned counsel, respectfully submit this statement of material facts.

1. The Navajo Nation and the BIA’s Navajo Regional Office entered into Contract No. A12AV00698, effective January 1, 2012 to December 31, 2016 (“Contract”), to transfer the funding and the functions, services, activities, and programs otherwise contractible under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* (“ISDEAA”), for the Tribal Courts Program from the federal government to the Navajo Nation. Joint Statement of Stipulated Facts ¶ 6 (“Stipulations”); Exhibit A to Defendants’ Cross Motion for Summary Judgment and Opposition to Plaintiff’s Motion for Summary Judgment (“Defendants’ MSJ”).

2. The Contract requires the Navajo Nation and the BIA to negotiate successor Annual Funding Agreements (“AFAs”), each of which is incorporated into the Contract. Stipulations ¶ 7.
3. The Calendar Year (“CY”) 2012 AFA included a scope of work pursuant to the 2007 Strategic Plan of the Navajo Nation Judicial Branch, which included fifteen specific tasks and objectives. Stipulations ¶ 10; Defendants’ MSJ Ex. A, Att. A – Fiscal Year 2012 Scope of Work at 1-2.
4. The CY 2012 AFA provided the Navajo Nation with \$1,349,659 to provide these services. Stipulations ¶ 8; Defendants’ MSJ Ex. A at 1.
5. The scope of work under the proposed CY 2014 AFA included fifteen specific tasks and objectives set forth in Attachment A to the proposed CY 2014 AFA. Stipulations ¶ 18; Compl. Ex. B, Att. A – Fiscal Year 2014 Scope of Work at 2. Those same fifteen specific tasks and objectives were previously included in the Contract’s CY 2012 and 2013 AFAs. *See* Stipulations ¶ 19; Defendants’ MSJ Ex. A, Att. A – Fiscal Year 2012 Scope of Work at 1-2.
6. Due to a lapse in annual agency appropriations from Congress, the Executive agencies of the federal government, including the Department of the Interior and the BIA, were unable to operate from October 1, 2013, through October 16, 2013, except in limited circumstances set forth by law. Compl. Exs. D, I; Defendants’ MSJ Ex. B, Declaration of Jeanette Quintero at ¶ 9 (“Quintero Decl.”); *see also* Compl. Ex. G at 4-5, Declaration of Ronald Duncan at ¶ 8. The BIA’s Navajo Regional Office was closed, and a sign was placed on the front doors of the Gallup Federal Building noting that the building was closed due to the lapse in appropriations. Quintero Decl. at ¶ 9. Only excepted or

exempted employees were allowed to work during the lapse. Compl. Ex. I; Quintero Decl. at ¶ 9.

7. There were no excepted employees in the BIA's Navajo Regional office authorized to receive or work on ISDEAA contracts during the government shutdown. Compl. Ex. I; Quintero Decl. at ¶ 9. The BIA's Navajo Regional office had an exempt employee, Mr. Raymond Slim, whose salary was funded from multi-year appropriations for road construction contracts. Compl. Ex. I; Quintero Decl. at ¶ 10. As an exempt employee, he was specifically authorized to receive or work on contracts related to road construction during the government shutdown. Compl. Ex. I; Quintero Decl. at ¶ 10. He was not deemed excepted in order to work on contracts such as the Navajo Nation's Contract for the Tribal Courts Program. Compl. Ex. I; Quintero Decl. at ¶ 10.
8. On October 4, 2013, Mr. Ronald Duncan handed the Navajo Nation's proposed CY 2014 AFA to Mr. Slim at the receptionist's desk of the Self-Determination Office in the BIA's Navajo Regional Office. Stipulations ¶ 15; Quintero Decl. at ¶ 11. Mr. Slim marked the CY 2014 AFA proposal for intra-office mail delivery to Ms. Jeanette Quintero. Quintero Decl. at ¶ 11. However, due to the lapse in appropriations, intra-office mail delivery had ceased and did not resume until October 17, 2013, so the CY 2014 AFA proposal remained at the receptionist's desk until October 17, 2013, on which date Ms. Quintero received the Navajo Nation's CY 2014 AFA proposal. *Id.* During the lapse in appropriations, Ms. Quintero and the other employees in her office except for Mr. Slim were furloughed. *Id.*
9. On October 21, 2013, the BIA issued a letter acknowledging receipt of the Navajo Nation's CY 2014 AFA proposal on October 17, 2013. Stipulations ¶¶ 21–22; Compl.

Ex. D. In this letter, the BIA stated that the 90-day period to approve, decline, or award the Navajo Nation's CY 2014 AFA proposal would end on January 15, 2014.

Stipulations ¶ 21; Compl. Ex. D.

10. The Navajo Nation did not respond to the BIA's October 21, 2013 letter. Stipulations ¶ 23.
11. After the BIA acknowledged receipt of the CY 2014 AFA proposal, the BIA began its review of the proposal. Quintero Decl. at ¶ 12.
12. On November 7, 2013, the BIA issued a letter to the Navajo Nation that described the agency's concerns with the proposal and requested additional information to resolve those concerns. Stipulations ¶¶ 24–25; Defendants' MSJ Ex. D.
13. The BIA's letter requested that the Navajo Nation "provide [its] response to our points of concern by November 29, 2013, so that we may complete the review of [its] CY 2014 SAFA proposal. We will hold the approval of the Tribal Courts proposal until requested documents are submitted." Defendants' MSJ Ex. D at 2.
14. The BIA did not receive a response to its November 7, 2013, letter. Stipulations ¶ 26.
15. On January 9, 2014, the BIA formally requested a 45-day extension "to provide additional time for the Navajo Nation to submit a response to the Navajo Region's review letter dated November 7, 2013." Stipulations ¶ 27; Compl. Ex. E.
16. The BIA did not receive a response to its extension request. Stipulations ¶ 28.
17. On January 15, 2014, the BIA issued its formal partial declination of the Navajo Nation's CY 2014 AFA proposal. Stipulations ¶ 30; Compl. Ex. F. The Navajo Nation's CY 2014 AFA proposal included a proposed budget of \$17,055,517.00. Stipulations ¶ 20. The BIA declined the amount of funding requested by the Navajo Nation above the

\$1,292,532 Secretarial amount determined pursuant to 25 U.S.C. § 450j-1(a)(1). Compl. Ex. F; *see* Stipulations ¶ 9.

18. On February 4, 2014, the BIA sent a follow-up letter to the Navajo Nation, attaching the documents the BIA relied upon to support its partial declination. Compl. Ex. H; *see also* 25 C.F.R. § 900.29(a) (requiring the Secretary to provide the tribe “within 20 days, any documents relied on in making the [declination] decision”).
19. On January 30, 2014, the BIA received a letter from the Navajo Nation dated January 30, 2014, which asserted that the BIA’s partial declination of the Navajo Nation’s CY 2014 AFA proposal was untimely. Compl. Ex. G. For the first time, the Navajo Nation indicated its belief to the BIA that the deadline for approval or declination of the proposal was January 2, 2014. *Id.*; Quintero Decl. at ¶ 22.
20. On February 7, 2014, the BIA issued a letter in response, noting that the BIA’s partial declination of the Navajo Nation’s CY 2014 AFA proposal was timely issued on January 15, 2014. Compl. Ex. I.

DATED: April 3, 2015

Respectfully submitted,

BENJAMIN C. MIZER  
Acting Assistant Attorney General

ERIC R. WOMACK  
Assistant Branch Director

/s/ Elizabeth L. Kade  
ELIZABETH L. KADE  
(D.C. Bar No. 502980)  
Trial Counsel  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, N.W.  
Washington, D.C. 20530  
Telephone: (202) 616-8491  
Facsimile: (202) 616-8470  
E-mail: Elizabeth.L.Kade@usdoj.gov

Counsel for Defendants



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S.M.R. JEWELL, in her official capacity as	)	
Secretary, U.S. Department of the Interior,	)	
	)	
Defendants.	)	
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**DEFENDANTS’ RESPONSE TO PLAINTIFF’S STATEMENT OF MATERIAL FACTS**

Pursuant to LCvR 7(h), the United States Department of the Interior and S.M.R. Jewell, in her official capacity as Secretary of the Interior (“Defendants”), by and through undersigned counsel, respectfully submit this Response to Plaintiff’s Statement of Material Facts As to Which There Is No Genuine Issue (“Response”). This Response is designed solely to respond to the Plaintiff’s Statement by identifying which of the factual grounds for Plaintiff’s Motion for Summary Judgment are denied. These disputes relate only to facts Plaintiff proffers, and have no bearing on Defendants’ Motion for Summary Judgment or the factual support for that Motion. Defendants maintain that there are no genuine issues of material fact with respect to the grounds entitling Defendants to summary judgment.

The paragraph numbers for this Response refer to the corresponding numbers in Plaintiff’s Statement:

- 1. Undisputed.

2. Undisputed.
3. Undisputed.
4. Undisputed.
5. Undisputed.
6. Undisputed.
7. Undisputed.
8. Paragraph 8 of Plaintiff's Statement contains legal conclusions and opinions about the statutory scheme, to which no response is required. The Court is respectfully referred to the cited statutes for a full and accurate statement of their contents. To the extent a response is required, this paragraph is disputed. *See* 25 U.S.C. § 450j-1(b).
9. Defendants do not dispute that the Nation's funding proposal for CY 2014 consisted of a cover letter and the Nation's proposed CY 2014 AFA. The Court is respectfully referred to these materials for a full and accurate statement of their contents.
10. Paragraph 10 of Plaintiff's Statement constitutes Plaintiff's characterization of the proposed 2014 AFA and its attachments, to which the Court is respectfully referred for a full and accurate statement of their contents. Defendants do not dispute that the Nation proposed to administer and perform the tasks and objectives of the Tribal Courts Program identified in the proposed 2014 AFA's Scope of Work.
11. Paragraph 11 of Plaintiff's Statement constitutes Plaintiff's characterization of the proposed 2014 AFA and its attachments, to which the Court is respectfully referred for a full and accurate statement of their contents. Defendants do not dispute that the Scope of Work included various tasks and objectives.
12. Undisputed.

13. This paragraph constitutes Plaintiff's characterization of the proposed 2014 AFA and its attachments, to which the Court is respectfully referred for a full and accurate statement of their contents. Defendants do not dispute that Plaintiff's request totaled \$17,055,517.00.
14. Defendants dispute Plaintiff's characterizations in Paragraph 14 of Plaintiff's Statement except to admit that Mr. Ronald Duncan signed the sign-in sheet provided by the uniformed officer at the BIA's Navajo Regional Office on October 4, 2013, and Mr. Duncan handed Plaintiff's proposed CY 2014 AFA for the Navajo Nation's Tribal Courts program to Indian Self-Determination Specialist Raymond Slim, an employee of the BIA. The BIA sent a letter to Plaintiff dated October 21, 2013, to which the Court is respectfully referred for a full and accurate statement of its content.
15. Paragraph 15 of Plaintiff's Statement contains legal conclusions and opinions to which no response is required. To the extent a response is required, Defendants dispute that they did not decline the Nation's proposal within 90 days of receipt by the Secretary.
16. Paragraph 16 of Plaintiff's Statement contains legal conclusions and opinions to which no response is required. Defendants do not dispute that the BIA requested a 45-day extension in a letter dated January 9, 2014, "to provide additional time for the Navajo Nation to submit a response to the Navajo Region's review letter dated November 7, 2013," and the BIA did not receive a formal response to this extension request. To the extent a response is required to the remainder, it is disputed.
17. Paragraph 17 of Plaintiff's Statement contains legal conclusions and opinions to which no response is required. Defendants do not dispute that the BIA formally partially declined

Plaintiff's proposed CY 2014 AFA in a letter dated January 15, 2014, which speaks for itself. To the extent a response is required to the remainder, it is disputed.

18. Defendants do not dispute that the Nation issued a letter dated January 27, 2014, to the BIA. The remainder constitutes Plaintiff's characterization of the letter, to which the Court is respectfully referred for a full and accurate statement of its content.
19. Paragraph 19 of Plaintiff's Statement contains legal conclusions and opinions to which no response is required. Defendants do not dispute that the BIA issued a letter to Plaintiff on February 4, 2014, transmitting the documents upon which it had relied when it issued its formal partial declination of Plaintiff's proposed CY 2014 AFA. *See* 25 C.F.R. § 900.29(a) (requiring the Secretary to provide, "within 20 days [of a declination], any documents relied on in making the decision"). The Court is respectfully referred to the letter for a full and accurate statement of its contents.
20. Defendants do not dispute that the BIA issued a letter to Plaintiff on February 7, 2014, in response to Plaintiff's letter dated January 27, 2014. The Court is respectfully referred to the letter for a full and accurate statement of its contents. The remainder of this paragraph contains legal conclusions and opinions to which no response is required. To the extent a response is required, it is disputed.
21. Undisputed.
22. Defendants do not dispute that they sent a letter dated February 28, 2014, to the Navajo Nation concerning the 2014 AFA proposal. The Court is respectfully referred to the letter for a full and accurate statement of its contents. The remainder of this paragraph contains legal conclusions and opinions to which no response is required. To the extent a response is required, it is disputed.

23. Defendants do not dispute that they received a letter from the Nation dated November 19, 2013, and that they responded to that letter on December 10, 2013. The Court is respectfully referred to the letters for a full and accurate statement of their contents. The remainder of this paragraph contains legal conclusions and opinions to which no response is required. To the extent a response is required, it is disputed.
24. Paragraph 24 of Plaintiff's Statement contains legal conclusions and opinions, as well as Plaintiff's characterizations, to which no response is required. To the extent a response is required, it is disputed. The Court is respectfully referred to the November 19, 2013, letter for a full and accurate statement of its contents.
25. Paragraph 25 of Plaintiff's Statement contains legal conclusions and opinions, to which no response is required. To the extent a response is required, it is disputed.
26. Paragraph 26 of Plaintiff's Statement contains legal conclusions and opinions, to which no response is required. To the extent a response is required, it is disputed.
27. Paragraph 27 of Plaintiff's Statement contains legal conclusions and opinions to which no response is required. To the extent a response is required, it is disputed.
28. Defendants do not dispute that the Nation submitted a letter to the BIA on March 24, 2014, supplemented by a letter of April 17, 2014, which purported to submit a claim to the BIA Self-Determination Awarding Official. This Court is respectfully referred to these letters for a full and accurate statement of their contents. Defendants dispute Plaintiff's characterization of these letters.
29. Defendants do not dispute that the BIA issued a letter to Plaintiff dated May 13, 2014, which Plaintiff received on May 20, 2014, in response to the letters described in paragraph 28. Defendants dispute Plaintiff's characterization of this letter, which advised

that the Awarding Official did “not have authority to review this appeal under the CDA” because Plaintiff’s dispute was more appropriately characterized as a pre-award declination appeal. The Court is respectfully referred to the letter for a full and accurate statement of its contents.

30. Paragraph 30 of Plaintiff’s Statement contains legal conclusions and opinions to which no response is required. The Court is respectfully referred to the May 13, 2014, letter and the attached IBIA opinion for a full and accurate statement of their contents.
31. Defendants do not dispute that the BIA paid the Nation \$1,814,135.00 for the CY 2014 Tribal Courts Program contract. Defendants dispute Plaintiff’s characterizations of this payment.

DATED: April 3, 2015

Respectfully submitted,

BENJAMIN C. MIZER  
Acting Assistant Attorney General

ERIC R. WOMACK  
Assistant Branch Director

/s/ Elizabeth L. Kade  
ELIZABETH L. KADE  
(D.C. Bar No. 502980)  
Trial Counsel  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, N.W.  
Washington, D.C. 20530  
Telephone: (202) 616-8491  
Facsimile: (202) 616-8470  
E-mail: Elizabeth.L.Kade@usdoj.gov

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**MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND  
OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

This is a challenge, brought under Section 110 of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* (“ISDEAA”), and the Contract Disputes Act, 41 U.S.C. §§ 7101 *et seq.* (“CDA”), to the timeliness of the January 15, 2014, decision of the Bureau of Indian Affairs (“BIA”), a bureau of the United States Department of the Interior, to partially decline to enter into the Navajo Nation’s (“Navajo Nation”) proposed Calendar Year (“CY”) 2014 Annual Funding Agreement (“AFA”) for operation of the Navajo Nation’s Tribal Courts Program.

In CY 2014, the Navajo Nation proposed funding for its Tribal Courts Program that was more than 13 times (\$17,055,517/\$1,292,532) the level of funding provided in CY 2013, which was the funding level determined by the Secretary for the CY 2014 contract pursuant to 25 U.S.C. § 450j-1(a)(1). The Navajo Nation hand-delivered the CY 2014 AFA proposal during a lapse in federal appropriations, when no one at the BIA Navajo Regional Office was authorized to receive or act on the proposal on behalf of the Secretary. As soon as the lapse in appropriations ended, the BIA swiftly completed its review of the proposal. The BIA sent letters to the Navajo Nation on October 21, 2013, and November 7, 2013, explaining that the 90-day statutory deadline ended on January 15, 2014, identifying several problems with the Navajo Nation’s proposal, and seeking additional information from the Navajo Nation to permit negotiations between the parties, as had occurred routinely in the past. Despite these good faith attempts, the Navajo Nation remained silent as to its purported belief that the proposal was “received” for purposes of the 90-day clock on October 4, 2014. The Navajo Nation should not

be entitled to reap a windfall from the BIA's good faith attempt to negotiate consistent with the purposes and intent of the ISDEAA and associated regulations.

To the contrary, the best reading of the statutory and regulatory scheme is that the 90-day statutory clock under the ISDEAA did not begin to run until annual appropriations were restored on October 17, 2013, because the Navajo Nation's CY 2014 AFA proposal for the Tribal Courts Program could not have been "received by the Secretary" for purposes of the ISDEAA during the shutdown at the Navajo Regional Office. The office did not have any positions designated as excepted or exempted from the prohibitions of the Anti-Deficiency Act which would authorize an employee to "receive" such a proposal during the shutdown.

Furthermore, Plaintiff should not be entitled to claim that the Navajo Nation's CY 2014 AFA proposal was statutorily "received by the Secretary" for purposes of the 90-day clock on October 4, 2013. The BIA relied on the Navajo Nation's silence in the face of the agency's repeated, good faith attempts to negotiate as demonstrating the Navajo Nation's agreement that the 90-day approval period began on October 17, 2013. If the Navajo Nation had notified the BIA that they believed the proposal was statutorily "received by the Secretary" on October 4, 2013, the BIA could have issued its formal declination by January 2, 2014.

Even if the Court determines that the Navajo Nation's CY 2014 AFA proposal was deemed approved—a result that Defendants believe is contrary to law—the proposed CY 2014 funding amount which exceeds the Contract's Secretarial amount should be rejected. This is consistent with a plain reading of the statutory and regulatory scheme and with Ninth Circuit precedent, and the rationale for this interpretation is particularly clear where, as here, an ISDEAA proposal includes a funding level which is grossly disproportionate to the Secretarial

amount. The Navajo Nation's proposed \$17,055,517.00 amount for CY 2014 grossly exceeds the Secretarial amount for the Contract and appears to be facially unreasonable. The Navajo Nation's proposed funding was more than 13 times ( $\$17,055,517/\$1,292,532$ ) the level of funding determined by the Secretary for CY 2014, and the Navajo Nation has not provided any formula or detailed explanation as to why the proposed funding is facially reasonable.

Accordingly, this Court should deny Plaintiff's motion for summary judgment, grant Defendants' cross motion for summary judgment, and enter judgment for Defendants.

### **STATUTORY AND REGULATORY BACKGROUND**

The BIA provides a broad range of services, both directly and through funding agreements with tribes and tribal organizations, to more than 2.0 million American Indian and Alaska Natives who are members of 566 federally-recognized tribes. *See* U.S. Dep't of the Interior, Budget Justifications and Performance Information Fiscal Year 2015: Indian Affairs at IA-GS-2 (2015). Among other services, the BIA may provide or contract with tribes to provide education, social services, and repair and maintenance of roads and bridges, as well as law enforcement, detention services, and administration of tribal courts. *See, e.g.*, 25 U.S.C. § 13; ISDEAA, 25 U.S.C. §§ 450 *et seq.*

A tribe's or tribal organization's authority to contract with the BIA to perform BIA services arises under the ISDEAA. Congress created the ISDEAA to effect "an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. § 450a(b); *see also id.* § 450b(j) (requiring the BIA to enter into contracts with tribes "for the planning, conduct and administration of programs and

services which are otherwise provided to Indian tribes and their members”). Upon the request of a tribe by tribal resolution, the ISDEAA requires the BIA to enter into a self-determination contract with the tribe or a tribal organization to administer any program, function, service or activity that is currently provided by the BIA for the benefit of the tribe. 25 U.S.C. § 450f(a)(1).

The ISDEAA provides that the funding transferred pursuant to a self-determination contract “shall not be less than the appropriate [agency] would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract [if the agency had continued to provide the service itself].” *Id.* § 450j-1(a)(1) (emphasis added). This amount is also called the “Secretarial amount.”<sup>1</sup> The ISDEAA prohibits including duplicative costs in the Secretarial amount. *Id.* § 450j-1(a)(3)(A). In short, a self-determination contract “transfer[s] the funding [for the Secretarial amount] and the [] related programs [or activities] (or portions thereof)” from the BIA to a tribal organization. *Id.* § 450l(c), model agreement § (a)(2) (emphasis added).

A tribal organization that wishes to enter into a self-determination contract must submit a proposal to the Secretary to review. Once a proposal has been received by the Secretary, the Secretary has 90 days to approve the contract proposal and award the contract or decline the contract proposal. *See* 25 U.S.C. § 450f(a)(2) (“[T]he Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract . . . .”) (emphasis added); 25 C.F.R. § 900.16 (“The Secretary has 90 days after receipt of a proposal to review and approve

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<sup>1</sup> To carry out this requirement, BIA implementing regulations require a tribal organization’s proposal for a self-determination contract to identify the funds requested for the program to be performed, including the tribal organization’s share of BIA funds related to the program. *See* 25 C.F.R. § 900.8(h).

the proposal and award the contract or decline the proposal in compliance with section 102 of the Act and subpart E.”) (emphasis added). This 90-day deadline may be extended by written agreement from the tribe. 25 U.S.C. § 450f(a)(2); 25 C.F.R. § 900.17. The BIA’s regulations provide that “if a proposal is not declined within 90 days after it is received by the Secretary”, the proposal “is deemed approved and the Secretary shall award the contract or any amendment or renewal within that 90-day period and add to the contract the full amount of funds pursuant to section 106(a) of the Act.” 25 C.F.R. § 900.18.

The agency may decline all or a portion of an ISDEAA proposal that meets at least one of the five bases for declination, including if “the amount of funds proposed under the contract is in excess of the applicable funding level for the contract.” 25 U.S.C. § 450f(a)(2). If the agency declines an ISDEAA proposal, the agency must “state any objections in writing to the tribal organization” and provide the tribal organization an opportunity for discovery and a hearing. 25 U.S.C. § 450f(b). Further, if a proposal exceeds the funding amount allowed by the statute, the Secretary may “approve a level of funding authorized under section 450j-1(a) of this title” as part of the Secretary’s power to approve any severable portion of a contract proposal. 25 U.S.C. § 450f(a)(4).

The ISDEAA allows tribes to request additional funding above the Secretarial amount. *See id.*; 25 U.S.C. § 450j-1(a)(3)(B) (“On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this subchapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.”); 25 U.S.C. § 450j-1(b)(5) (“The amount



of funds required by [Section 106(a)] . . . may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this [Act] . . .”). However, the ISDEAA does not require the BIA to award a self-determination contract with program funding that exceeds the amount of funds that the BIA would otherwise have expended on the particular program or service for the tribe. *Id.* § 450f(a)(2)(D). Nor can the BIA be required to reduce funding for programs and activities provided for one tribe in order to make funds available for a self-determination contract with another tribe. *Id.* § 450j-1(b).

## **FACTUAL BACKGROUND**

### **I. The Navajo Nation’s Contract for Tribal Courts**

The Navajo Nation and the BIA’s Navajo Regional Office entered into Contract No. A12AV00698, effective January 1, 2012 to December 31, 2016 (“Contract”), to transfer the funding and the functions, services, activities, and programs otherwise contractible under the ISDEAA for the Tribal Courts Program from the federal government to the Navajo Nation pursuant to the ISDEAA. *See* Contract No. A12AV00698 at 1-3 & ¶¶ A(1)–(2), attached hereto as Ex. A; Joint Statement of Stipulated Facts ¶ 6 (“Stipulations”). The Contract requires the Navajo Nation and the BIA to negotiate successor AFAs, each of which is incorporated into the Contract. Stipulations ¶ 7.

The CY 2012 AFA included a scope of work pursuant to the 2007 Strategic Plan of the Navajo Nation Judicial Branch, which included fifteen specific tasks and objectives:

- Ensure the continued provision of efficient, fair and respectful services within the parameters of Title 7 and Title 9 of the Navajo Nation Code;
- Ensure that the judicial system is in accordance with Diné bi beenahaz’ áanii that fully incorporates Navajo values and processes;
- Actively participate in the development of integrated justice information sharing among Navajo Nation judicial and justice stakeholders;

- Process and assist with peacemaking cases;
- Provide rehabilitative and/or restorative justice services in probation and parole cases;
- Provide case management services to youth that have entered the justice system;
- Educate and inform the public of judicial court and program services via various measures including the employment of a Judicial Liaison Officer;
- Create or maintain partnerships with local service providers and other governmental entities;
- Train personnel to provide effective and continual court services to the public;
- Ensure safe court and program facilities;
- Ensure the public's access to the judicial system;
- Train and employ bilingual court reporters/transcribers;
- Fund updates to the Navajo Law Reporter;
- Continue to train and employ court clerks; and
- Maintain court and program facilities.

Ex. A, Att. A – Fiscal Year 2012 Scope of Work at 1-2; Stipulations ¶ 10. The CY 2012 AFA provided the Navajo Nation with \$1,349,659 to provide these services. Stipulations ¶ 8; Ex. A at 1.

On November 28, 2012, the Navajo Nation submitted its CY 2013 AFA proposal in a proposal packet labeled “Supplemental AFA,” which included a proposed CY 2013 funding level of \$2,072,950. Declaration of Jeanette Quintero at ¶ 8 (“Quintero Decl.”), attached hereto as Ex. B. After clarifying with the Navajo Nation that the proposal was intended to be a CY 2013 AFA, on January 8, 2013, the BIA partially declined the Navajo Nation’s CY 2013 AFA as in excess of the applicable funding level for the Contract for CY 2013 (which was \$1,373,926). *Id.* The Navajo Nation requested an informal conference regarding the partial declination, after which the Navajo Nation submitted a proposed revised scope of work for the Contract which included a new sixteenth objective: “Establish and sustain alternative punishments in core sentencing.” *Id.*; *see also* Stipulations ¶ 11. The BIA recommended that the Navajo Nation

submit a request for expansion funding for the new proposed objective, and informed the Navajo Nation that new sources of supplemental funding may have opened up. Stipulations ¶ 12; Quintero Decl. at ¶ 8. As a result, the Navajo Nation withdrew its proposed revision to the Contract's scope of work and requested expansion and supplemental funding. Stipulations ¶ 13. The BIA approved a modification to the Contract to add one-time expansion funding of \$133,527.00 for CY 2013. Stipulations ¶ 14.

## **II. The Navajo Nation's CY 2014 AFA Proposal**

Due to a lapse in annual agency appropriations from Congress, the Executive agencies of the federal government, including the Department of the Interior and the BIA, were unable to operate from October 1, 2013, through October 16, 2013, except in limited circumstances set forth by law. Compl. Exs. D, I; Quintero Decl. at ¶ 9; *see also* Compl. Ex. G at 4-5, Declaration of Ronald Duncan at ¶ 8. The BIA's Navajo Regional Office was closed, and a sign was placed on the front doors of the Gallup Federal Building noting that the building was closed due to the lapse in appropriations. Compl. Ex. I; Quintero Decl. at ¶ 9. Only excepted or exempted employees were allowed to work during the lapse. Compl. Ex. I; Quintero Decl. at ¶ 9. Excepted employees were those employees who were expressly authorized to work on specific assignments to protect life and property. Compl. Ex. I; *see* Anti-Deficiency Act, 31 U.S.C. § 1342. Exempted employees were those employees whose salaries were paid out of a source of funding other than annual appropriations and therefore were not implicated by the lapse. Compl. Ex. I; *see* BIA Contingency Plan Q&A Document (Sept. 27, 2013), attached hereto as Ex. C (describing excepted and exempted programs and employees).

There were no excepted employees in the BIA's Navajo Regional office authorized to receive or work on ISDEAA contracts during the government shutdown. Compl. Ex. I; Quintero Decl. at ¶ 9. The BIA's Navajo Regional office had an exempt employee, Mr. Raymond Slim, whose salary was funded from multi-year appropriations for road construction contracts. Compl. Ex. I; Quintero Decl. at ¶ 10. As an exempt employee, he was specifically authorized to receive or work on contracts related to road construction during the government shutdown. Compl. Ex. I; Quintero Decl. at ¶ 10. He was not deemed excepted in order to work on contracts such as the Navajo Nation's Contract for the Tribal Courts Program. Compl. Ex. I; Quintero Decl. at ¶ 10.

On October 4, 2013, Mr. Ronald Duncan handed the Navajo Nation's proposed CY 2014 AFA to Mr. Slim at the receptionist's desk of the Self-Determination Office in the BIA's Navajo Regional Office. Stipulations ¶ 15; Quintero Decl. at ¶ 11. Mr. Slim marked the CY 2014 AFA proposal for intra-office mail delivery to Ms. Jeanette Quintero. Quintero Decl. at ¶ 11. However, due to the lapse in appropriations, intra-office mail delivery had ceased and did not resume until October 17, 2013, so the CY 2014 AFA proposal remained at the receptionist's desk until October 17, 2013, on which date Ms. Quintero received the Navajo Nation's CY 2014 AFA proposal. *Id.* During the lapse in appropriations, Ms. Quintero and the other employees in her office except for Mr. Slim were furloughed. *Id.*

On October 21, 2013, the BIA issued a letter acknowledging receipt of the Navajo Nation's CY 2014 AFA proposal on October 17, 2013. Stipulations ¶¶ 21–22; Compl. Ex. D; *see also* 25 C.F.R. § 900.15(a) (“Upon receipt of a proposal, the Secretary shall [w]ithin two days notify the applicant in writing that the proposal has been received[.]”). The letter noted that the “government was on shutdown from October 1, 2013, through October 16, 2013, which

included mail delivery to our office,” and that the BIA therefore had “90 days after October 17, 2013, to approve, decline, or award the proposal. The 90-day period will end on January 15, 2014.” Compl. Ex. D (emphasis in original); *see also* Stipulations ¶ 21. After the BIA acknowledged receipt of the CY 2014 AFA proposal, the BIA began its review of the proposal. Quintero Decl. at ¶ 12.

On November 7, 2013, the BIA issued a letter to the Navajo Nation that described the agency’s concerns with the proposal and requested additional information to resolve those concerns. Stipulations ¶¶ 24–25; Letter from Pearl Chamberlin to Hon. Ben Shelly dated Nov. 7, 2013, attached hereto as Ex. D; *see also* 25 C.F.R. § 900.15(b)-(c) (“Upon receipt of a proposal, the Secretary shall ... (b) Within 15 days notify the applicant in writing of any missing items required by § 900.8 and request that the items be submitted within 15 days of receipt of the notification; and (c) Review the proposal to determine whether there are declination issues under section 102(a)(2) of the Act.”). The BIA noted in its review that “[t]he proposed CY 2014 budget amount of \$17,055,517.00 is substantially more than the FY 2013 Direct Base” and recommended that the Navajo Nation submit a revised budget for \$1,292,532. Ex. D at 1. The review letter also noted substantial changes in the proposed CY 2014 AFA’s scope of work narrative sections, and the BIA recommended that the Navajo Nation keep its current approved scope of work and submit an Annual Performance Plan to indicate which tasks the Nation would be working on in CY 2014. *Id.* at 2. The BIA’s letter requested that the Navajo Nation “provide [its] response to our points of concern by November 29, 2013, so that we may complete the review of [its] CY 2014 SAFA proposal. We will hold the approval of the Tribal Courts proposal until requested documents are submitted.” *Id.* at 2.

In past years, including CY 2013, the BIA has negotiated with the Navajo Nation's Contracting Officer, who in turn works with his program contacts to negotiate any issues with an ISDEAA program contract. Quintero Decl. at ¶ 15. The Navajo Nation's Contracting Officer who serves as the BIA's point of contact for the Tribal Courts Program is Mr. Cordell Shortey. *Id.* On January 7, 2014, Ms. Quintero emailed Mr. Shortey with a carbon copy to Mr. Ronald Duncan, inquiring about the status of the CY 2014 proposal and noting the upcoming January 15, 2014, 90-day deadline. *Id.* She did not receive a response from Mr. Shortey or Mr. Duncan. *Id.*

In fact, the BIA did not receive any formal or informal response to its November 7, 2013, letter. Stipulations ¶ 26; Quintero Decl. at ¶ 16. Accordingly, on January 9, 2014, the BIA formally requested by letter a 45-day extension "to provide additional time for the Navajo Nation to submit a response to the Navajo Region's review letter dated November 7, 2013." Stipulations ¶ 27; Compl. Ex. E; Quintero Decl. at ¶ 17. The BIA requested this extension as a good faith effort to resolve the deficiencies noted in its November 7, 2013, letter and wanted to give the Navajo Nation as much time as possible to respond to the BIA's concerns. Quintero Decl. at ¶ 17. The Navajo Nation had agreed to similar extensions in other ISDEAA programs, and it is rare for the Navajo Nation to not respond to an extension request. *Id.* ¶ 17 & Att. 1. As part of the extension request, the BIA again indicated that "[t]he 90 days will expire January 15, 2014." Compl. Ex. E.

The BIA expected the Navajo Nation to approve the requested extension, as it had in the past, but the BIA did not receive a formal response to its extension request. Stipulations ¶ 28; Quintero Decl. at ¶ 18. Ms. Quintero emailed Ms. Veronica Blackhat, a Navajo Nation DOJ Attorney, on January 14, 2014, inquiring about the status of the CY 2014 proposal and noting the

upcoming January 15, 2014, 90-day deadline. *Id.* Ms. Quintero did not receive a response from Ms. Blackhat. *Id.*

On January 15, 2014, the BIA issued its formal partial declination of the Navajo Nation's CY 2014 AFA proposal. Stipulations ¶ 30; Compl. Ex. F; Quintero Decl. at ¶ 20. In the partial declination, the BIA noted that it had advised the Navajo Nation on November 7, 2013, that the proposed budget of \$17,055,517.00 "far exceeded the funding available" for FY 2014 which was anticipated to be \$1,292,532. Compl. Ex. F at 1 (emphasis added). The BIA accordingly—pursuant to 25 U.S.C. § 450f(a)(2)(D) and 25 C.F.R. § 900.22(d)—declined the amount of funding requested by the Navajo Nation above the \$1,292,532 Secretarial amount determined pursuant to 25 U.S.C. § 450j-1(a)(1). *Id.* The BIA noted that "[w]hile we still need to address the additional activities proposed [in the statement of work modifications], we are willing to award the full funding we have available." *Id.* On February 4, 2014, the BIA sent a follow-up letter to the Navajo Nation, attaching the documents the BIA relied upon to support its partial declination as required by 25 C.F.R. § 900.29(a) (requiring the Secretary to provide the tribe "within 20 days, any documents relied on in making the [declination] decision."). Compl. Ex. H.

On January 27, 2014, the Navajo Nation sent the BIA a letter received on January 30, 2014, which asserted that the BIA's partial declination of the Navajo Nation's CY 2014 AFA proposal was untimely. Compl. Ex. G; Quintero Decl. at ¶ 21. The Navajo Nation maintained that its CY 2014 AFA proposal was hand-delivered to Mr. Slim on October 4, 2013, and, for the first time, argued that this constituted statutory "receipt" of the proposal. Compl. Ex. G at 1. The Navajo Nation asserted that the BIA's partial declination of the CY 2014 AFA proposal was therefore due by January 2, 2014. *Id.*

On February 7, 2014, the BIA issued a letter in response, noting that the BIA's partial declination of the Navajo Nation's CY 2014 AFA proposal was timely issued on January 15, 2014. Compl. Ex. I. Reiterating the points first made on October 21, 2013, the BIA explained that the federal government was shutdown from October 1, 2013, until October 17, 2013, during which time only excepted and exempted employees were allowed to work. *Id.* at 1; *see also* Compl. Ex. D. The BIA noted that hand-delivery of the CY 2014 AFA proposal to Mr. Slim did not constitute receipt "by the Secretary" for purposes of the 90-day deadline because Mr. Slim was an exempt employee only authorized to perform work for contracts related to road construction. Compl. Ex. I at 1-2. There was no employee within the Navajo Regional office who was authorized to receive or work on the Navajo Nation's CY 2014 AFA proposal on behalf of the Secretary during the government shutdown. *Id.* at 2. The BIA noted that the 90-day review period therefore did not begin until October 17, 2013, and continued through January 15, 2014. *Id.*

On February 28, 2014, the BIA issued a letter notifying the Navajo Nation that the Navajo Nation's current approved statement of work would remain in place for CY 2014 based on the BIA's November 7, 2013, letter. Compl. Ex. J. The Navajo Nation did not at any point



request a formal or informal conference with the BIA regarding the CY 2014 AFA partial declination.<sup>2</sup> Quintero Decl. at ¶ 26.

### **III. Plaintiff's Complaint**

The Navajo Nation maintains that the BIA failed to take the statutorily required action to approve or lawfully decline the Navajo Nation's CY 2014 AFA proposal before the expiration of the 90-day period set forth in the ISDEAA and promulgating regulations, and that the Navajo Nation's CY 2014 AFA proposal must therefore be deemed approved and a contract awarded for the full amount proposed, no matter the deficiencies with the request. The Navajo Nation requests (i) a judgment declaring that the Navajo Nation's CY 2014 AFA proposal is deemed approved as of January 3, 2014, (ii) a judgment compelling the Secretary to sign, award, and fund the Navajo Nation's CY 2014 AFA, and (iii) an award of damages for breach of contract in the amount of \$15,762,985, plus interest, fees, and costs.

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<sup>2</sup> By letter dated March 24, 2014, the Navajo Nation sent a claim to the BIA, purportedly under the CDA. *See* Compl. Ex. K. In its claim, the Navajo Nation argued that it delivered the CY 2014 AFA proposal to the BIA on October 4, 2013, the 90-day review period ended on January 2, 2014, and the BIA did not decline the proposal until January 15, 2014. The Navajo Nation argued that the CY 2014 AFA proposal was therefore deemed approved pursuant to the ISDEAA.

On May 13, 2014, the BIA sent the Navajo Nation a letter in response to the Navajo Nation's purported claim. *See* Compl. Ex. L. In its letter, the BIA pointed the Navajo Nation to the BIA's prior correspondence for its assertion that the declination had been timely. The BIA also asserted that although the Navajo Nation submitted a claim pursuant to the CDA under 25 C.F.R. Subpart N, "Post-Award Contract Disputes," the Navajo Nation's claim in fact was a pre-award declination appeal that should instead be appealed under 25 C.F.R. Subpart L, "Appeals." The Navajo Nation should therefore not appeal to the awarding official but instead should either file an informal conference request with the awarding official, an appeal to the Interior Board of Indian Appeals ("IBIA"), or a complaint to the applicable federal district court. *Compare* 25 C.F.R. §§ 900.152-153 *with* 25 C.F.R. §§ 900.219-221. The Navajo Nation chose to file its complaint in the instant proceeding. *See* 25 U.S.C. § 450f(b)(3); 25 C.F.R. § 900.153.

## STANDARD OF REVIEW

### I. Applicable Standard of Review for the BIA's Decision

This Court derives its jurisdiction to entertain Plaintiff's claims under the ISDEAA through 25 U.S.C. § 450m-1(a), Compl. ¶ 5, a provision that does not specify a particular standard of judicial review. *Cherokee Nation of Oklahoma v. U.S.*, 190 F. Supp. 2d 1254 (E.D. Okla. 2001), *aff'd*, 311 F.3d 1054 (10th Cir. Okla. 2002), *rev'd on other grounds*, 543 U.S. 631, 125 S. Ct. 1172 (2005); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306, 1313 (D. Or. 1997). When a statute provides for judicial review but fails to set forth the standards for that review, it is well accepted that the courts look to the Administrative Procedure Act ("APA") for guidance. *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963). The APA's arbitrary and capricious standard of review is the appropriate standard for cases brought under ISDEAA. *See Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103, 109 (D.D.C. 2009) (applying the APA standard of review to claims under the ISDEAA); *Al-Fayed v. C.I.A.*, 254 F.3d 300, 304 (D.C. Cir. 2001) (quoting *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1404 n. 12 (D.C. Cir. 1995) and citing *Workplace Health & Safety Council v. Reich*, 56 F.3d 1465, 167 (D.C. Cir. 1995)).

In *Maniilaq Ass'n v. Burwell*, No. 13-cv-380, 2014 WL 5558336 at\*4-5 (D.D.C. Nov. 3, 2014), a court in this Circuit noted that there is disagreement about whether this standard, or *de novo* review, should apply to claims under the ISDEAA. However, it is unnecessary to resolve this dispute in the present case because under either standard of review it is evident that Plaintiff is not entitled to the relief sought.

## II. Statutory Interpretation and Indian Law

In interpreting a statute, the general rule is that a court “must first determine whether the statutory text is plain and unambiguous.” *See Carciere v. Salazar*, 555 U.S. 379, 387 (2009) (interpreting the Indian Reorganization Act, 25 U.S.C § 465) (citations omitted). As Plaintiff notes, “[t]he Supreme Court has clarified that canons of statutory construction are slightly different when courts consider laws governing relations between the United States and Indian nations.” *Seneca Nation of Indians v. United States HHS*, 945 F. Supp. 2d 135, 142 (D.D.C. 2013); *see also Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444–45 (D.C. Cir. 1988) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)); *Tunica–Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 421 (D.D.C. 2008) (“The result, then, is that if the [statutory text] can reasonably be construed as the [t]ribe [or tribal organization] would have it construed, it must be construed that way”) (quoting *Muscogee*, 851 F. 2d at 1445; alterations in original)).

Nevertheless, “[i]n seeking to give effect to the provisions of the ISDEAA, as with any statute, the Court must treat the ‘object and policy’ of that statute as its polestar.” *Seneca Nation of Indians*, 945 F. Supp. 2d at 142 (citing *BlackLight Power, Inc. v. Rogan*, 295 F.3d 1269, 1273 (Fed. Cir. 2002) (internal quotation marks and citation omitted)).

## ARGUMENT

### I. The Navajo Nation’s CY 2014 Proposal Should Not Be Deemed “Received by the Secretary” until October 17, 2013

Plaintiff claims that the 90-day clock began running when the CY 2014 AFA proposal was hand-delivered on October 4, 2013. Pl.’s MSJ at 3-4; 12-16. However, that argument ignores the fact that annual appropriations for the BIA had lapsed at that time, and that the agency was therefore prohibited from operating in the normal course.

The United States Constitution states that “[n]o money shall be drawn from the Treasury, but in [c]onsequence of [a]ppropriations made by law.” U.S. Const. art. I, § 9, cl. 7. The Anti-Deficiency Act specifically prohibits agencies from incurring obligations in excess of appropriations, including the employment of federal personnel during a lapse in appropriations, except in emergencies unless otherwise authorized by law. *See* 31 U.S.C. § 1342. The term “emergency” . . . “does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.” *Id.*; *see also Am. Fed’n of Gov’t Emps. v. Rivlin*, No. 95-2115, 1995 WL 697236, \*2 (D.D.C. Nov. 17, 1995) (generally describing the Anti-Deficiency Act and the statute’s emergency exception). In addition to this exception to the Anti-Deficiency Act, federal personnel may be employed during a lapse in appropriations where they are working under a multi-year or indefinite appropriation, as those sources of funding remain despite the lapse in annual appropriations. Such employees are considered exempted because they are “authorized by law” to continue working during a one-year lapse in appropriations. *See Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 5 Op. O.L.C. 1, at \*11 (1981) (Attorney General Benjamin R. Civiletti) (“Ordinarily, then, should an agency’s regular one-year appropriation lapse, the ‘authorized by law’ exception to the Antideficiency Act would permit the agency to continue the obligation of funds to the extent that such obligations are: (1) funded by moneys, the obligational authority for which is not limited to one year, e.g., multi-year appropriations . . . .”); *see also* BIA Contingency Plan Q&A Document (Sept. 27, 2013), attached hereto as Ex. C (defining excepted and exempted programs and employees).

No BIA Navajo Regional Office employee was designated as excepted to allow such employee to work on ISDEAA contracts under the “emergency involving safety to human life or protection of property” exception during the October 2013 government shutdown. Compl. Ex. I; Quintero Decl. at ¶ 9. In addition, no BIA Navajo Regional office employee was authorized to work on the Navajo Nation’s CY 2014 AFA proposal for the Tribal Courts Program. Compl. Ex. I; Quintero Decl. at ¶¶ 9–10. Mr. Slim, the employee to whom the proposal was hand-delivered on October 4, 2013,<sup>3</sup> was exempted from the government shutdown to work on road construction project contracts. Compl. Ex. I; Quintero Decl. at ¶ 10. Road construction projects are funded through multi-year appropriations, so employees with salaries funded by such projects were exempt from the prohibitions of the Anti-Deficiency Act during the October 2013 government shutdown. *See* Compl. Ex. I; Ex. C. Mr. Slim’s authorization did not include work on contracts such as the CY 2014 AFA proposal for the Tribal Courts Program. Compl. Ex. I; Quintero Decl. at ¶ 10.

Due to the lapse in appropriations, it would be inconsistent with the statutory and regulatory scheme to hold that Mr. Slim’s acceptance of the hand-delivered proposal began the 90-day approval period. Both the statute and the regulations contemplate not only receipt, but receipt by the Secretary. *See, e.g.*, 25 U.S.C. § 450f(a)(2) (“[T]he Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract . . . .”); 25 C.F.R.

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<sup>3</sup> Mr. Ronald Duncan, a Principal Contract Analyst with the Navajo Nation, hand-delivered the CY 2014 AFA proposal to the Navajo Regional Office on October 4, 2013. Stipulations ¶ 15. Mr. Duncan knew that he was delivering the proposal during the federal shutdown, and he noted that “only minimal staff were there.” *See* Compl. Ex. G at 4-5, Declaration of Ronald Duncan at ¶ 8. In fact, Mr. Duncan would have walked past signs on the front entrance that noted the building was closed due to the government shutdown. *See* Quintero Decl. at ¶ 9.

§ 900.16 (“The Secretary has 90 days after receipt of a proposal to review and approve the proposal and award the contract or decline the proposal . . . .”); 25 C.F.R. § 900.18 (“What happens if a proposal is not declined within 90 days after it is received by the Secretary?”); 25 C.F.R. § 900.21 (“[A] proposal can only be declined within 90 days after the Secretary receives the proposal . . . .”). Receipt by the Secretary contemplates more than simple physical “receipt,” otherwise Plaintiff’s argument, extended to its logical end, would mean that Plaintiff could have simply slipped the envelope under the agency’s door, or dropped it through a mailslot when the office was closed, with the same consequences.

What the phrase actually contemplates is receipt by the agency at a time when a responsible official authorized to act on the proposal is available to receive it. *Cf. Aircraft Owners & Pilots Ass’n v. Hinson*, 102 F.3d 1421, 1428-29 (7th Cir. 1996) (noting a response was not considered timely received by the Clerk when copies of the response were thrown on the floor by the elevators in the court’s federal building after the Clerk’s office had closed); *Tech Hills II Assoc. v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963, 968 (6th Cir. 1993) (noting the general rule that a complaint is considered received by a corporation when it is received by an agent authorized to accept service of process, so delivery of a complaint to a security guard at the company’s building on a Saturday when the offices were closed was not received by the company until the following Monday when the complaint was delivered to an authorized representative); *Ascom Hasler Mailing Sys., Inc. v. U.S Postal Serv.*, 815 F. Supp. 2d 148, 167 (D.D.C. 2011) (noting “it is established that apparent authority will not suffice to hold the [g]overnment bound by the acts of its agents” and “anyone entering into an arrangement with the [g]overnment takes the risk of having accurately ascertained that he who purports to act for the

government stays within the bounds of his authority” (quoting *Doe v. United States*, 95 Fed. Cl. 546, 583 (Fed. Cl. 2010), and *Jumah v. United States*, 90 Fed. Cl. 603, 612 (Fed. Cl. 2009), respectively) (internal quotations omitted)).

Otherwise the requirements imposed on the agency by regulation, including the duty to respond to the tribe within two days to indicate receipt and the duty to respond in 15 days with a request for additional information, 25 C.F.R. § 900.15(a)-(b), would be meaningless, as Mr. Slim was not authorized to perform either of these tasks during the lapse in appropriations. This reading is supported by what actually occurred when Mr. Slim received the proposal. Mr. Slim marked the CY 2014 AFA proposal for intra-office mail delivery to Ms. Jeanette Quintero. Quintero Decl. at ¶ 11. However, due to the lapse in appropriations, intra-office mail delivery had ceased, so the CY 2014 AFA proposal remained at the receptionist’s desk until the lapse was over on October 17, 2013, on which date a responsible official authorized to act on the proposal was no longer furloughed and was available to receive it. *Id.*

Plaintiff repeatedly asserts that the BIA has attempted to “extend” the 90-day statutory period. Pl.’s MSJ at 10, 18-19. However, the 90-day period did not begin until the government shutdown ended on October 17, 2013. The BIA had 90 days in which to decline or approve the Navajo Nation’s CY 2014 AFA proposal, but the 90-day clock did not begin to run until the BIA’s office was open with an employee authorized by law to receive and act on the proposal.<sup>4</sup>

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<sup>4</sup> However, if the Court determines that the Navajo Nation’s CY 2014 AFA proposal was received by the Secretary on October 4, 2013, the statutory 90-day deadline should be equitably tolled until January 15, 2014, because the BIA acted diligently upon receiving the proposal and because the Navajo Nation’s actions induced the BIA to wait until January 15, 2014, to issue its formal declination decision. In *Herman v. Int’l Union of Bricklayers & Allied Craftsmen*, No. 96-753, 1998 WL 1039418, \*3 (D.D.C. Oct. 26, 1998), the agency’s mail room “received but did not date-stamp mail for the closed offices in the Department” during a lapse in appropriations so

Plaintiff also argues that the BIA's construction of the statute "would make the 90-day limit in the ISDEAA illusory; an agency could effectively toll the 90-day period by throwing a proposal in a stack and unilaterally deciding when to start the 90-day period by delaying the review assignment to someone other than the ISDEAA Specialist who received the proposal." Pl.'s MSJ at 18. However, that argument is a red herring, as "throwing the proposal in a stack" on October 17, 2013, would not have prevented the 90-day period from beginning to run on that date because the BIA's office was open with someone in that office authorized to receive and act on the proposal. Here the agency did not ignore the proposal. To the contrary, the BIA received and responded to the proposal as soon as it was received.

Moreover, the October 2013 federal government shutdown was an extraordinary event.

*See Best Key Textiles Co. Ltd. v. United States*, 942 F. Supp. 2d 1367, 1374 (Ct. Int'l Trade

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"the Office of Elections did not actually receive and date-stamp the [Intervenor's] complaint until January 11, 1996, when the government reopened." The *Herman* court noted that the 60-day statute of limitations set forth in 29 U.S.C. § 482(b) was not jurisdictional, and the court equitably tolled the 60-day limit because "the shutdown of the federal government presents an extraordinary circumstance which the parties could not control" and Intervenor "should not suffer the draconian result of dismissal of his suit because of the federal furlough." *Id.* at \*5-6.

Here, the BIA swiftly completed its review of the proposal as soon as the lapse in appropriations ended. *See* Stipulations ¶¶ 21–25; Quintero Decl. at ¶¶ 8–9. The BIA only failed to issue a formal declination decision by January 2, 2014, because it was engaging in good faith attempts to negotiate with the Navajo Nation, and because it was unaware that the Plaintiff believed the 90-day deadline was anything other than the January 15, 2014, deadline that the agency had repeatedly represented. *See* discussion *infra* Part II. Furthermore, Plaintiff would not be prejudiced by equitable tolling of the 90-day deadline because Plaintiff remained silent despite the fact that they knew that the BIA considered the 90-day statutory deadline to run until January 15, 2014, and that the BIA was waiting on a response from them before issuing a partial declination. *Id.* Finding the Navajo Nation's CY 2014 AFA proposal to be deemed approved on January 3, 2014, would be a "draconian result" under these circumstances. Equitable tolling of the 90-day statutory clock until January 15, 2014, would therefore be appropriate if the Court determines that the Navajo Nation's CY 2014 AFA proposal was received by the Secretary on October 4, 2013.



2013) (determining that a statutory 60-day notice period began running on October 17, 2013, despite the fact that the bulletin was printed on October 2, 2013, and noting “[i]t would be inequitable to allow the government to shorten the Congressionally-imposed notice obligations because of such an unusual set of circumstances *i.e.*, a government shutdown”). The unique circumstances of this case are unlikely to create the slippery slope that Plaintiff suggests.

The Navajo Regional Office did not have any designated excepted or exempted positions which would authorize an employee to “receive” the Navajo Nation’s proposal during the shutdown. Accordingly, the Secretary could not have received the Navajo Nation’s CY 2014 AFA proposal as a matter of law until October 17, 2013, when annual appropriations were restored.

**II. Plaintiff Is Equitably Estopped from Asserting that the Navajo Nation’s CY 2014 AFA Proposal Was “Received by the Secretary” on October 4, 2013**

Even if this Court does not agree that the receipt date was October 17, 2013, principles of equity should prohibit Plaintiff from arguing otherwise in the present case. The BIA relied on the Navajo Nation’s silence in the face of the agency’s repeated, good faith attempts to negotiate as demonstrating the Navajo Nation’s agreement that the 90-day approval period began on October 17, 2013. The statutory and regulatory scheme contemplates negotiations between the parties in an attempt to resolve any funding disputes. The Navajo Nation cannot now be permitted to use the unique circumstance of a lapse in appropriations as a weapon to avoid negotiations over areas of disagreements in an attempt to reap a financial windfall to which it would not otherwise be entitled.

“Estoppel is the doctrine by which a person may be precluded by his act or conduct, or silence if it is his duty to speak, from asserting a right which he otherwise would have had.”

*Britamco Underwriters, Inc. v. Nishi, Papagjika & Assocs., Inc.*, 20 F. Supp. 2d 73, 77 n.2 (D.D.C. 1998) (citing Black’s Law Dictionary 538 (6th ed. 1990)); *see also Tech 7 Sys., Inc. v. Vacation Acquisition, LLC*, 594 F. Supp. 2d 76, 86 (D.D.C. 2009) (same, quoting *Marshall v. Wilson*, 175 Or. 506, 154 P.2d 547, 551–52 (1944)). In all of the cases holding a party to be estopped by silence, “there was both the specific opportunity and apparent duty to speak.” *Wiser v. Lawler*, 189 U.S. 260, 272 (1903) (quoting *Viele v. Judson*, 82 N.Y. 32, 40 (1880)). Creation of a duty to speak requires that “the party maintaining silence knew that some one else was relying upon that silence, and either acting or about to act as he would not have done, had the truth been told.” *Id.*

The BIA considered the Navajo Nation’s CY 2014 AFA proposal received by the Secretary on October 17, 2013, and therefore believed the 90-day statutory declination deadline was January 15, 2014. On October 21, 2013, the BIA sent the Navajo Nation a letter stating: “[W]e have 90 days after October 17, 2013, to approve, decline, or award the proposal. The 90-day period will end on January 15, 2014.” Compl. Ex. D (emphasis in original); *see also* Stipulations ¶¶ 21–22. The Navajo Nation was therefore on notice that Defendants believed the Navajo Nation’s CY 2014 AFA proposal was received by the Secretary on October 17, 2013, and that the BIA was relying on that receipt date for its calculation of the 90-day statutory deadline. Despite this knowledge, Plaintiff did not respond. Stipulations ¶ 23.

On November 7, 2013, the BIA issued another letter providing the Navajo Nation with the results of its completed review of the CY 2014 proposal. Stipulations ¶¶ 24–25; Ex. D. The BIA noted in its review comments and recommendations that “[t]he proposed CY 2014 budget amount of \$17,055,517.00 is substantially more than the FY 2013 Direct Base” and

recommended that the Navajo Nation submit a revised budget for \$1,292,532. Ex. D. The review letter also noted substantial changes in the proposed CY 2014 AFA's scope of work narrative sections, and the BIA recommended that the Navajo Nation keep its current approved scope of work and submit an Annual Performance Plan to indicate which tasks the Nation would be working on in CY 2014. *Id.* The BIA's letter requested that the Navajo Nation "provide [its] response to our points of concern by November 29, 2013, so that we may complete the review of [its] CY 2014 SAFA proposal. We will hold the approval of the Tribal Courts proposal until requested documents are submitted." *Id.* (emphasis added). The Navajo Nation was therefore aware that the BIA intended to partially decline its CY 2014 AFA as proposed, but also that the BIA would wait to issue its formal decision until it heard back from the Navajo Nation. Plaintiff did not respond. Stipulations ¶ 26.

On January 9, 2014, the BIA requested an extension from the Navajo Nation "to provide additional time for the Navajo Nation to submit a response" to the BIA's November 7, 2014, letter. Compl. Ex. E; Stipulations ¶ 27. In that letter, the BIA again noted that "[t]he 90 days will expire January 15, 2014." Compl. Ex. E. Yet again, Plaintiff did not respond. Stipulations ¶ 28. Ms. Quintero emailed Ms. Veronica Blackhat, a Navajo Nation DOJ Attorney, on January 14, 2014, inquiring about the status of the CY 2014 proposal and noting the upcoming January 15, 2014, 90-day deadline. *Id.* Ms. Quintero did not receive a response from Ms. Blackhat. *Id.*

The BIA waited until January 15, 2014, to issue the partial declination in order to give Plaintiff the maximum amount of time to respond before the declination deadline that Defendants believed applied. Quintero Decl. at ¶ 22. However, the BIA's declination analysis

did not change between November 7, 2013, and January 15, 2014. *Id.* ¶ 19. The BIA could have issued its formal partial declination any time after November 7, 2013. *Id.*

On January 30, 2014, the BIA received a letter from the Navajo Nation dated January 27, 2014, which asserted, for the first time, that the BIA's partial declination of the Navajo Nation's CY 2014 AFA proposal was untimely. *See* Compl. Ex. G. If the Navajo Nation had provided this notification in response to any of the agency's prior letters and requests, the BIA could have issued its formal declination letter by January 2, 2014.<sup>5</sup> Quintero Decl. at ¶ 22. But the agency chose instead, consistent with the statutory and regulatory scheme, to attempt to resolve the issues with Navajo Nation in a collaborative manner. *See* 25 U.S.C. § 450a(b) (intent of the ISDEAA is to "establish[] a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.")<sup>6</sup>

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<sup>5</sup> The BIA would still have waited until the purported January 2, 2014, deadline in order to give the Navajo Nation the maximum amount of time to respond without waiving the BIA's declination rights. Quintero Decl. at ¶ 22.

<sup>6</sup> *See also* 25 C.F.R. § 900.3(b)(1) & (3):

**(1)** It is the policy of the Secretary to facilitate the efforts of Indian tribes and tribal organizations to plan, conduct and administer programs, functions, services and activities, or portions thereof, which the Departments are authorized to administer for the benefit of Indians because of their status as Indians. The Secretary shall make best efforts to remove any obstacles which might hinder Indian tribes and tribal organizations including obstacles that hinder tribal autonomy and flexibility in the administration of such programs. . . .

**(3)** It is the policy of the Secretary to provide a uniform and consistent set of rules for contracts under the Act. The rules contained herein are designed to facilitate and encourage Indian tribes to participate in the planning, conduct, and administration of those Federal programs serving Indian people. The Secretary shall afford Indian tribes and tribal organizations the flexibility, information, and discretion necessary to design

The BIA reasonably expected responses from the Navajo Nation because there had been a history of good faith negotiation between the parties when, as here, the Nation had proposed substantial changes to an AFA from the previous year. Quintero Decl. at ¶ 14. The BIA's review letter is routinely used as the basis for further negotiations of an AFA proposal, or as a basis for the Navajo Nation to submit a unilaterally revised proposal for final BIA review. *Id.* The BIA typically works with the Navajo Nation's Contracting Officer, who in turn works with his program contacts to negotiate any issues with an ISDEAA program contract. *Id.* ¶ 15. Plaintiff remained silent despite the fact that they knew that the BIA considered the 90-day statutory deadline to have begun on October 17, 2013, and that the BIA was waiting on a response from them before issuing a partial declination. The BIA's actions were consistent with the statutory objective behind the 90-day negotiation period, which is to resolve obstacles to contracting and, even after declination, to provide technical assistance to overcome objections to contracting. *See* 25 U.S.C. § 450f(b)(2).

The actions taken by the BIA with respect to the Navajo Nation's CY 2014 AFA proposal before the 90-day deadline asserted by either party distinguishes this case from those relied upon by Plaintiff. Pl.'s MSJ at 6, 14, 20. In *Seneca Nation of Indians v. United States HHS*, 945 F. Supp. 2d 135 (D.D.C. 2013), and *Maniilaq Ass'n v. Burwell*, No. 13-cv-380, 2014 WL 5558336 (D.D.C. Nov. 3, 2014), the government failed to provide any response to the ISDEAA proposals beyond a plain acknowledgment of receipt. Indeed, in *Seneca*, the court noted that, following receipt of the proposal, "[r]adio silence . . . ensued." *Seneca Nation*, 945 F.

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contractible programs to meet the needs of their communities consistent with their diverse demographic, geographic, economic, cultural, health, social, religious and institutional needs.  
(emphasis added).

Supp. 2d at 139. In contrast here, the BIA completed its review of the ISDEAA proposal and any “delay” in its formal declination decision was due entirely to (i) good faith attempts to negotiate with the tribal organization, and (ii) a lack of awareness that Plaintiff believed that the beginning of the 90-day period was anything other than what the agency had formally represented.

Plaintiff also relies upon *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F. Supp. 2d 1059, 1067 (D. S.D. 2007). Pl.’s MSJ at 14, 19-20. In *Cheyenne River Sioux*, the purported declination decision failed to apply the declination criteria to any specific facts in the ISDEAA proposal, failed to include the documents relied on in making the decision, and failed to advise the tribe of its appeal rights. Plaintiff does not claim that the BIA failed to comply with the substantive requirements of the declination statutes and regulations. In fact, the Navajo Nation was aware of the substantive bases for the BIA’s partial declination of its CY 2014 AFA proposal as early as November 7, 2013.<sup>7</sup> Plaintiff only challenges the timeliness of the BIA’s formal declination decision.

Furthermore, considering the Navajo Nation’s CY 2014 AFA proposal “received by the Secretary” for purposes of the 90-day statutory clock on October 4, 2014, would create perverse incentives for government agencies reviewing ISDEAA proposals and would produce an unjust result. Rather than waiting to negotiate or work with tribes to overcome technical obstacles, and

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<sup>7</sup> Indeed, the BIA’s November 7, 2013, could be considered a constructive declination of the Navajo Nation’s CY 2014 AFA proposal. The BIA had completed its review of the proposal by November 7, 2013, and did not change its review or analysis between November 7, 2013, and January 15, 2014. Quintero Decl. at ¶ 19. Plaintiff was therefore on notice of the specific, substantive bases for the BIA’s partial declination on November 7, 2013. Any technical defects in the constructive declination were cured by the BIA’s formal partial declination issued on January 15, 2015, and provision of documents relied upon on February 4, 2015.

risking the windfall for a tribe at the expense of others that any misunderstanding may produce, the agency should simply decline the proposal as soon as it discovers problems or concerns.

That is not the result intended by Congress or the agency.

**III. Even if the Navajo Nation’s CY 2014 AFA Proposal Is Deemed Approved, the Amount of Funding Requested by Plaintiff in the Navajo Nation’s CY 2014 AFA Proposal Grossly Exceeds the Contract’s Secretarial Amount and Should Be Rejected**

If the Court determines that the Navajo Nation’s CY 2014 AFA proposal was deemed approved—a result that Defendants believe is contrary to law—the proposed CY 2014 funding amount which exceeds the Contract’s Secretarial amount should be rejected. Even if an ISDEAA contract proposal is “deemed approved” by operation of law, the funding level awarded pursuant to the contract may not exceed the Secretarial amount. The regulations provide that if a proposal is not declined within 90 days after it is received by the Secretary, it “is deemed approved and the Secretary shall award the contract or any amendment or renewal within that 90-day period and add to the contract the full amount of funds pursuant to section 106(a) of the Act.” 25 C.F.R. § 900.18 (emphasis added).<sup>8</sup> Thus, the consequence of a contract proposal being deemed approved is that the Secretary must provide only the “full amount of funds” required by the ISDEAA, *i.e.*, the appropriate Secretarial amount.

It would run contrary to the statutory and regulatory scheme if *any* proposed amount, even if it grossly exceeds the Secretarial amount, could be deemed approved by the BIA’s failure

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<sup>8</sup> The statute itself does not contemplate “deemed approved” contract proposals. “Deemed approvals” are a remedy provided by the regulations. *See* 25 C.F.R. § 900.18.

to properly respond to a proposal within 90 days.<sup>9</sup> The ISDEAA does not require the BIA to award a self-determination contract with program funding that exceeds the amount of funds that the BIA would otherwise have expended on the particular program or service for the tribe. 25 U.S.C. § 450f(a)(2)(D). In fact, declining AFA proposals pursuant to Section 450f(a)(2)(D) because the amount of funds the tribes sought exceeded the “Secretarial amount” for each tribe is one of the limited bases set out in 25 U.S.C. § 450f(a)(2) under which the BIA may decline a contract. *See Hopland Band of Pomo Indians v. Norton*, 324 F. Supp. 2d 1067, 1077 (N.D. Cal. 2004); *cf.* 25 U.S.C. § 450f(a)(4)(B). Nor can the BIA be required to reduce funding for programs and activities provided for one tribe in order to make funds available for a self-determination contract with another tribe. *Id.* § 450j-1(b).<sup>10</sup> The ISDEAA provides no basis to challenge Secretarial funding amounts or to skew the allocation of such funding in favor of one tribal organization’s program by such a facially unreasonable amount. Indeed, the required amount of funding for a contract may increase only at the request of a tribal organization and after a determination by the Secretary that additional funds are necessary to carry out the ISDEAA or to reflect changed circumstances and factors, including, but not limited to, cost increases beyond the contractor’s control. 25 U.S.C. §§ 450j-1(a)(3)(B), 450j-1 (b)(5).

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<sup>9</sup> The IBIA has found that the agency’s failure to respond within 90 days does not transfer functions that would interfere with the agency’s ability to carry out its trust responsibilities, in light of the ISDEAA’s prohibition on agencies “mak[ing] any contract which would impair [their] ability to discharge [their] trust responsibilities to any Indian tribe or individuals.” *Skokomish Indian Tribe v. Portland Area Director, Bureau of Indian Affairs*, 31 IBIA 156, 168–72 (IBIA Sept. 12, 1997) (citing 25 U.S.C. § 450j(g)).

<sup>10</sup> The statute also provides for reduction in the “amount funds required” by 25 U.S.C. § 450j-1(a) pursuant to a reduction in appropriations or a change in the amount of pass-through funds needed under a contract. 25 U.S.C. § 450j-1(b)(2).



This reading of the plain language of the statute and regulations is consistent with Ninth Circuit precedent defining the applicable funding level under Section 106(a) of the ISDEAA, 25 U.S.C. § 450j-1(a), as an amount that would have been required for the program but for the ISDEAA contract. In *Los Coyotes*, the Ninth Circuit held that the BIA properly rejected a tribe's contract request to fund law enforcement on the Los Coyotes Reservation. *Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025 (9th Cir. 2013). The tribe had applied for a contract under the ISDEAA seeking \$746,110.00 to increase law enforcement on the reservation. *Id.* at 1034. The BIA denied the contract "pursuant to 25 U.S.C. § 450f(a)(2)(D), because 'the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under [§] 450j-1(a) of this title.'" *Id.* The Court held that the "applicable funding level" is defined as "the amount that the BIA would have spent on the program if it did not enter the contract with the tribe." *Id.* at 1033 (citing 25 U.S.C. § 450j-1(a)). Therefore, while the BIA is obligated to pay the applicable amount determined pursuant to Section 106(a)(1) to tribes carrying out ISDEAA contracts, the BIA is not legally obligated to pay a tribe an amount in excess of that funding level. *See* 25 U.S.C. §450f(a)(2)(D); *see also Los Coyotes*, 729 F.3d at 1037.

The rationale for this interpretation of the statutory and regulatory scheme is particularly clear where, as here, an ISDEAA proposal includes a funding level which is grossly disproportionate to the Secretarial amount. The Navajo Nation's CY 2014 AFA proposed funding that was more than 13 times ( $\$17,055,517/\$1,292,532$ ) the level of funding provided in CY 2013, which was the funding level determined by the Secretary for the contract's programs pursuant to 25 U.S.C. § 450j-1(a)(1). If a contract proposal's funding level appears to be

unreasonable on its face, a tribal organization should not be entitled to that portion of the proposed funding that is unreasonable. *Cf. Seneca Nation of Indians v. United States HHS*, 945 F. Supp. 2d at 151-52 (noting that “the amount proposed by the Nation appears facially reasonable because even if IHS does not traditionally calculate funding on a per-person basis, the Nation has explained that it selected a formula to remedy its perceived funding gap by picking a comparatively low per-capita figure from the five formulas given to it as examples by IHS representatives, including Mr. Wiggins”). In *Seneca Nation*, the amount proposed only constituted an increase of 1.4 times the Secretarial amount (\$12,461,319/\$8,686,927). In addition, the tribe in *Seneca Nation* proposed a per-patient formula as a basis for its increase in funding. Here, the Navajo Nation has not provided any detailed explanation as to why the proposed funding is facially reasonable. The proposed amount is particularly problematic because the Navajo Nation’s CY 2014 AFA proposal included the same fifteen specific tasks and objectives as in the effective Contract. *See* Stipulations ¶ 19; Contract No. A12AV00698, Att. A – Fiscal Year 2012 Scope of Work at 1-2; Compl. Ex. B, Att. A – Fiscal Year 2014 Scope of Work at 2.

Although the Navajo Nation was required to submit a summary budget with its CY 2014 AFA proposal, the budget simply increased the amounts in each budget category dramatically without an explanation of why such an increase would be necessary. *See* Contract No. A12AV00698, Att. B – Fiscal Year 2012 Tribal Court Program Budget Summary; Compl. Ex. B, Att. B – Fiscal Year 2014 Tribal Court Program Budget Summary. For example, the Navajo Nation’s summary budget amount for Personnel Salary increased from \$1,889,839.00 in the CY 2012 AFA’s summary budget to \$9,107,736.00 in the CY 2014 AFA proposal’s summary

budget. *Id.* The Navajo Nation's summary budget amount for Fringe Benefits increased from \$779,559.00 in the CY 2012 AFA's summary budget to \$4,215,622.00 in the CY 2014 AFA proposal's summary budget. *Id.* The Navajo Nation's proposed \$17,055,517.00 funding level for CY 2014 grossly exceeds the Secretarial amount for the Contract and is facially unreasonable, and as such it should be rejected.

### CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court deny Plaintiff's motion for summary judgment, grant Defendants' cross motion for summary judgment, and enter judgment for Defendants.

DATED: April 3, 2015

Respectfully submitted,

BENJAMIN C. MIZER  
Acting Assistant Attorney General

ERIC R. WOMACK  
Assistant Branch Director

/s/ Elizabeth L. Kade  
ELIZABETH L. KADE  
(D.C. Bar No. 502980)  
Trial Counsel  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, N.W.  
Washington, D.C. 20530  
Telephone: (202) 616-8491  
Facsimile: (202) 616-8470  
E-mail: Elizabeth.L.Kade@usdoj.gov

Counsel for Defendants

# **EXHIBIT A**

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United States Department of the Interior  
Bureau of Indian Affairs



Navajo Regional Office  
301 West Hill Avenue  
P. O. Box 1060  
Gallup, New Mexico 87305



In Reply Refer to:  
N303 - Branch Indian Self-  
Determination Services

MAR 23 2012

Honorable Herb Yazzie

Chief Justice, The Navajo Nation

Attention: Cordell Shortey, Contracting Officer  
Contracts and Grants Section, OMB

Dear Chief Justice Yazzie:

Enclosed is the signed Contract No. A12AV00698 for Navajo Nation's Public Law 93-638, Tribal Courts (Judicial Program) for Calendar Year (CY) 2012 in the amount of \$1,349,659.00.

Please refer to said contract number and calendar year in all future correspondences and contacts with this office.

Should you have any questions regarding the enclosure please contact Ms. Jeanette Quintero at (505) 863-8228 or me at (505) 863-8311.

Sincerely,

Awarding Official  
BIA-2009-L2-000004

Enclosure

cc: K273 - Accounting Operations  
N360, Tribal Services, Attn: Daniel Largo, Jr., AOTR  
Honorable Chief Justice Herb Yazzie, Navajo Nation, Judicial Branch  
Navajo Nation Judicial Branch, Attn: Jimmy Yellowhair, Fiscal Director

N303:JQUINTERO:jq:3/23/11:x8228  
bcc: 1501 P5 - A12AV00698  
15GRS 23/1 - ISD Chrono File

**AWARD/CONTRACT**

1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 350)

RATING

PAGE OF PAGE  
1 1

2. CONTRACT (Proc. Inst. Ident.) NO. **A12AV00698**

3. EFFECTIVE DATE **January 1, 2012**

4. REQUISITION/PURCHASE REQUEST/PROJECT NO. **N0036012026**

5. ISSUED BY **U.S. Department of the Interior  
Bureau of Indian Affairs  
Navajo Regional Office-Office of Self-Determination  
P.O. Box 1060  
Gallup, New Mexico 87305-1060**

CODE **N00303**

6. ADMINISTERED BY (If other than Item 5) **Same as Item 6.**

CODE **N00303**

7. NAME AND ADDRESS OF CONTRACTOR (No. street, city, county, State and ZIP Code)

**The Navajo Nation  
Office of Management and Budget  
P.O. Box 9000  
Window Rock, Arizona 86515**

CFDA No. 15.029 DUNS No. 009001702

8. DELIVERY  FOB ORIGIN  OTHER (See below)

9. DISCOUNT FOR PROMPT PAYMENT **N/A**

10. SUBMIT INVOICES (4 copies unless otherwise specified) TO THE ADDRESS SHOWN IN: **Block 6**

11. SHIP TO/MARK FOR

CODE

FACILITY CODE

12. PAYMENT WILL BE MADE BY **BIA-Navajo Regional Office  
Branch of Finance, Gallup, New Mexico 87305**

CODE

13. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION:

10 USC 2304(c) ( )  41 USC 253(c) (P.L. 93-638)

14. ACCOUNTING AND APPROPRIATION DATA **N00780/2012/2013/J9080/252i \$1,349,659.00**

15A. ITEM NO.	15B. SUPPLIES/SERVICES	15C. QUANTITY	15D. UNIT	15E. UNIT PRICE	15F. AMOUNT
	Contract for: Tribal Courts (Judicial Program) The Contractor shall perform the Tribal Courts (Judicial Program) services in accordance with the Model 108 Agreement, Statement of Work Program Standards and Budget, and other terms and conditions, attached hereto and incorporated: Contract Term: Jan. 1, 2012 - Dec. 31, 2016	1		1,349,659.00	1,349,659.00

15G. TOTAL AMOUNT OF CONTRACT **\$ 1,349,659.00**

16. TABLE OF CONTENTS

(X)	SEC.	DESCRIPTION	PAGE(S)	(X)	SEC.	DESCRIPTION	PAGE(S)
PART I - THE SCHEDULE				PART II - CONTRACT CLAUSES			
X	A	SOLICITATION/CONTRACT FORM		X	I	CONTRACT CLAUSES	
X	B	SUPPLIES OR SERVICES AND PRICES/COST		PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACH.			
X	C	DESCRIPTION/SPECS./WORK STATEMENT		X	J	LIST OF ATTACHMENTS	
N/A	D	PACKAGING AND MARKING		PART IV - REPRESENTATIONS AND INSTRUCTIONS			
N/A	E	INSPECTION AND ACCEPTANCE		N/A	K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS	
X	F	DELIVERIES OR PERFORMANCE		N/A	L	INSTRS., CONDS., AND NOTICES TO OFFERORS	
X	G	CONTRACT ADMINISTRATION DATA		N/A	M	EVALUATION FACTORS FOR AWARD	
X	H	SPECIAL CONTRACT REQUIREMENTS					

**CONTRACTING OFFICER WILL COMPLETE ITEM 17 OR 18 AS APPLICABLE**

17.  CONTRACTOR'S NEGOTIATED AGREEMENT (Contractor is required to sign this document and return ALL copies to issuing office.) Contractor agrees to furnish and deliver all items or perform all the services set forth or otherwise identified above and on any continuation sheets for the consideration stated herein. The rights and obligations of the parties to this contract shall be subject to and governed by the following documents: (a) this award/contract, (b) the solicitation, if any, and (c) such provisions, representations, certifications, and specifications, as are attached or incorporated by reference herein. (Attachments are listed herein.)

18.  AWARD (Contractor is not required to sign this document.) Your offer on Solicitation Number \_\_\_\_\_ including the additions or changes made by you which additions or changes are set forth in full above, is hereby accepted as to the items listed above and on any continuation sheets. This award consummates the contract which consists of the following documents: (a) the Government's solicitation and your offer, and (b) this award/contract. No further contractual document is necessary.

19A. NAME AND TITLE OF SIGNER (Type or print)  
**Herb Yazzie, Chief Justice  
The Navajo Nation**

20A. NAME OF CONTRACTING OFFICER  
**Frances Price, Awarding Official  
BIA-2009-L2-000004**

19B. NAME OF CONTRACTOR  
**BY *Herb Yazzie***

19C. DATE SIGNED **3/16/12**

20B. UNITED STATES OF AMERICA  
**BY *Frances Price***

20C. DATE SIGNED **3/23/12**

**FISCAL YEAR 2012  
MODEL 108 CONTRACT**

**CONTRACT NO. A12AV00698  
Tribal Courts (Judicial Program)  
(Mature Definite 1/1/12 to 12/31/16)**

**BY AND BETWEEN**

**THE NAVAJO NATION**

**AND**

**THE UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF INDIAN AFFAIRS  
Navajo Regional Office**

**FOR THE PERIOD**

**January 1, 2012 through December 31, 2012**

**Pursuant to 25 U.S.C. 450 et.seq.  
(Pub. L. 93-638, as amended)**

**AGREEMENT BETWEEN THE SECRETARY  
OF THE DEPARTMENT OF THE INTERIOR  
AND THE NAVAJO NATION**

**A. Authority and Purpose**

**1. Authority**

This agreement, denoted a Self-Determination Contract (referred to in this agreement as the "Contract"), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the "Secretary"), for and on behalf of the United States pursuant to Title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et seq.) and by the authority of the Navajo Nation (referred to in this agreement as the "Contractor"). The provisions of Title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et seq.) are incorporated in this agreement.

**2. Purpose**

Each 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 to transfer the funding and the following related functions, services, activities and programs (or portions thereof), that are otherwise contractible under Section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: Judicial - Tribal Courts.

**B. Terms, Provisions and Conditions**

**1. Term**

Pursuant to Section 105(c) (I) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(c)



(1), the term of this contract shall be five (5) years. Pursuant to Section 105(d)(1) of such Act (25 U.S.C. 450j(d), upon the election by the Contractor, the period of this Contract shall be determined on the basis of a calendar year, unless the Secretary and the Contractor agree on a different period in the annual funding agreement incorporated by reference in subsection F2.

**2. Effective Date**

This Contract shall become effective upon the date of approval and execution by the Contractor and the Secretary, unless the Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

**3. Program Standards**

The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection A2 of the Contract in conformity with the following standards: Navajo Nation law and regulations and the Indian Civil Rights Act.

The Secretary shall provide copies of all Bureau of Indian Affairs manuals, federal laws and regulations, as well as any updates, used as standards within this Contract. The procedures contained within this Contract supersede any conflicting Bureau procedures. In the event the Bureau updates its procedures the Contractor may request a waiver before these updated procedures become applicable to this Contract. To the extent the parties can agree on applicable Federal Acquisition Regulations, they will be included as standards in this Contract.

**4. Funding Amount**

Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection F2. Such amount shall not be less than the applicable amount determined pursuant to Section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1(a)).

**5. Limitation of Costs**

The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

**6. Payment**

A. In general - Payments to the Contractor under this Contract shall:

- (i) be made as expeditiously as practicable; and
- (ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

B. Quarterly, semi-annual, lump-sum, and other methods of payment:

- (i) In general - Pursuant to Section 108(b) of the Indian Self-Determination and Education Assistance Act, and notwithstanding any other provision of law, for each fiscal year covered by this contract, the Secretary shall make available to the Contractor the funds specified for the fiscal year under the annual funding agreement incorporated by reference pursuant to subsection F2 by paying to the Contractor, on a quarterly basis, one-quarter of the total amount provided for in the annual funding agreement for that fiscal year, in a lump-sum payment or as semiannual payments, or any other method of payment authorized by law, in accordance with such method as may be requested by the Contractor and specified in the annual funding agreement; and
- (ii) Method of quarterly payment - If quarterly payments are specified in the annual funding agreement incorporated by reference pursuant to subsection F2, each quarterly payment made pursuant to clause (i) shall be made on the first day of each quarter of the fiscal year, except that in any case in which the Contract year coincides with the Federal fiscal year, payment for the first quarter shall be made not later than the date that is 10 calendar days after the date on which the Office of Management and Budget apportions the appropriations for the fiscal

year for the programs, services, functions and activities subject to this Contract; and  
(iii) Applicability - Chapter 39 of Title 31, United States Code, shall apply to the payment of funds due under this Contract and the annual funding agreement referred to in clause (i).

**7. Records and Monitoring**

A. In general - Except for previously provided copies of tribal records that the Secretary demonstrates are clearly required to be maintained as part of the recordkeeping system of the Department of the Interior or the Department of Health and Human Services (or both), records of the Contractor shall not be considered Federal records for purposes of Chapter 5 of Title 5, United States Code.

B. Recordkeeping System - The Contractor shall maintain a recordkeeping system and, upon reasonable advance request, provide reasonable access to such records to the Secretary.

C. Responsibilities of Contractor - The Contractor shall be responsible for managing the day-to-day operations conducted under this Contract and for monitoring activities conducted under this Contract to ensure compliance with the contract and applicable Federal requirements. With respect to the monitoring activities of the Secretary, the routine monitoring visit shall be limited to not more than one performance monitoring visit for this contract by the head of each operating division, departmental bureau, or departmental agency, or duly authorized representative of such head unless:

(i) the contractor agrees to one or more additional visits; or

(ii) the appropriate official determines that there is reasonable cause to believe that grounds for resumption of the Contract, suspension of Contract payments, or other serious Contract performance deficiency may exist. No additional visit referred to in clause (ii) shall be made until such time as reasonable advance notice that includes a description of the nature of the problem that requires the additional visit has been given to the Contractor.

#### **8. Property**

A. In general - As provided in Section 105(f) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(f)), at the request of the Contractor, the Secretary may make available, or transfer to the Contractor, all reasonable divisible real property, facilities, equipment, and personal property that the Secretary has used to provide or administer the programs, services, functions, and activities covered by this Contract. A mutually agreed upon list specifying the property, facilities, and equipment so furnished shall also be prepared by the Secretary, with the concurrence of the Contractor, and periodically revised by the Secretary, with the concurrence of the Contractor.

B. Records - The Contractor shall maintain a record of all property referred to in subparagraph A or other property acquired by the Contractor under Section 105(f)(2)(A) of such Act for purposes of replacement.

C. Joint Use Agreements - Upon the request of the Contractor, the Secretary and the Contractor shall enter into a separate joint use agreement to address the shared use by the

parties of real or personal property that is not reasonably divisible.

D. Acquisition of Property - The Contractor is granted the authority to acquire such excess property as the Contractor may determine to be appropriate in the judgment of the Contractor to support the programs, services, functions and activities operated pursuant to this Contract.

E. Confiscated or Excess Property - The Secretary shall assist the Contractor in obtaining such confiscated or excess property as may become available to tribes, tribal organizations, or local governments.

F. Screener Identification Card - A screener identification card (General Services Administration form numbered 2946) shall be issued to the Contractor not later than the effective date of this Contract. The designated official shall, upon request, assist the Contractor in securing the use of the card.

G. Capital Equipment - The Contractor shall determine the capital equipment, leases, rentals, property, or services the Contractor requires to perform the obligations of the Contractor under this subsection, and shall acquire and maintain records of such capital equipment, property rentals, leases, property, or services through applicable procurement procedures of the Contractor.

**9. Availability of Funds**

Notwithstanding any other provision of law, any funds provided under this contract:

- A. shall remain available until expended; and
- B. with respect to such funds, no further:
  - (i) approval by the Secretary, or

- (ii) justifying documentation from the Contractor, shall be required prior to the expenditure of such funds.

#### **10. Transportation**

Beginning on the effective date of this Contract, the Secretary shall authorize the Contractor to obtain interagency motor pool vehicles and related services for performance of any activities carried out under this Contract.

#### **11. Federal program guidelines, manuals, or policy directives.**

Except as specifically provided in the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et seq.) the Contractor is not required to abide by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law.

#### **12. Disputes**

A. Third-Party Mediation Defined - For the purposes of this Contract, the term "third-party mediation" means a form of mediation whereby the Secretary and the Contractor nominate a third party who is not employed by or significantly involved with the Secretary of the Interior, the Secretary of Health and Human Services, or the Contractor, to serve as third-party mediator to mediate disputes under this Contract.

B. Alternative Procedures - In addition to, or as an alternative to, remedies and procedures prescribed by Section 110 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450m-1), the parties to this Contract may jointly:

- (i) submit disputes under this Contract to third-party mediation; and

- (ii) submit the dispute to the adjudicatory body of the Contractor, including the tribal court of the Contractor; and
- (iii) submit the dispute to mediation processes provided for under the laws, policies, or procedures of the Contractor; or
- (iv) use the administrative dispute resolution process authorized in subchapter IV of Chapter 5, Title 5, United States Code.

C. Effect of Decisions - The Secretary shall be bound by decisions made pursuant to the procedures set forth in subparagraph B, except that the Secretary shall not be bound by any decision that significantly conflicts with the interests of Indians or the United States.

### **13. Administrative Procedures of Contractor**

Pursuant to the Indian Civil Rights Act of 1968 (25 U.S.C. 1301 et seq.), the laws policies and procedures of the Contractor shall provide for administrative due process (or the equivalent of administrative due process) with respect to programs, services, functions, and activities that are provided by the Contractor pursuant to this Contract.

### **14. Successor Annual Funding Agreement**

A. In general - Negotiations for a successor annual funding agreement, provided for in subsection F2, shall begin not later than 120 days prior to the conclusion of the preceding annual funding agreement. Except as provided in Section 105(c)(2) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450(c)(2)), the funding for each successor annual funding agreement shall only be reduced pursuant to Section 106(b) of such Act (25 U.S.C. 450j-1(b)).

B. Information - The Secretary shall prepare and supply relevant information, and promptly comply with any



request by the Contractor for information that the Contractor reasonably needs to determine the amount of funds that may be available for a successor annual funding agreement, as provided for in subsection F2 of this Contract.

**15. Contract Requirements, Approval by Secretary**

A. In general - Except as provided in subparagraph B, for the term of the contract Section 2103 of the Revised Statutes (25 U.S.C. 81) and Section 16 of the Act of June 18, 1934 (48 Stat. 937, Chapter 576; 25 U.S.C. 476) shall not apply to any contract entered into in connection with this Contract.

B. Requirements - Each Contract entered into by the Contractor with a third party in connection with performing the obligations of the Contract under this Contract shall:

- (i) be in writing;
- (ii) identify the interested parties, the authorities of such parties, and purpose of the Contract;
- (iii) state of work to be performed under the Contract; and
- (iv) state the process for making any claim, the payments to be made, and the terms of the Contract, which shall be fixed.

**C. Obligation of the Contractor**

**1. Contract Performance**

Except as provided in subsection D2, the Contract shall perform the programs, services, functions, and activities as provided in the annual funding agreement under subsection F2 of this Contract.

**2. Amount of Funds**

The total amount of funds to be paid under this Contract pursuant to Section 106(a) shall be determined in an

annual funding agreement entered into between the Secretary and the Contractor, which shall be incorporated into this Contract.

3. **Contracted Programs** - Subject to the availability of appropriated funds, the Contractor shall administer the programs, services, functions, and activities identified in this Contract and funded through the annual funding agreements under subsection F2.

4. **Trust Services for Individual Indians**

A. In general - To the extent that the annual funding agreement provides funding for the delivery of trust services to individual Indians that have been provided by the Secretary, the Contractor shall maintain at least the same level of service as the Secretary provided for such individual Indians, subject to the availability of appropriated funds for such services.

B. Trust Services to Individual Indians - For the purposes of this paragraph only, the term "trust services for individual Indians" means only those services that pertain to land or financial management connected to individually held allotments.

5. **Fair and Uniform Services** - The Contractor shall provide services under this Contract in a fair and uniform manner and shall provide access to an administrative or judicial body empowered to adjudicate or otherwise resolve complaints, claims, and grievances brought by program beneficiaries against the Contractor arising out of the performance of the Contract.

D. **Obligation of the United States**

1. **Trust Responsibility**

A. In general - The United States reaffirms the trust responsibility of the United States to the Navajo Nation

to protect and conserve the trust resources of the Navajo Nation and the trust resources of individual Indians.

B. Construction of Contract - Nothing in this Contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribe(s) or individuals Indians. The Secretary shall act in good faith in upholding such trust responsibility.

**2. Good Faith**

To the extent that health programs are included in this Contract, and within available funds, the Secretary shall act in good faith in cooperating with the Contractor to achieve the goals set forth in the Indian Health Care Improvement Act (25 U.S.C. 1601, et seq.).

**3. Programs Retained**

As specified in the annual funding agreement, the United States hereby retains the programs, services, functions, and activities with respect to the tribe(s) that are not specifically assumed by the Contractor in the annual funding agreement under subsection F2.

**E. Other Provisions**

**1. Designated Officials**

Not later than the effective date of this Contract, the United States shall provide to the Contractor, and the Contractor shall provide to the United States, a written designation of a senior official to serve as a representative for notices, proposed amendments to the Contract, and other purposes for this Contract.

**2. Contract Modifications or Amendment**

A. In general - Except as provided in subparagraph B, no modification to this Contract shall take effect unless such modification is made in the form of a written amendment to

the Contract, and the Contractor and the Secretary provide written consent for the modification.

B. Exception - The addition of supplement funds for programs, functions, and activities (or portions thereof) already included in the annual funding agreement under subsection F2, and the reduction of funds pursuant to Section 106(b)(2), shall not be subject to subparagraph A.

**3. Officials Not to Benefit**

No Member of Congress, or resident commissioner, shall be admitted to any share or part of any contract executed pursuant to this Contract, or to any benefit that may arise from such contract. This paragraph may not be construed to apply to any contract with a third party entered into under this Contract if such contract is made with a corporation for the general benefit of the corporation.

**4. Covenant Against Contingent Fees**

The parties warrant that no person or selling agency has been employed or retained to solicit or secure any contract executed pursuant to this Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

**F. Attachments**

**1. Approval of Contract**

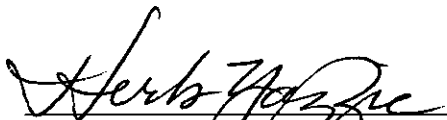
Unless previously furnished to the Secretary, the resolution of the Intergovernmental Relations Committee of the Navajo Nation Council authorizing the contracting of the programs, services, functions, and activities identified in this Contract is attached to this Contract as Attachment 1.

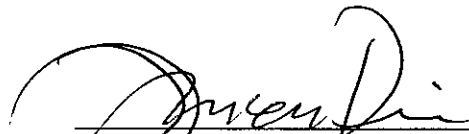
**2. Annual Funding Agreement**

A. In general - The annual funding agreement under this Contract shall only contain:

- (i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and
- (ii) such other provision, including a brief description of the program, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agreed.

B. Incorporation by Reference - The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as Attachment 2.

  
Herb Yazzie, Chief Justice  
THE NAVAJO NATION

  
Secretary, Department of the Interior, or  
designee  
UNITED STATES OF AMERICA

# ATTACHMENT 1

NABIJA-09-12

RESOLUTION OF THE  
NÁABIK'ÍYÁTI' COMMITTEE OF THE  
22<sup>ND</sup> NAVAJO NATION COUNCIL

22<sup>ND</sup> NAVAJO NATION COUNCIL - Second Year, 2012

AN ACTION

RELATING TO LAW AND ORDER AND NÁABIK'ÍYÁTI'; APPROVING AND AUTHORIZING A CONTRACT BETWEEN THE NAVAJO NATION AND THE UNITED STATES DEPARTMENT OF THE INTERIOR UNDER 25 U.S.C. § 450 ET SEQ. (P.L. 93-638, AS AMENDED), FOR A FIVE YEAR TERM FOR JUDICIAL-TRIBAL COURTS; APPROVING AND AUTHORIZING THE FISCAL YEAR 2012 ANNUAL FUNDING AGREEMENT AND SCOPE OF WORK FOR THE PERIOD JANUARY 1, 2012 THROUGH DECEMBER 31, 2012

BE IT ENACTED:

1. The Navajo Nation hereby approves and authorizes a contract between the Navajo Nation and the United States Department of the Interior under 25 U.S.C. § 450 et seq. (P.L. 93-638, as amended), for a five year term for the Judicial - Tribal Courts, as set forth in the documents attached hereto as Exhibit A.

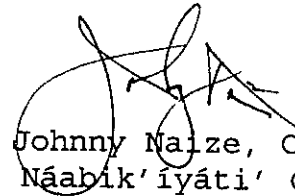
2. The Navajo Nation hereby approves and authorizes the Fiscal Year 2012 Annual Funding Agreement and Scope of Work for the Judicial-Tribal Courts for the period January 1, 2012 through December 31, 2012, as set forth in the documents attached hereto as Exhibit A.

3. The Navajo Nation hereby authorizes the Chief Justice of the Navajo Nation to execute and effectuate the Contract, Annual Funding Agreement and Scope of Work, provided the terms and conditions in such documents are substantially similar to those approved by this resolution.

NABIJA-09-12

**CERTIFICATION**

I hereby certify that the foregoing resolution was duly considered by the Náabik'iyáti' Committee of the Navajo Nation Council at a duly called meeting in Window Rock, Navajo Nation (Arizona) at which a quorum was present and that the same was passed by a vote of 13 in favor and 0 opposed, this 5<sup>th</sup> day of January 2012.

  
Johnny Naize, Chairperson  
Náabik'iyáti' Committee

Motion: Mel R. Begay

Second: Roscoe Smith

**FISCAL YEAR 2012  
ANNUAL FUNDING AGREEMENT**

**CONTRACT NO. A12AV00698  
Judicial – Tribal Courts  
(Mature Definite for 1/01/12 to 12/31/16)**

**BY AND BETWEEN**

**THE NAVAJO NATION**

**AND**

**THE UNITED STATES  
DEPARTMENT OF THE INTERIOR  
Bureau of Indian Affairs  
Navajo Regional Office**

**FOR THE PERIOD**

**January 1, 2012 through December 31, 2012**

**Pursuant to 25 U.S.C. 450 et. seq.  
(Pub. L. 93-638, as amended)**



## ANNUAL FUNDING AGREEMENT

This Annual Funding Agreement (“AFA”) is entered into between the Navajo Nation and the United States Department of the Interior (“DOI”), pursuant to the agreement between the Navajo Nation and DOI for Judicial-Tribal Courts, pursuant to Title I of the Indian Self-Determination and Education Assistance Act (“ISDEAA”), as amended, and Pub. L. 93-638, as amended (hereinafter referred to as the Contract).

### A. PROGRAM, FUNCTIONS, SERVICES AND ACTIVITIES

1. The Navajo Nation agrees to administer and perform those portions of the Bureau of Indian Affairs’ (“BIA”) Judicial-Tribal Courts identified in the Scope of Work, attached hereto as Attachment A and incorporated herein by reference, in accordance with its own laws and policies and the terms, provisions, and conditions of the Contract and this AFA and any attachments hereto. The program standards, including any provisions of Federal Regulations waived by the Secretary, are identified in Section B of the Contract.
2. The Navajo Nation agrees that any services or assistance provided to Indian beneficiaries under the Contract and this AFA shall be provided in a fair and uniform manner subject to applicable laws and regulations.
3. The Navajo Nation shall obtain from the BIA all such funds and other resources made available for the benefit of the tribe and Indian beneficiaries for all programs to be operated and services to be delivered by the Navajo Nation through the Contract and this AFA on behalf of the DOI, except for “Trust” and executive functions of the BIA considered non-contractible under the ISDEAA, as amended.
4. The BIA shall transfer to the Navajo Nation all such funds and other resources available for the benefit of the Tribe and Indian beneficiaries through the Contract in the most expeditious manner authorized by law, and shall provide technical support and

assistance at the request of the Navajo Nation or as provided herein, in the most expeditious manner authorized by law.

5. The Navajo Nation shall exercise full discretion over the funds made available subject only to the provisions of the Contract, this AFA, tribal law, and Federal law.

6. The Navajo Nation has identified a need for program and/or office space. DOI shall undertake reasonable efforts to make such program and/or office space available to the Navajo Nation, together with such maintenance services as may be necessary for that program and/or office space. When not available and tribal buildings are used, DOI will enter into a lease pursuant to Section 105 (f) (1) of the ISDEAA, as amended and 25 CFR Part 900, Subpart H.

**B. PROGRAM FUNDING**

Subject to the availability of Congressional appropriation, DOI shall provide direct program funding for Fiscal Year 2012 in the distribution amount shown on the budget form attached hereto as Attachment B exclusive of any Central Office or Regional Office shares, direct contract support costs and indirect costs, in one lump sum payment to the Navajo Nation in accordance with Section B(6) of the Contract. Funding award(s) such as one time funding which require separate expenditure report shall be specified in the contact modification (SF-30) by BIA. A separate account (FMIS Business Unit) shall be assigned by the Navajo Nation accordingly. Full payment shall be made by wire transfer as soon as Form P638 is executed between BIA NRO and the Navajo Nation.

DOI acknowledges that the direct amount identified does not fully fund the contracted activities and agrees to make good faith efforts to identify additional funding for the contracted activities and to expeditiously notify the Navajo Nation when such funding is available.

**C. TRIBAL SHARES**

In addition to the amount referred to in Paragraph B of this AFA, DOI shall pay a sum to be negotiated representing Central Office and Regional Office shares associated with this AFA. Such

shares do not reflect Central Office or Regional Office shares which the Navajo Nation has included in other Fiscal Year 2012 Pub. L. 93-638, as amended, Contracts.

**D. CONTRACT SUPPORT FUNDS**

The Navajo Nation shall be entitled to contract support funds to the full extent specified in Section 106 (a) (2) of the ISDEAA, as amended and related provisions. It is understood by the parties that full contract support funds may not be initially available to the Navajo Nation. However, upon becoming available by Congressional appropriation or through the identification of appropriate budget savings from Contract Support Cost line items, the Navajo Nation shall participate in the distribution of those shortfall funds. If, during the term of this AFA, it is not possible to pay all contract support amounts, DOI shall make a good faith effort, subject to applicable law, to identify funds or to obtain an appropriation to address this shortfall.

**1. Direct Contract Support**

In addition to the amount in paragraphs D and D(2) of this AFA, the Navajo Nation shall receive direct contract support costs pursuant to Section 106(a)(2) of the ISDEAA, as amended. The amount of direct contract support costs are subject to negotiation between the Navajo Nation and DOI. To the extent that DOI does not receive sufficient appropriations to fully fund the amount of direct contract support costs that would otherwise be available under Section 106(a) (2) of the ISDEAA, as amended, DOI shall report such shortfall to Congress pursuant to the requirements of Section 106(c)(2) of the ISDEAA, as amended, and simultaneously provide the Navajo Nation with such report. DOI shall pay any shortfalls in direct contract support when, and to the extent such shortfall funds are appropriated by Congress. In no event does the Navajo Nation waive its right to recover 100% of the direct contract support costs negotiated under this AFA.

**2. Indirect Costs**

In addition to the amount identified in paragraphs B, C, and D(1) of this AFA, the Navajo Nation shall receive indirect costs applicable to the period covered by this AFA as determined pursuant to the applicable Indirect Cost Agreement, negotiated between the Navajo Nation and its cognizant agent. To the extent that DOI does not receive sufficient appropriations to fully fund the amount of indirect costs that would otherwise be available

under Section 106(a) (2) of the ISDEAA, as amended, DOI shall report such shortfall to Congress pursuant to the requirements of Section 106(c) (2) of the ISDEAA, as amended, and simultaneously provide the Navajo Nation with such report. DOI shall pay any shortfalls in indirect costs when, and to the extent, such shortfall funds are appropriated by Congress. In no event does the Navajo Nation waive its right to recover 100% of the indirect costs associated with this AFA.

**E. PRE-AWARD COSTS**

Any cost the Navajo Nation incurs with respect to the performance of the Contract and this AFA before the award date or effective date of this AFA may be paid with funding under this AFA to the extent (a) that such costs are otherwise reasonable, allowable and allocable to performance of the attached Scope of Work, and (b) that the Navajo Nation informed BIA of costs consistent with Section 106 (a) (6) of the ISDEAA, as amended, if this AFA covers the initial year of a contract.

**F. PROGRAM BUDGET**

The budget for the services provided under this AFA reflects the agreements reached during negotiations and is attached hereto as Attachment B, which is incorporated herein by reference.

1. The Navajo Nation shall request prior approval from the Awarding Official for budget revisions whenever:
  - a. The budget revision results from changes in the scope or stated objective of the program;
  - b. The revision requires additional funding;
  - c. The revision causes an increase in the amount of indirect cost for the Contract, or;
  - d. The revision pertains to the addition of items requiring approval of the BIA under the ISDEAA, as amended or 25 CFR Part 900.
2. All other budget revisions do not require BIA approval, including prior year savings attributable to operations of the program.

**G. AVAILABILITY OF FUNDS**

1. All funding under this AFA is subject to the availability of Congressional appropriations. Funding under this AFA may be reduced only according to the provisions of Section 106(b) of the ISDEAA, as amended. No legal liability by the Federal government for any payment may arise until funds are made available to the BIA for the Contract.

2. In the event that funding of this AFA is reduced because of Congressional action, the Navajo Nation retains the option to rescind the Contract, renegotiate the attached Scope of Work, or suspend performance under the Contract consistent with Section B(5) of the Contract.

3. To the extent that any shortfalls exist in funding, direct, contract support or otherwise, owed to the Navajo Nation, the DOI and BIA shall make a good faith effort, subject to applicable law, to identify funds or to obtain an appropriation to address this shortfall. DOI will report such shortfalls to Congress, and simultaneously provide the Navajo Nation with such report.

4. Nothing in this AFA shall be deemed a waiver of any right the Navajo Nation may have under the Act to receive 100% of its funding, direct, contract support or otherwise, as determined under Section 106 of the ISDEAA, as amended.

**H. APPLICABLE LAW**

In the performance of the Contract and this AFA, the Navajo Nation agrees to comply with all expressly applicable Federal laws, regulations and executive orders, including the Drug-Free Workplace Act of 1988 (Pub. L. 100-689), and all applicable Navajo Nation laws, regulations and executive orders. The parties shall renegotiate and modify the language of this AFA to conform to any applicable federal and Navajo Nation laws, regulations or executive orders which are passed after the effective date of this AFA. The BIA shall inform the Navajo Nation, in writing, of all existing federal laws, regulations and executive orders it believes apply to this AFA within 60 days of execution. The BIA shall inform the Navajo Nation, in writing, of all newly enacted or amended

federal laws, regulations and executive orders it believes apply to this AFA within 60 days of adoption. The Navajo Nation retains the right to renegotiate the attached Scope of Work to reflect any amended federal laws, regulations, and executive orders and shall not be held responsible under this AFA for compliance with such laws, regulations, and executive orders until the BIA has provided the notice described above.

**I. MANAGEMENT SYSTEMS**

The Navajo Nation shall maintain management systems consistent with requirements of the ISDEAA, as amended and 25 CFR Part 900. The BIA has on file the most recent versions of the following Navajo Nation/Judicial Branch management system Policies and Procedures:

- i. Judicial Branch Employee Policies and Procedures
- ii. Navajo Nation Employees Travel Policies and Procedures Handbook.
- iii. Property Management Policy.
- iv. Navajo Nation Procurement Rules and Regulations.

The Navajo Nation agrees to provide copies of the of the following management system Policies and Procedures Manuals, within 90 days of final adoption by the responsible oversight committees:

- i. Recordkeeping Policies
- ii. Finance and Accounting Policies

**1. Accounting/Financial System**

The Navajo Nation shall maintain a fiscal accounting system which will provide accurate, current and complete information with respect to the Contract and this AFA in such a manner as to facilitate audit and review of the financial records consistent with federal statutory and regulatory requirements.

The Navajo Nation shall provide certification by a licensed accountant that the bookkeeping and accounting procedures that the tribal organization presently uses meets the standards of 25 CFR Part 900, Subpart F. The Navajo Nation has submitted the certification and it is on file at the BIA, Navajo Regional Office.

2. **Personnel Management**

Unless otherwise stated in this AFA or through an approved and executed Intergovernmental Personnel Agreement, all personnel employed by the Navajo Nation Judicial Branch to carry out the Contract and this AFA shall meet the qualifications set forth by the Navajo Nation Judicial Branch Human Resources Department and all personnel employed by the Navajo Nation Judicial Branch under this AFA will adhere to applicable Navajo Nation Judicial Branch personnel policies and procedures including sick leave, holidays, pay schedules and pay tables.

3. **Records System**

a. The Navajo Nation agrees to keep such records as required pursuant to Section B(7) of the Contract, as amended; to make reports required by Section 5(a)(1) and (2) of the ISDEAA, as amended; and to make such information and reports available to the Indian beneficiaries as required by Section 5(c) of the ISDEAA, as amended. The Navajo Nation shall maintain a recordkeeping system that will allow for the maintenance of records to facilitate retrocession or reassumption of the Contract. Such records system, at a minimum, shall:

1) Provide for the creation, maintenance and safeguarding of records of lasting value, including those involving individual rights.

2) Provide for orderly retirement of records used or created under the Contract. Such records shall be returned to the BIA for disposition according to the General Records Schedules and the BIA Records Control Schedule.

b. When the Navajo Nation operates a system of records to accomplish a BIA function, the Navajo Nation shall comply with the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. Section 81, et seq.

c. The Navajo Nation shall make all reports and information concerning the Contract available to the Indian beneficiaries that the Contract serves or represents

pursuant to the provisions of the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. Section 81 et seq.

**J. EXAMINATION OF RECORDS.**

1. The Navajo Nation agrees to maintain books, records, documents and other evidence pertaining to the costs and expenses of the Contract (hereinafter collectively called "records") to the extent and in such detail as will properly reflect all net costs, direct and indirect, of labor, materials, equipment, supplies and services, and other costs of whatever nature for which expenditure, payment or reimbursement is claimed under the provisions of the Contract or this AFA.
  
2. The Navajo Nation agrees to make available at the Navajo Nation offices at all reasonable times during the time period of the Contract and this AFA below any of the records, with reasonable advance notice, for inspection, audit or reproduction by any authorized representative of the Comptroller General or the Secretary of Interior as required under the ISDEAA, as amended, and applicable federal regulations.
  
3. Pursuant to Section (B)(7) of the Contract, the Navajo Nation shall preserve and make available its records related to the Contract and this AFA:
  - a. Until the expiration of the earlier of three years from the date of final payment under the Contract or the time period for the particular records specified in 25 CFR Chapter V, Part 900, Subpart F, Subsection 900.41 (a-d), whichever expires earlier.
  
  - b. If the Contract is completely or partially cancelled, the records relating to the work terminated shall be preserved and made available for a period of three years from the date of any resulting final settlement.
  
4. Records which relate to appeals under Section (B)(12), Disputes, of the Contract; litigation or the settlement of claims arising out of the performance of the Contract; or costs and expenses of the Contract as to which written exception has been taken by the Awarding



Official or any of his duly authorized representatives, shall be retained until such appeals, litigation, claims or exceptions have been disposed of.

5. Except for documentary evidence required under paragraph 4 above, the Navajo Nation may in fulfillment of its obligation to retain records substitute photographs, microphotographs, or other authentic reproductions or such records, after the expiration of 2 years following the last day of the month of payment or reimbursement to the Navajo Nation of the invoice or voucher to which such records relate, unless a shorter period is authorized by the Awarding Official with the concurrence of the Comptroller General or his duly authorized representative.

6. The provisions of this paragraph (J) shall be applicable to each subcontract hereunder which is on a cost; cost-plus-a-fixed-fee, time-and-material or labor-hour basis.

7. The Navajo Nation further agrees to include in each of its sub-contracts hereunder a provision to the effect that the sub-Contractor agrees that the Comptroller General, the Secretary of the Interior, the Awarding Official, and the Tribal Contracting Officer, or any of their duly authorized representatives, shall, until the expiration of 3 years after final payment under the subcontract, or of the time periods for the particular records specified in 25 CFR Chapter V, Part 900, Subpart F, Subsection 900.41 (a-d) whichever expires earlier, have access to and the right to examine any directly pertinent books, documents, papers, and records of such sub-Contractor, involving transactions related to the sub-Contract. The term "sub-Contract" as used in this paragraph only, excludes:

- i. Purchase orders not exceeding \$10,000; and
- ii. Sub-Contracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

**K. NAVAJO PREFERENCE**

Consistent with Section 7 (b) of the ISDEAA, as amended, the Navajo Nation Business Opportunity Act, 5 N.N.C. Section 201, et seq., and the Navajo Preference in Employment Act, 15 N.N.C. Section 601, et seq., shall apply to the administration of the Contract and this AFA.

**L. REPORTS**

During the course of this AFA, the Navajo Nation shall submit the following reports:

1. **Federal Financial Report (*FFR*).** The Navajo Nation agrees to submit an original annual *FFR* to the Awarding Official through the designated Awarding Official's Technical Representative (AOTR). This report shall be used to monitor expenditures incurred during annual operations. The *FFR* shall be submitted with the Annual Report 120 days after closure of each contract funding period.
2. **Annual Report.** The Navajo Nation agrees to submit the brief Annual Report to the Awarding Official through the designated AOTR 120 days after closure of each contract funding period. The report shall describe the conduct of the program and activities in:
  - a. Accomplishments of the program objectives;
  - b. Description of any significant problems encountered; and
  - c. Any changes required to the Contract and/or Scope of Work.

The AOTR will notify the Navajo Nation of delinquent report(s) and suggest the due date that the BIA must receive the delinquent report(s). If the Navajo Nation fails to submit the overdue report(s) by the established deadline, the AOTR will notify the Awarding Official and recommend corrective action. A copy of such recommendation shall be provided to the Navajo Nation. The Awarding Official will then take appropriate action, consistent with the ISDEAA, as amended, to ensure that the Navajo Nation complies with the terms and conditions of the Contract and this AFA.

3. **Budget Reports.** The Navajo Nation agrees to submit by July 10 detailed budgets on all funds awarded and/or allocated through the end of the sixth month (June 30) of the AFA calendar year. The budget shall be used internally at BIA NRO for the sole purpose of supporting the DOI's Contract Support Cost and pay cost allocations and shortfall reports to

Congress. The budget shall be prepared at or equivalent to Level of Detail 5 of the Navajo Nation's FMIS.

4. **GPRA Reports.** The Navajo Nation agrees to submit applicable and relevant data and information concerning the operation of the attached Scope of Work to the Awarding Official through the AOTR necessary for the BIA to meet the requirements of the Government Performance Results Act ("GPRA") of 1993 (Pub. L. 103-62). The data and information, including format and due date(s), that the Navajo Nation will submit shall be negotiated between the parties and delineated in Attachment C, which is attached hereto and incorporated herein by reference. The BIA shall simultaneously provide the Navajo Nation with copies of any GPRA reports it submits to the Central Office or the Office of Management and Budget.

5. **Additional Reports.** Any additional reports required by law to be submitted beyond the reports identified in (1) through (4) above shall be negotiated between the parties and delineated in Attachment D, which is attached hereto and incorporated herein by reference.

**M. SINGLE AUDIT REQUIREMENTS**

1. The Navajo Nation shall comply with the Single Audit Act Amendment of 1996, 31 U.S.C. Chapter 75 et seq., and agrees to arrange for an annual single organization-wide audit as prescribed by the ISDEAA, as amended; the Single Audit Act Amendment of 1996, 31 U.S.C. Chapter 75 et seq., Office of Management and Budget (OMB) Circular No. A-133, and 43 CFR Part 12.

2. If the Navajo Nation fails to comply with the requirements for obtaining audits according to the Single Audit Act Amendment of 1996, the BIA may take actions as appropriate given the circumstances and as allowed pursuant to Subpart B § \_\_.225 of the OMB Circular No. A-133.

3. In addition to the submission requirements of the Single Audit Act Amendment of 1996 and to meet the requirements of ISDEAA, as amended, the Navajo Nation shall send

- a. Single Audit Report with Form SF-SAC (Data Collection Form) to:  
Federal Audit Clearinghouse

U.S. Bureau of the Census  
1201 East Tenth Street  
Jeffersonville, IN 47132

- b. Single Audit Report to the Clearinghouse for each funding agency wherein the Report includes a finding related to the funding awarded to the Navajo Nation by such agency.
- c. Two copies of the Single Audit Report to:  
Office of Internal Evaluation and Assessment  
U.S. Department of the Interior  
Ely Parker Building  
2051 Mercator Drive  
Reston, VA 20191  
(709) 390-6357

**N. TECHNICAL ASSISTANCE AND MONITORING**

1. The BIA will expeditiously provide special technical assistance to assist the Navajo Nation to successfully operate the program under the Contract and this AFA. When the Navajo Nation submits a written request for technical assistance through the process indentified in Section P., BIA will provide the Navajo Nation with written acknowledgement of the request within 15 business days of receipt. The acknowledgement shall include a time frame for completion of the technical assistance.
2. The Awarding Official and designated AOTR will monitor the submission of annual reports required under the Contract and the ISDEAA, as amended.
3. The BIA will provide monitoring services to ensure compliance with the terms of the Contract and this AFA. The BIA shall provide (30) days advance written notice which shall include date of the monitoring, information on process and instrument that will be used. This monitoring function will include:
  - a. One annual evaluation (Monitoring Session) by the Awarding Official and AOTR. This visit shall be scheduled in advance as prescribed in Section B(7)(C) of the Contract. During the Monitoring Session, the Awarding Official, and the designated AOTR will review records, speak to the Program Director and staff, and inspect premises to determine compliance with the Contract and this AFA.

b. Additional visits beyond the Monitoring Session shall only occur when requested by the Navajo Nation or when the Awarding Official determines that there is reasonable cause to believe that grounds for reassumption of the Contract, suspension of contract payments, or that other serious Contract performance deficiency may exist in accordance with Section B(7)(C) of the Contract. Such visits shall be scheduled in advance as prescribed in Section B(7)(C) of the Contract.

c. The Monitoring Session shall be conducted pursuant to Memorandum of Understanding entered into by the Navajo Nation and BIA NRO.

**O. FEDERAL TORT CLAIMS ACT**

1. For purposes of Federal Tort Claims Act coverage, the Navajo Nation and its employees are deemed to be employees of the Federal government while performing work under the contract. This status is not changed by the source of the funds used by the Navajo Nation to pay the employees salary and benefits unless the employee receives additional compensation for performing covered services from anyone other than the Navajo Nation.

2. In accordance with the requirement in 25 CFR, Part 900, Subpart M, subsection 900.188(a) the Navajo Nation agrees to designate an individual to serve as tort claims liaison with the Federal government. The designated tort claims liaison shall provide the assistance specified in 25 CFR, Part 900, and Subpart M. subsection 900.188(c).

**P. CONTRACT ADMINISTRATION**

Requests or inquiries on significant and non routine matters such as technical assistance and those raising legal issues regarding this AFA shall be submitted in writing as follows. Communication and correspondence on items of routine nature is not subject to this Section.

**1. Federal Contract Administration**

All correspondences by BIA NRO concerning the Contract and this AFA shall be routed as follows for submission to the Navajo Nation:

Indian Self-Determination Specialist/Awarding Official  
Bureau of Indian Affairs – Navajo Regional Office

P.O. Box 1060  
Gallup, New Mexico 87305  
Telephone No.: (505) 863-8403  
Fax No. (505) 863-8461

**2. Tribal Contract Administration**

All correspondences by the Navajo Nation's Pub. L. 93-638 BIA contracted programs' concerning the Contract and this AFA shall be routed as follows for submission to the BIA NRO:

Navajo Nation Contracting Officer  
Contracts and Grants Section - Office of Management and Budget  
Post Office Box 646  
Window Rock, Arizona 86515  
Telephone No.: (928) 871-6470  
Fax No. (928) 871-6567

**Q. SEVERABILITY**

The provisions of this AFA are severable. If any provision of this AFA is determined to be invalid or unenforceable by a court of competent jurisdiction, such invalidity shall not affect the remainder of the AFA.

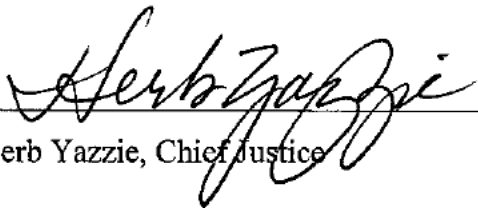
**R. EFFECT ON EXISTING RIGHTS**

1. Nothing in this AFA shall be construed as affecting, modifying, diminishing, waiving or otherwise impairing the sovereign immunity from suit enjoyed by the Navajo Nation.
2. Nothing in this AFA shall be construed as waiving any rights of the parties under applicable federal law.
3. Nothing in this AFA shall be construed as authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Navajo Nation, Navajo people, or Indian beneficiaries.

**S. EFFECTIVE DATE**

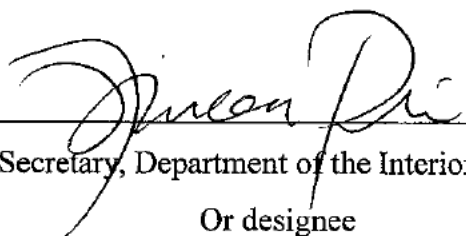
This AFA shall be effective for the term (mature definite) of the funding year, January 1, 2012 through December 31, 2012, or until such time that a successor AFA is executed or a new

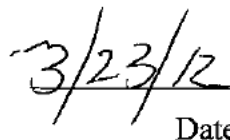
contract is issued with a new contract term identified. However, this does not alter the obligation of the Navajo Nation to provide DOI with a proposed AFA for the following calendar year, or a notice of intent not to renew, at least 90 days prior to end of the current calendar year.

  
\_\_\_\_\_  
Herb Yazzie, Chief Justice

  
\_\_\_\_\_  
Date

**THE NAVAJO NATION**

  
\_\_\_\_\_  
Secretary, Department of the Interior,  
Or designee

  
\_\_\_\_\_  
Date

**UNITED STATES OF AMERICA**

## **Attachment A**

### **Fiscal Year 2012 Scope of Work**



## THE JUDICIAL BRANCH OF THE NAVAJO NATION

### SCOPE OF WORK

Revised March 13, 2012

#### A. Program Purpose

##### **Mission<sup>1</sup>**

The Judicial Branch will provide stability in the Navajo Nation government by providing services through the tribal courts, peacemaking, and probation and parole services to adjudicate cases, resolve disputes, rehabilitate individuals and families, restore harmony, educate the public, agencies, services and other governments in Diné bi beenahaz'áanii, and protect persons and property pursuant to Navajo Nation laws, customs, traditions, and applicable federal laws. Pursuant to Diné bi beenahaz'áanii, the Judicial Branch will carefully develop a justice system that fully embodies the traditional values and processes of the Navajo People.

##### **Vision**

The present Navajo judicial system consists of an adversarial-style tribal court system modeled on the American court system, a peacemaking system modeled on Diné original dispute resolution methods, and Probation and Parole Services. It is our vision that the Judicial Branch will fully embody the values and processes of the Navajo People, including the family and clan-centered Navajo values, so that our justice system as a whole will truly reflect the heart and soul of the Diné. It will be one that the People can recognize as their own and fully participate in the spirit of nabinahaazlaago.

#### B. Specific Tasks and Objectives

Pursuant to the 2007 Strategic Plan of the Navajo Nation Judicial Branch,<sup>2</sup> the specific objectives of the courts and programs of the Judicial Branch are:

1. Ensure the continued provision of efficient, fair and respectful services within the parameters of Title 7 and Title 9 of the Navajo Nation Code;
2. Ensure that the judicial system is in accordance with Diné bi beenahaz'áanii that fully incorporates Navajo values and processes;
3. Actively participate in the development of integrated justice information sharing among Navajo Nation judicial and justice stakeholders;
4. Process and assist with peacemaking cases;
5. Provide rehabilitative and/or restorative justice services in probation and parole cases;
6. Provide case management services to youth that have entered the justice system;

<sup>1</sup>, The mission and vision have not changed from that which was included in previous Scopes of Work.

<sup>2</sup> at <http://www.navajocourts.org/StrategicPlan101607.pdf>.

7. Educate and inform the public of judicial court and program services via various measures including the employment of a Judicial Liaison Officer;
8. Create or maintain partnerships with local service providers and other governmental entities;
9. Train personnel to provide effective and continual court services to the public;
10. Ensure safe court and program facilities;
11. Ensure the public's access to the judicial system;
12. Train and employ bilingual court reporters/transcribers;
13. Fund updates to the Navajo Law Reporter;
14. Continue to train and employ court clerks; and
15. Maintain court and program facilities.

In addition, the Judicial Branch is authorized to engage in any and all activities necessary to carry out the purposes of the Contract.

### **C. Scope of Work**

Due to the limited funding provided by the Bureau of Indian Affairs under the Annual Funding Agreements (AFA), the Judicial Branch has, in previous years, included in its Scope of Work only the crucial need of hiring court clerks to assist judges, staff attorneys, court administrators and staff of the Judicial Branch to provide tribal court services to the Navajo Nation and the public. Other objectives and tasks appropriate for Pub. L. 93-638 funding, have not historically been included in the Scopes of Work due to the lack of adequate funds provided under the AFA.

Specifically, Section B, Task and Objectives 5, 6, 10,<sup>3</sup> 12, and 13 have never been funded, while Objective 15 has not been sufficiently funded.

For FY 2012, all Section B tasks and objectives are appropriately included in the Scope of Work and will be implemented to the extent of funds provided under the AFA.

### **D. Operation Guidelines**

The Navajo Nation Judicial Branch is guided in its operations by the laws, procedures, policies, rules and regulations enacted by the Navajo Nation Council and its Committees, adopted by the Judicial Branch, or adopted by the Navajo Nation Peacemaking Program. These include the Fundamental Laws of the Diné, Navajo traditional law, the Navajo Nation Code, applicable federal laws, and the 1968 Indian Civil Rights Act.

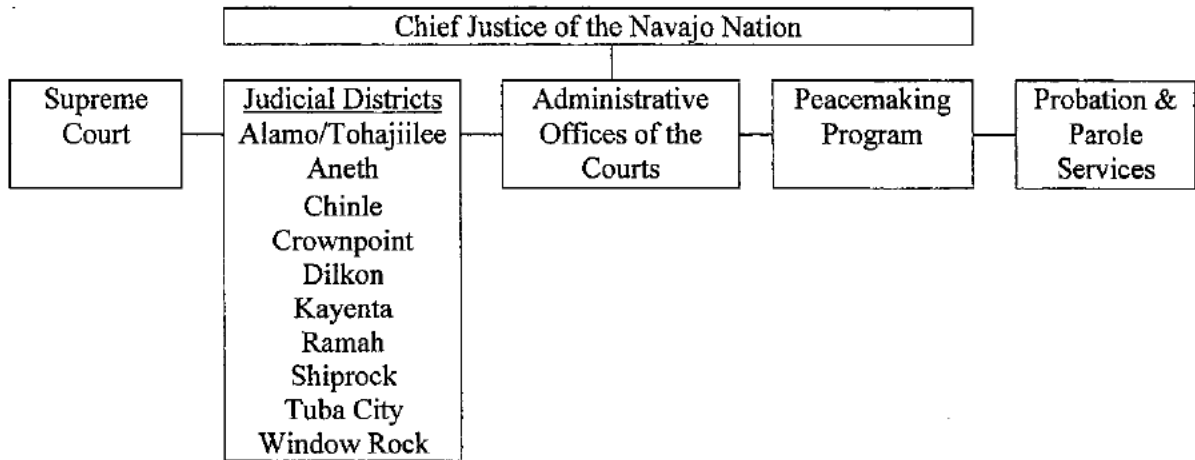
### **E. Organization**

The Judicial Branch of the Navajo Nation is comprised of ten (10) judicial districts, the Supreme Court of the Navajo Nation, the Administrative Office of the Courts, Probation and Parole Services, and the Peacemaking Program. The Chief Justice of the Navajo

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<sup>3</sup> For FY 2012, Objective #10 is being addressed by the BIA under supplemental funding.

Nation administers the Judicial Branch and supervises the work of all justices and judges of the Navajo Nation pursuant to 7 N.N.C. § 371.



**F. Performance Measures**

The Judicial Branch of the Navajo Nation establishes performance measurements on an annual basis for each component of the Navajo tribal court services. These measurements gauge the overall progress and accomplishments of the entire court system and are reported quarterly and annually in publications issued by the Judicial Branch.

**G. Personnel Policies**

The Employees’ Policies and Procedures of the Judicial Branch govern the contract employment positions. The Human Resources office of the Judicial Branch coordinates the class specification and compensation of branch personnel with the Navajo Nation Class Specification and Pay Plan.

**H. Plan of Operations**

The plan of operations of the Judicial Branch is codified at 7 N.N.C. §§ 101-424.

## **Attachment B**

### **Fiscal Year 2012 - Tribal Court Program Budget Summary**

The Navajo Nation  
 Budget Summary on  
 FY 2012 P.L. 93-638 BIA Funding

**Part 1. Program Information:**

A. Program/Division: Judicial Branch  
 B. Contract No. CTN00T780A9

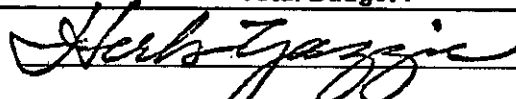
**Part II. Budget Information:**

A	B	C	D
Major Category	Description	Explain or give example on purposed of the Budget.	Budget Amount
2001	Personnel Salary	To use federal funding to pay personnel for employees of the judicial branch.	1,889,839.00
2900	Fringe Benefits	To provide fringes benefits for employees of the judicial branch.	779,559.00
3000	Travel	To provide for fleet, meals, lodging and travel expenses related to the court operations.	114,624.00
3500	Meeting		
4000	Supplies	To provide for ofc, general operating supplies postage, printing, photocoping and equipment.	284,000.00
5000	Lease & Rental	To provide equipment rental, media equipment for work sessions and building rental..	47,600.00
5500	Communication & Utilities	To provide basic telephone services and internet connectivity.	52,500.00
6000	Repairs & Maintenance	To provide repair and maintenance fees for furniture, equipment, and computer upgrade hardware.	82,200.00
6500	Contractual Service		
7000	Special Transactions	To provide training/registration fees, advertising, vehicle and General Liability	172,287.00
8000	Assistance		
9000	Capital Outlay	To provide for replacement of furniture, office equipment and computers.	0.00
9700	Indirect Cost		
<b>Total Budget :</b>			3,422,609.00

Part III. - Signatures:



Director of Judicial Administration - Date



Chief Justice - Date

## **Attachment C**

### **Government Performance Result Act (GPRA)**

**The GPRA Reports are not required  
for Judicial - Tribal Courts.**

## **Attachment D**

### **Program Specific Reporting**

**No Program Specific Reporting is  
required for Judicial – Tribal Courts.**

# **EXHIBIT B**



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

NAVAJO NATION,	)	
a federally recognized Indian tribe,	)	
Navajo Nation Department of Justice,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:14-CV-01909 (TSC)
	)	
DEPARTMENT OF THE INTERIOR,	)	
	)	
and	)	
	)	
S.M.R. JEWELL, in her official capacity as	)	
Secretary, U.S. Department of the Interior,	)	
	)	
Defendants.	)	
_____	)	

**DECLARATION OF JEANETTE QUINTERO**

I, JEANETTE QUINTERO, hereby declare and state:

1. I am an Indian Self-Determination Level 1 Awarding Official for the Navajo Region of the Bureau of Indian Affairs (“BIA”), an agency of the United States Department of the Interior. I have held this position since February 1, 2013, when I received the Awarding Official Certification BIA-2013-L1-000098, but I have been an Indian Self-Determination Specialist since August 2011. I am responsible for making award and declination decisions for Navajo Nation contracts under the Indian Self-Determination and Education Assistance Act (“ISDEAA”). I make the following statements based upon my personal knowledge, which in turn is based on a personal review of my records and upon information furnished to me in the course of my official duties. Through the exercise of my official duties, I have also become familiar with the background of this case.

2. In my capacity as an Indian Self-Determination Level 1 Awarding Official for the Navajo Region of the BIA, I am familiar with and can identify the documents attached as Exhibits A and D to Defendants' Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment ("Defendants' MSJ").

3. Exhibit A to Defendants' MSJ is a true and correct copy of Contract No. A12AV00698 effective January 1, 2012 to December 31, 2016, to transfer the funding and the functions, services, activities, and programs otherwise contractible under the ISDEAA for the Tribal Courts Program from the federal government to the Navajo Nation.

4. Exhibit D to Defendants' MSJ is a true and correct copy of a letter from Pearl Chamberlin to Hon. Ben Shelly dated November 7, 2013.

5. Attachment 1 attached hereto includes a true and correct copy of an e-mailed letter from Cordell Shortey to Sharon Pinto dated December 23, 2014, and a true and correct copy a letter from Dianne Gutierrez to Cordell Shortey dated December 11, 2014.

**I. NAVAJO NATION'S CONTRACT FOR TRIBAL COURTS**

6. The Navajo Nation and the BIA's Navajo Regional Office entered into Contract No. A12AV00698 effective January 1, 2012 to December 31, 2016 ("Contract"), to transfer the funding and the functions, services, activities, and programs otherwise contractible under the ISDEAA for the Tribal Courts Program from the federal government to the Navajo Nation. Pursuant to the Contract, subject to the availability of appropriations, the Secretary of the Interior shall make available to the Navajo Nation the total amount specified in the annual funding agreement ("AFA") incorporated into the Contract. This amount shall not be less than the applicable amount determined pursuant to Section 106(a) of the ISDEAA, which amount is also known as the "secretarial amount."

7. The Contract Year (“CY”) 2012 AFA included a scope of work pursuant to the 2007 Strategic Plan of the Navajo Nation Judicial Branch, which included fifteen specific tasks and objectives:

- Ensure the continued provision of efficient, fair and respectful services within the parameters of Title 7 and Title 9 of the Navajo Nation Code;
- Ensure that the judicial system is in accordance with Diné bi beenahaz’ áanii that fully incorporates Navajo values and processes;
- Actively participate in the development of integrated justice information sharing among Navajo Nation judicial and justice stakeholders;
- Process and assist with peacemaking cases;
- Provide rehabilitative and/or restorative justice services in probation and parole cases;
- Provide case management services to youth that have entered the justice system;
- Educate and inform the public of judicial court and program services via various measures including the employment of a Judicial Liaison Officer;
- Create or maintain partnerships with local service providers and other governmental entities;
- Train personnel to provide effective and continual court services to the public;
- Ensure safe court and program facilities;
- Ensure the public’s access to the judicial system;
- Train and employ bilingual court reporters/transcribers;
- Fund updates to the Navajo Law Reporter;
- Continue to train and employ court clerks; and
- Maintain court and program facilities.

The CY 2012 AFA provided the Navajo Nation with \$1,349,659 to provide these services.

8. On November 28, 2012, the Navajo Nation submitted its CY 2013 AFA proposal in a proposal packet labeled “Supplemental AFA,” which included a proposed CY 2013 funding level of \$2,072,950. After clarifying with the Navajo Nation that the proposal was intended to be a CY 2013 AFA, on January 8, 2013, the BIA partially declined the Navajo Nation’s CY 2013 AFA as in excess of the applicable funding level for the Contract for CY 2013 (which was \$1,373,926). The Navajo Nation requested an informal conference regarding the partial declination, and during the scheduled CY 2013 negotiation meeting, the Navajo Nation verbally informed the BIA that the wrong scope of work was submitted and that they would be submitting

a revised scope of work. After this meeting, the Navajo Nation submitted a proposed revised scope of work for the Contract which included a new sixteenth objective: “Establish and sustain alternative punishments in core sentencing.” The BIA recommended that the Navajo Nation submit a request for expansion funding for the new proposed objective, and informed the Navajo Nation that new sources of supplemental funding may have opened up. As a result, the Navajo Nation withdrew its proposed revision to the Contract’s scope of work and requested expansion and supplemental funding. The BIA approved a modification to the Contract to add one-time expansion funding of \$133,527.00 for CY 2013.

## **II. THE NAVAJO NATION’S CY 2014 AFA PROPOSAL**

9. Due to a lapse in annual agency appropriations from Congress, the Executive agencies of the federal government, including the Department of the Interior and the BIA, were unable to operate from October 1, 2013, through October 16, 2013, except in limited circumstances set forth by law. *See* Compl. Ex. I. The BIA’s Navajo Regional office was closed, and a sign was placed on the front doors of the Gallup Federal Building noting that the building was closed due to the lapse in appropriations. Only excepted or exempted employees were allowed to work during the lapse. *See id.* Excepted employees were those employees who were expressly authorized to work on specific assignments to protect life and property. *See id.* Exempted employees were those employees whose salaries were paid out of a source of funding other than annual appropriations and therefore were not implicated by the lapse. *See id.* There were no excepted employees in the BIA’s Navajo Regional office authorized to receive or work on ISDEAA contracts during the government shutdown. *See id.*

10. The BIA’s Navajo Regional office had an exempt employee, Mr. Raymond Slim, whose salary was funded from multi-year appropriations for road construction contracts. *See id.*

As an exempt employee, he was specifically authorized to receive or work on contracts related to road construction during the government shutdown. *See id.* He was not deemed excepted in order to work on tribal funding contracts, including the Navajo Nation's Contract for the Tribal Courts Program. *See id.*

11. On October 4, 2013, Mr. Ron Duncan handed the Navajo Nation's proposed CY 2014 AFA to Mr. Slim at the receptionist's desk of the Self-Determination Office in the BIA's Navajo Regional Office. Mr. Slim marked the CY 2014 AFA proposal for intra-office mail delivery to me. However, due to the lapse in appropriations, intra-office mail delivery had ceased and did not resume until October 17, 2013, so the CY 2014 AFA proposal remained at the receptionist's desk until October 17, 2013, on which date I received the Navajo Nation's CY 2014 AFA proposal. During the lapse in appropriations, I was furloughed, as were the other employees in my office except for Mr. Slim.

12. On October 21, 2013, the BIA issued a letter acknowledging receipt of the Navajo Nation's CY 2014 AFA proposal on October 17, 2013. *See* Compl. Ex. D. The letter noted that the "government was on shutdown from October 1, 2013, through October 16, 2013, which included mail delivery to our office," and that the BIA therefore had "90 days after October 17, 2013, to approve, decline, or award the proposal. The 90-day period will end on January 15, 2014." After the BIA acknowledged receipt of the CY 2014 AFA proposal, the BIA began its review of the proposal.

13. On November 7, 2013, the BIA issued a letter to the Navajo Nation that described the agency's concerns with the proposal and requested additional information to resolve those concerns. *See* Defendants' MSJ Ex. D. The BIA noted in its review that "[t]he proposed CY 2014 budget amount of \$17,055,517.00 is substantially more than the FY 2013 Direct Base" and

recommended that the Navajo Nation submit a revised budget for \$1,292,532. The review letter also noted substantial changes in the proposed CY 2014 AFA's scope of work narrative sections, and the BIA recommended that the Navajo Nation keep its current approved scope of work and submit an Annual Performance Plan to indicate which tasks the Nation would be working on in CY 2014. The BIA's letter requested that the Navajo Nation:

Please provide your response to our points of concern by November 29, 2013, so that we may complete the review of your CY 2014 SAFA proposal. We will hold the approval of the Tribal Courts proposal until requested documents are submitted.

14. The BIA and the Navajo Nation usually use good faith efforts to negotiate if there are substantial changes proposed to an AFA from the previous year. The BIA's review letter is routinely used as the basis for further negotiations of an AFA proposal, or as the basis for the Navajo Nation to submit a unilaterally revised proposal for final BIA review. The BIA's November 7, 2013, letter was an attempt to work with the Navajo Nation to resolve the CY 2014 AFA proposal's technical deficiencies and to revise the CY 2014 AFA scope of work and budget and submit the proposal for final review. This is the routine protocol that the BIA's Navajo Region usually follows.

15. In past years, including CY 2013, the BIA has negotiated with the Navajo Nation's Contracting Officer, who in turn works with his program contacts to negotiate any issues with an ISDEAA program contract. The Navajo Nation's Contracting Officer who serves as the BIA's point of contact for the Tribal Courts Program is Mr. Cordell Shortey. I asked the Awarding Official's Technical Representative for the Contract to call the Navajo Nation, and it is my understanding based on his December 5, 2013, conversation with a representative of the Navajo Nation that the Navajo Nation understood the BIA's requested deadline of November 29, 2013, and the Navajo Nation planned on following up with the BIA. On January 7, 2014, I

emailed Mr. Shortey with a carbon copy to Mr. Ronald Duncan, inquiring about the status of the CY 2014 proposal and noting the upcoming January 15, 2014, 90-day deadline. I did not receive a response from Mr. Shortey or Mr. Duncan.

16. The BIA did not receive any formal or informal response to its November 7, 2013, letter. The Navajo Nation usually responds in writing to the BIA's review letter by the designated due date, and the BIA expected a timely response to its November 7, 2013 letter.

17. On January 9, 2014, the BIA formally requested by letter a 45-day extension "to provide additional time for the Navajo Nation to submit a response to the Navajo Region's review letter dated November 7, 2013." *See* Compl. Ex. E. The BIA requested this extension as a good faith effort to resolve the deficiencies noted in its November 7, 2013, letter and wanted to give the Navajo Nation as much time as possible to respond to the BIA's concerns. The Navajo Nation had agreed to similar extensions in other ISDEAA programs, *see, e.g.*, Attachment 1, and it is rare for the Navajo Nation to not respond to an extension request.

18. The BIA expected the Navajo Nation to approve the requested extension, as it had in the past, but the BIA did not receive a formal response to its extension request. I emailed Ms. Veronica Blackhat, a Navajo Nation DOJ Attorney, on January 14, 2014, inquiring about the status of the CY 2014 proposal and noting the upcoming January 15, 2014, 90-day deadline. I did not receive a response from Ms. Blackhat. Mr. Shortey contacted my supervisor, Frances Price, via telephone at 4:25 p.m on January 15, 2014. As a result of that conversation, and the lack of timely formal response to our extension request, the BIA finalized its partial declination of the Navajo Nation's CY 2014 AFA proposal as set forth in the November 7, 2013, letter.

19. The BIA's declination analysis did not change between November 7, 2013, and January 15, 2014. The BIA could have issued its formal partial declination any time after November 7, 2013.

20. On January 15, 2014, the BIA issued its formal partial declination of the Navajo Nation's CY 2014 AFA proposal. *See* Compl. Ex. F. In the partial declination, the BIA noted that it had advised the Navajo Nation on November 7, 2013, that the proposed budget of \$17,055,517.00 "far exceeded the funding available" for FY 2014 which was anticipated to be \$1,292.532. The BIA noted that "[w]hile we still need to address the additional activities proposed [in the statement of work modifications], we are willing to award the full funding we have available."

21. On January 30, 2014, the BIA received a letter from the Navajo Nation dated January 27, 2014, which asserted that the BIA's partial declination of the Navajo Nation's CY 2014 AFA proposal was untimely. *See* Compl. Ex. G. The Navajo Nation's letter maintained that the Navajo Nation's CY 2014 AFA proposal was hand-delivered to Mr. Slim on October 4, 2013. The Navajo Nation's letter asserted that the BIA's partial declination of the CY 2014 AFA proposal was therefore due by January 2, 2014.

22. The Navajo Nation's letter dated January 27, 2014, was the first indication from the Navajo Nation that they believed the BIA's response to the CY 2014 AFA proposal was due before January 15, 2014. If the Navajo Nation had notified the BIA in response to any of the agency's prior letters and requests that it believed the 90-day statutory deadline began on October 4, 2013, the BIA could have issued its formal partial declination by January 2, 2014. The BIA would still have waited until the purported January 2, 2014, deadline in order to give



the Navajo Nation the maximum amount of time to respond without waiving the BIA's declination rights.

23. On February 4, 2014, the BIA issued a letter pursuant to 25 C.F.R. § 900.29(a) which provided the Navajo Nation with the documents BIA relied on when issuing the partial declination. *See* Compl. Ex. H.

24. On February 7, 2014, the BIA issued a letter in response to the Navajo Nation's letter dated January 27, 2014, noting that the BIA's partial declination of the Navajo Nation's CY 2014 AFA proposal was timely issued on January 15, 2014. *See* Compl. Ex. I. The BIA explained that the federal government was shutdown from October 1, 2013, until October 17, 2013, during which time only excepted and exempted employees were allowed to work. The BIA noted that hand-delivery of the CY 2014 AFA proposal to Mr. Slim did not constitute receipt by the Secretary for purposes of the 90-day deadline because Mr. Slim was an exempt employee only authorized to perform work for contracts related to road construction. There was no employee within the Navajo Regional office who was authorized to receive or work on the Navajo Nation's CY 2014 AFA proposal on behalf of the Secretary during the government shutdown. The BIA noted that the 90-day review period therefore did not begin until October 17, 2013, and continued through January 15, 2014.

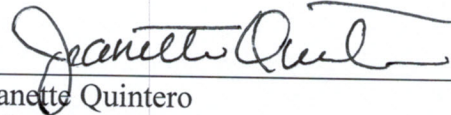
25. On February 28, 2014, the BIA issued a letter notifying the Navajo Nation that the Navajo Nation's current approved statement of work would remain in place for CY 2014 based on the BIA's November 7, 2013, letter. *See* Compl. Ex. J.

26. The Navajo Nation did not request a formal or informal conference with the BIA regarding the CY 2014 AFA partial declination.

\* \* \*

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of April 2015.



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Jeanette Quintero  
Indian Self-Determination Awarding Official  
Bureau of Indian Affairs, Navajo Region  
Branch of Indian Self-Determination Services

# **Attachment 1**

**THE NAVAJO NATION**



**BEN SHELLY PRESIDENT**  
**REX LEE JIM VICE PRESIDENT**

December 23, 2014

Sharon Pinto, Regional Director  
Branch of Indian Self Determination  
Bureau of Indian Affairs – Navajo Regional Office  
PO Box 1060  
Gallup, New Mexico 87305

**Re: FY 2015 Successor Annual Funding Agreement (SAFA) on P. L. 93-638 Contract for Safety of Dam Program (SOD)**

Dear Ms. Pinto:

In response to your request in a letter dated December 11, 2014, the Navajo Nation is hereby granting extension on the 90 days review period on the above matter. Pursuant to your request, we are granting an additional 45 days to extend the review period from January 13, 2014 to February 27, 2015. However, we advise the proposal be approved and awarded at the earliest date possible and not take the entire 45 days granted herein.

You indicated that additional time on the review period is necessary since the FY 2015 funding is not currently available. As you are aware, the annual funding for SOD in prior years has always been distributed late in the funding period. It is important your office and BIA Central resolve this. Please schedule a meeting within the next two (2) weeks so that we can discuss this issue. Meanwhile, we respectfully urge you to approve and award all funding proposals submitted by the Nation within the 90 days as required by 25 CFR Part 900.16.

Your timely approval and immediate execution of the SAFA is appreciated. If you have question contact Contracts and Grants Section / OMB at 928-871-6470.

Sincerely,  
**THE NAVAJO NATION**

  
Cordell Shortey, Contracting Officer  
Contracts and Grants Section / OMB

CC: File  
Brenda Hatathlie, Department Manager / SOD  
Veronica Blackhat, Attorney NN DOJ



**United States Department of Interior**  
**BUREAU OF INDIAN AFFAIRS**  
**Navajo Regional Office**  
**P. O. Box 1060**  
**Gallup, New Mexico 87305**



**IN REPLY REFER TO:**  
N303 – Branch of Indian Self-Determination  
Services

DEC 11 2014

Honorable Ben Shelly

President, The Navajo Nation

Attention: Cordell Shortey, Contracting Officer  
Contracts and Grants Section, OMB

Dear President Shelly:

This letter also serves as an official request as required by 25 CFR Part 900.17 for an additional 45 days to award your Calendar Year (CY) 2015 Successor Annual Funding Agreement proposal for the Safety of Dams Program. Based on the initial SAFA proposal submission the 90 days will expire on January 13, 2015. The additional request for 45 days to award your proposal will expire on **February 27, 2015**.

The extension request is due to Fiscal Year (FY) 2015 Safety of Dams funding allocation is not currently available.

We request that you provide us with a written consent on the extension request for our files and records by December 28, 2014.

Should you have any questions please contact Ms. Pearl Chamberlin, Environmental Engineer at (505) 863-8393, or Ms. Jeanette Quintero, Indian Self-Determination Specialist at (505) 863-8228.

Sincerely,

Acting Regional Director, Navajo

cc: Navajo Nation, Safety of Dams Program, Attn: Brenda Hatathlie, Program Manager  
N461, Water Resources, Attn: Pearl Chamberlin, Environmental Engineer

# **EXHIBIT C**

**Bureau of Indian Affairs**  
**Contingency Plan Q & A Document**  
**September 27, 2013**

We continue to hope that Congress will reach an agreement to avoid a government shutdown, but we are working to prepare for all possible scenarios. The following document provides information regarding contingency plans in the event of a government shutdown.

**What are Excepted and Exempted services?**

In some cases, BIA has identified programs and employees that are excepted from furlough to continue working in the event of a shutdown due to the importance of their roles in protecting life and property. Some programs and employees will not be furloughed and are considered exempt because they are funded through non-lapsing sources including; revenue collection from irrigation and power projects, and federal highway multi-year appropriations.

**What will happen during a lapse in appropriations when residents of Tribal communities call the police for an emergency?**

The BIA Office of Justice Service law enforcement personnel who respond to emergencies or are responsible for the protection of life and property will continue to report to duty and respond those these type of incidents as well as perform crime prevention activities. Only Office of Justice Service staff who are not responsible for life and safety are subject to furlough.

**What will happen if there is a fire on Indian lands?**

Firefighters will be available to respond as needed.

**Will the BIA continue to process financial assistance to needy individuals?**

Without an appropriation and with limited financial operations, the BIA will have no authority to make payments.

**Will the BIA be able respond to reports of Child Abuse and Neglect?**

Yes, the social services workers will be on duty to assist law enforcement on responses to abuse and neglect.

**Is there anyone I can contact if I have questions?**

Please visit the DOI website at [www.DOI.gov](http://www.DOI.gov).

# **EXHIBIT D**





## United States Department of Interior

BUREAU OF INDIAN AFFAIRS

Navajo Region

P. O. Box 1060

Gallup, New Mexico 87305



IN REPLY REFER TO:  
N303 - Branch of Indian Self-Determination  
Services

NOV 7 2013

Honorable Ben Shelly

President, The Navajo Nation

Attention: Cordell Shortey, Contracting Officer  
Contracts and Grants Section, OMB

Dear President Shelly:

Pursuant to Subpart D - Review and Approval of Successor Annual Funding Agreement (SAFA), and 25 CFR Part 900.32, it details what the Secretary must do upon receiving a proposal (renewal, recontract, or SAFA). The Secretary has 90 days after receipt of a proposal to review, approve and/or decline the proposal in compliance with the Indian Self-Determination and Education Assistance Act, Section §900.16. Therefore, the Navajo Region's Division of Tribal Services and Indian Self-Determination Services have reviewed your Calendar Year (CY) 2014 SAFA proposal to Contract No. A12AV00698, Tribal Courts Program.

The review identified substantial changes from the prior year's approved CY 2013 Annual Funding Agreement as follows:

1. Budget

- a. The proposed CY 2014 budget amount of \$17,055,517.00 is substantially more than the FY 2013 Direct Base awarded to the Navajo Nation (Nation) without any one-time funding. We recommend the Nation to submit a revised budget for \$1,292,532.00 at the FY 2013 Direct Base. Presently, the FY 2014 Continuing Resolution No. 1 is at 29.32%.

2. Scope of Work

- a. Page 1 & 2 New Legislation Tribal Law and Order Act (TLOA) of 2010 reflect activities beyond the current SOW for CY 2013 and beyond the level of funding under FY 2014 Continuing Resolution No. 1.
- b. Page 3. The reference to "maintenance of existing courts and program facilities" under Task 15. Maintain court and program facilities. The operation and maintenance of the multi-purpose justice complexes is presently being address by the BIA's Office of Justice Services and Office of Facilities and Maintenance. Funding request for this should not be part of this SAFA proposal, but submitted as a separate proposal for operation and maintenance costs.

- c. Pages 3, 4 & 5. Mutual Responsibilities narrative in pages 3, 4 and 5 should not be part of the scope of work.

The BIA recommends the Nation keep the current approved CY 2012 SOW (dated March 23, 2012), in place for CY 2014. The CY 2012 SOW was approved by the Navajo Region for the purpose of providing flexibility to the Tribal Courts Program to select which tasks and objectives it would be implementing to the extent funds were provided under the AFA. We recommend the Nation to submit an Annual Performance Plan to indicate which tasks the Nation will be working on in the 2014 year.

We do not believe continuing to approach contracting in this fashion will result in acquiring new or additional funds.

Please provide your response to our points of concern by November 29, 2013, so that we may complete the review of your CY 2014 SAFA proposal. We will hold the approval of the Tribal Courts proposal until requested documents are submitted.

Should you have any questions please contact Mr. Daniel Largo, Jr., Tribal Operations Officer at (505) 863-8207 or Ms. Jeanette Quintero, Indian Self-Determination Specialist (505) 863-8228 or Ms. Frances Price, Indian Self-Determination Officer at (505) 863-8311.

Sincerely,



Acting Regional Director, Navajo

cc: N380, Tribal Services, Attn. Daniel Largo, Jr., AOTR  
Honorable Chief Justice Herb Yazzie, Navajo Nation, Judicial Branch

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

NAVAJO NATION,	)	
a federally recognized Indian tribe,	)	
Navajo Nation Department of Justice,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:14-CV-01909 (TSC)
	)	
DEPARTMENT OF THE INTERIOR,	)	
	)	
and	)	
	)	
S.M.R. JEWELL, in her official capacity as	)	
Secretary, U.S. Department of the Interior,	)	
	)	
Defendants.	)	
_____	)	

**[PROPOSED] ORDER GRANTING  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Upon consideration of the parties' cross-motions for summary judgment and the materials submitted in support of those motions and in opposition thereto, and good cause having been shown, it is hereby

ORDERED that Defendants' Motion for Summary Judgment is hereby GRANTED; and it is further

ORDERED that Plaintiff's Motion for Summary Judgment is hereby DENIED.

SO ORDERED.

DATED:

\_\_\_\_\_  
TANYA S. CHUTKAN  
United States District Judge