IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NAVAJO NATION, a federally recognized Indian tribe, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR and SALLY JEWELL, in her official capacity as Secretary of the Interior, Defendants.	)	No.1:14-cv-01909-TSC

NAVAJO NATION'S RESPONSE TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY TO DEFENDANTS' OPPOSITION TO NAVAJO NATION'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff Navajo Nation ("Nation") files this consolidated Response (the Nation's "Response") to Defendants' Cross Motion for Summary Judgment and Reply to Defendants' Opposition to Navajo Nation's Motion for Summary Judgment (Defendants' "Cross Motion and Opposition" or, collectively, "Opp."), pursuant to *Fed. R. Civ. P.* 56 and LCvR 7(h). The Cross Motion and Opposition make the same arguments regarding the untimeliness of the purported declination of the Nation's proposed contract under the Indian Self-Determination and Education Assistance Act (ISDEAA"), 25 U.S.C. §§ 450, 450a *et seq.*, by Defendants Department of the Interior and Secretary Jewell (collectively, the "Secretary"). This Response therefore addresses all of the contentions made by the Secretary in her Cross Motion and Opposition, and shows that they lack merit and that the Nation is entitled to summary judgment on its claims for relief.

I. INTRODUCTION; POSITIONS OF THE PARTIES

The Nation's Complaint asserts three related claims for relief. All are premised on the admitted failure of the Secretary to act on the Nation's proposed calendar year 2014 Annual Funding Agreement ("AFA") for the Nation's Judicial Branch (the "Proposal") within 90 days of its receipt by Bureau of Indian Affairs ("BIA") Indian Self-Determination Specialist Raymond Slim on October 4, 2013. The first claim asserts that the AFA was deemed approved by operation of law. *See* 25 U.S.C. § 450f(a)(2), (4); 25 C.F.R. § 900.18 ("**What happens if a proposal is not declined within 90 days after it is received by the Secretary?** A proposal that is not declined within 90 days . . . *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 the funds pursuant to section 106(a) of the

[ISDEAA, 25 U.S.C. § 450j-1(a)].") (bolding in original; italics added). The second claim seeks to require the Secretary to sign, award and fund the AFA. *Id.* The third claim seeks damages for the Secretary's breach of the deemed approved agreement. The Nation's position is directly supported by *Seneca Nation v. Department of Health and Human Services*, 945 F.Supp. 2d 135 (D.D.C. 2013), *app. dism'd*, No. 13-5219, 2013 WL 6818212 (D.C. Cir. Dec. 12, 2013), and *Maniilaq Ass'n v. Burwell*, __ F.Supp. 3d __, 2014 WL 5558336 (D.D.C. Nov. 3, 2014). *Accord Yurok Tribe v. Department of the Interior*, No. 2014-1529, __ F.3d __, 2015 WL 2146614 at *1, *6 (Fed. Cir. May 8, 2015); *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F.Supp. 2d 1059 (D.S.D. 2007) (Secretary failed to provide required explanation of reasons for declination within 90-day period; proposed contract amendment deemed approved); *Crownpoint Inst. of Tech. v. Norton*, CIV No. 04-531 JP/DJS (D.N.M. Sept. 16, 2005), Dkt. No. 86 (three ISDEAA contracts deemed approved for Secretary's failure to approve or deny within 90-day period).

Although the Secretary concedes that no decision was made on the Nation's Proposal within the period prescribed by law, the Secretary offers three rationales for why the Nation's Proposal should not be deemed approved. First, the Secretary asserts that the Nation's Proposal was not technically "received by the Secretary" because it was received by the wrong BIA Indian Self-Determination Contract Specialist (Raymond Slim) and because it was received by him during a partial federal furlough period, when *no one* (not even the Secretary herself) was authorized to receive any such contract documents while working during the partial furlough in their offices open to the public. Second, the Secretary contends

the Nation is equitably estopped from requiring her to act within statutory and regulatory deadlines because 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," Opp. at 22 (emphasis added), and not on October 4, 2013, when the Proposal was hand-delivered to and received by Mr. Slim in the BIA's Self-Determination Office. Third, the Secretary contends that the Nation's Proposal should not be deemed approved because it proposed funding greatly in excess of what the Secretary had provided in prior years.

These contentions lack any legal merit. First, the receipt by the BIA's Self-Determination Contract Specialist Slim in his office was receipt by the agency under the ISDEAA and its implementing regulations, notwithstanding the partial furlough. Second, there is no basis for estopping the Nation based on its silence because the Nation had no duty to speak and the Secretary did not reasonably rely on the Nation's silence. Third, the Secretary cannot defend her declination on the basis of the increased *amount* of the Nation's funding Proposal. *Yurok Tribe*, 2015 WL 2146614 at *6 (deeming tribe's contract approved and rejecting Secretary's argument that tribe's proposal could be declined for seeking funding in excess of that allowed by the ISDEAA, because "[t]he government's discretion to decline a proposal is irrelevant to what programs can be included in a contract where the government fails to act" within the 90-day deadline).[1]

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[1] Even if the merits of the Nation's proposal were at issue – which they are not because the sole issue before this Court is the procedural issue of whether the Secretary acted timely – the amount of funding in the Nation's Proposal was not more than the amount which the Secretary herself would be required to spend to operate the Nation's judicial programs.

II. NO MATERIAL FACTS ARE IN DISPUTE

A. The Facts Stated in the Nation's Statement of Material Facts as to Which There Is No Genuine Issue Are Admitted.

LCvR 7(h)(1) provides that, "[i]n determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." *Id*. Such statement of genuine issues must "include references to the parts of the record relied on to support the statement." *Id*. Although the Secretary did file a "Response" to the Nation's Statement of Material Facts quibbling with the Nation's characterizations of various events and documents, Doc. No. 18 pp. 9-14 (of 115), the Secretary did not file a statement of genuine issues, and did not support her assertions of disputes with the Nation's facts with references to the record. The facts identified in the Nation's Statement of Material Facts as to Which There Is No Genuine Issue, Doc. No. 15-1, should therefore be considered admitted. *See, e.g., Bruder v. Chu*, 953 F.Supp. 2d 234, 235-36 (D.D.C. 2013).

The Secretary has filed her own Statement of Material Facts, Doc. No. 18 pp. 3-8 (of 115), to which the Nation responds in its contemporaneously filed Statement of Genuine Issues. As stated therein, many of the Secretary's factual assertions concerning Mr. Slim are based on inadmissible hearsay or are legal conclusions asserted by a different BIA Indian

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Thus, notwithstanding the extreme underfunding in prior years, even a timely declination by the Secretary could not be sustained on an assertion of lack of available federal funding. *See* Ex. B (Declaration of Chief Justice Herb Yazzie); 25 U.S.C. §§ 450f(a)(2)(D), 450j-1(a); *Southern Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1079 (10th Cir. 2011).

Self-Determination Specialist, Jeanette Quintero, and cannot provide the basis for a grant of summary judgment. *See Ascom-Hasler Mailing Sys., Inc. v. United States Postal Serv.*, 815 F.Supp. 2d 149, 167 (D.D.C. 2011). The issues of fact preclude an award of summary judgment to the Secretary, but do not preclude the grant of summary judgment to the Nation because the Nation's theory of the case does not depend on resolution of those disputes.

The Nation is also filing its Statement of Additional Material Facts ("SAMF") to provide additional facts regarding the Nation's delivery and the Secretary's receipt of the Proposal on October 4, 2013 and to address the Secretary's irrelevant contention that the Nation's Proposal sought too much money.[2] The additional facts are summarized below.

B. The Nation Hand-Delivered the Proposal to the Agency on October 4, 2013.

An employee in the Navajo Nation's Contracts and Grants Section, Ronald Duncan, hand-delivered the Nation's Proposal to the BIA Indian Self-Determination Specialist, Raymond Slim, on October 4, 2013. Duncan Decl. (Ex. A hereto); SAMF ¶¶ 7, 9. Duncan went to the BIA's offices that day because his colleague in the Nation's Contracts and Grants Section, Agnes Barney, had delivered a proposal to the BIA at that office a day or two before, *i.e.*, also during the partial Government furlough. SAMF ¶ 8. The BIA had also responded by letter to the Nation regarding a third ISDEAA contract proposal (concerning forestry) on October 1, 2013, the first day of the partial furlough. *Id.* ¶ 1.

[2] Because the Nation's claims are based on the untimeliness of the Secretary's action, not the merits of the Proposal, that contention is irrelevant. Nonetheless, the SAMF shows that, if the Secretary were to assume the responsibility of operating the Navajo court system, she would incur costs in excess of the amount proposed in the Nation's 2014 AFA.

Duncan arrived at the BIA office at about 1:30 p.m. on October 4, 2013. *Id.* ¶ 9. The door on the building was unlocked. *Id*. Duncan did not see a "closed" sign on the door. *Id*. Duncan signed in at the front office and spoke with the uniformed officer there. *Id*. That officer let Duncan go to the BIA's Self-Determination Office, and the officer called Slim to say that Duncan was going to Slim's office. *Id.* Neither Slim nor the uniformed officer at the BIA office said that Slim was not authorized to receive the Nation's Proposal on that day on behalf of the BIA. *Id.* ¶ 10.

C. If the Nation's Judicial System Were Operated by the Secretary, the Secretary Would Incur Costs Well in Excess of $17 Million Annually.

The Nation's claims are based on the procedural issue of whether the Secretary's failure to act on the Nation's Proposal within 90 days of its receipt by the Secretary's Self-Determination Contract Specialist caused the Proposal to be deemed approved under the plain language of the ISDEAA, its implementing regulations, and the *Seneca* and *Maniilaq* decisions applying them.

The Secretary's argument, that even if a contract is deemed approved the Secretary cannot lawfully provide more funding than an amount unilaterally determined to be sufficient by the Secretary, was advanced by the Government in the *Seneca* and *Yurok* cases and rejected by the courts. Nonetheless, if this Court somehow decides in this case that the amount of the funding in the Nation's Proposal is relevant, the Nation has demonstrated that such funding is actually quite modest and *lower* than the Secretary would have to expend if she were to reassume responsibility to maintain the longstanding operation and administration of the Nation's courts upon retrocession or reassumption. *See* 25 C.F.R.

subpart P (Retrocession and Reassumption Procedures).

The Nation's court system covers an area of over 27,000 square miles, approximately the size of West Virginia. SAMF ¶ 11. It serves an on-Reservation population of more than 173,000 people, mostly Navajo tribal members but also non-Indians. *Id.* ¶ 12; *see Warren Trading Post v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965). So that people do not have to travel extraordinary distances to have their disputes resolved, the Nation operates 12 District Courts and Family Courts and one circuit-riding District Court throughout Navajo Indian country. SAMF ¶ 14. The Judicial Branch also operates a more traditional Peacemaker Court system. *See id.* ¶ 15. Appeals from the District Courts and Family Courts are handled by the Navajo Nation Supreme Court. *Id.* ¶ 17.

The case load in the Nation's District and Family courts in 2014 was 2,932 civil cases, 11,185 criminal cases, and 37,669 other cases (including Probation Services and Peacemaking), a total of 51,786 cases. SAMF ¶ 15. To shoulder that burden,[3] the Nation presently employs 11 full-time District and Family court judges (seven of such budgeted judgeships are unfilled), 60 clerks of court, 10 staff attorneys, 11 court administrators, 27 probation officers, 25 office technicians, 22 bailiffs, 10 custodians, and 12 specialists in traditional Navajo law, for a total of 177 support staff. *Id.* ¶ 16. The Supreme Court has two full-time Justices (and one vacant Justice position), one clerk of court, one law clerk, one associate attorney, and one secretary, and its decisions are published. *Id.* ¶¶ 18, 22.

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[3] The cost of providing such fora for resolving disputes was apparently one factor motivating the State of Arizona not to accept jurisdiction over the Nation when it had the opportunity. *Williams v. Lee*, 358 U.S. 217, 222-23 & n.11 (1959).

The Navajo Judicial Branch suffers from a lack of properly constructed and maintained facilities. SAMF ¶¶ 23. The Supreme Court itself has no courtroom. *Id.* ¶ 19. Other facilities are dilapidated and unsafe. *Id.* ¶ 23; Ex. B hereto (Yazzie Decl.) and attached pictures. Even for the newer facilities, there is insufficient money available for routine maintenance. SAMF ¶ 24.

The Nation's Proposal includes a budget that is minimally required to run the Navajo courts and no more than it would cost the Secretary to do. SAMF ¶ 25. The budget submitted by the Nation in its Proposal correlates precisely to the fifteen specific tasks and objectives listed in the approved contract, including maintenance of court facilities. *Id.* ¶ 26.

In past years, the Nation's contract for the tribal courts has been grossly underfunded. In practice, notwithstanding the Nation's determination of the funding requirements for the courts, the BIA simply states what it has available for funding the program and there is no negotiation of that figure. SAMF ¶ 27. Although the Nation had capitulated in prior years, for FYs 2012 and 2013 the Nation accepted the contracts "under protest." *Id.* ¶ 29; Ex. B hereto ¶ 22 & Att. 4.

III. THE NATION IS ENTITLED TO SUMMARY JUDGMENT.

A. The Secretary's Position Is Entitled to No Deference.

This case is brought under the ISDEAA. Therefore, no deference should be accorded any of the Secretary's actions, or to her interpretation of the ISDEAA or its implementing regulations.

The provisions of ISDEAA and the regulations clearly show Congress' determination

that the Secretary not be accorded deference and that the statute and regulations must be interpreted and applied in a way that benefits the tribes. *See generally Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2194 (2012) (ISDEAA "is construed in favor of tribes"). "[T]here is overwhelming evidence that Congress intended the [ISDEAA] to limit the Secretary's discretion in funding matters . . ." *Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338, 1347 (D.C. Cir. 1996). The ISDEAA mandates that the *Secretary* shoulder the burden of proof in such cases to establish by "clearly demonstrating the validity of the grounds for declining a contract proposal." 25 U.S.C. § 450f(e)(1); *accord* 25 U.S.C. § 450m. The ISDEAA provides that each statutory provision and each provision of ISDEAA contracts shall be liberally construed for the benefit of tribes to transfer federal funds to them. 25 U.S.C. § 450*l*(c) (Model Agreement at § 1(a)(2)). Congress even forbade the Secretary from issuing regulations outside of a few areas. *Babbitt*, 87 F.3d at 1344; 25 U.S.C. § 450k(a)).

The regulations are in accord. They provide that each provision of the Act and each provision of ISDEAA contracts must be liberally construed for the benefit of the tribes, 25 C.F.R. § 900.3(a)(5), and that the regulations themselves be liberally construed for the benefit of tribes and that any ambiguities therein be resolved in the tribes' favor, 25 C.F.R. § 900.3(b)(11). These rules conform to the more general principle that the canon of construction of statutes and regulations favoring tribes will prevail over the typical *Chevron* deference accorded to federal agencies under the APA. *See, e.g., Cobell v. Norton*, 240 F.3d 1081, 1101-02 (D.C. Cir. 2001); *accord Southern Ute*, 657 F.3d at 1078.

The published decisions under ISDEAA all hold that review of the Secretary's

decisions is *de novo*. *Pyramid Lake Paiute Tribe v. Burwell*, __ F.Supp. 3d __, 2014 WL 5013206 *4-*5 (D.D.C. Oct. 7, 2014); *Cheyenne River Sioux Tribe*, 496 F.Supp. 2d at 1066-67; *Cherokee Nation of Okla. v. United States*, 190 F.Supp. 2d 1248, 1258 (E.D. Okla. 2001), *aff'd,* 311 F.3d 1054 (10th Cir. 2002), *rev'd on other grounds by Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005); *Shoshone-Bannock Tribes of Ft. Hall Res. v. Shalala*, 988 F.Supp. 1306, 1314-15 (D. Or. 1997). *Citizen Potawatomi Nation v. Salazar*, 624 F.Supp. 2d 103, 109 (D.D.C. 2009), the only reported decision relied upon by the Secretary for a deferential review of her actions, is inapposite because the tribe in that case relied on the APA in its complaint. *Seneca*, 945 F.Supp. 2d at 141 & n.5 (distinguishing *Citizen Potawatomi* on that basis; parties agreed that standard of review should be *de novo*); *Maniilaq*, 2014 WL 5558336 at *5 (noting same).

Finally, the issues requiring resolution are questions of law. The Secretary does not dispute the facts that Slim received the Nation's Proposal on October 4, 2013, *see* Defs' St. of Mat. Facts No. 8 (Slim was "at the receptionist's front desk and accepted the proposal for intra-office mail delivery") or that the Secretary did not act on the Proposal within 90 days of that receipt, but argues that the actual receipt by Slim was rendered legally ineffective because of a partial government furlough. Nor does the Secretary contend that the Nation should be estopped from relying on the Secretary's regulations because of some disputed action taken by the Nation, but rather that the Nation's silence should estop it. Finally, the Secretary does not contend that $17 million per year exceeds the funds reasonably required to operate the Navajo courts, but only that $17 million is greatly in excess of what the

Secretary has been and is willing to provide and therefore that portion of the Nation's Proposal seeking the additional funding is subject to declination. Even under the APA, such questions of law are reviewed *de novo*. *See Athridge v. Aetna Cas. & Sur.Co.*, 351 F.3d 1166, 1171 (D.C. Cir. 2003); *Maniilaq*, 2014 WL 5558336 at *5.

B. The Nation's Proposal was Received by the Agency on October 4, 2013, and the Proposal Was Deemed Approved on January 3, 2014.

1. ISDEAA permits only one exception to the rule that a contract proposal is deemed approved if the Department does not act on it within 90 days of receipt, and that exception does not apply here.

Both the ISDEAA and its implementing regulations permit only one exception to the requirement that the Secretary act on a contract proposal within 90 days of receipt – the "voluntary and express written consent of the tribe." 25 U.S.C. § 450f(a)(2); *accord* 25 C.F.R. § 900.17. There is no exception to or tolling of the 90-day period for a partial government furlough or any other reason. *See, e.g., NRDC v. EPA*, 489 F.3d 1364, 1374 (D.C. Cir. 2007) (when Congress specifies certain exceptions to deadline in statute, courts should not read other exceptions into it absent contrary legislative intent). Those statutory and regulatory provisions must be strictly interpreted and applied in favor of the tribe. 25 U.S.C. § 450*l*(c) (Model Agreement § 1(a)(2)); 25 C.F.R. § 900.3(a)(5), (b)(11); *see generally Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339, 1347 (Fed. Cir. 2005) (court must enforce unambiguous statute or regulation "according to its obvious terms and not to insert words and phrases so as to incorporate therein a new and distinct provision").[4] As a

[4] The Secretary does not continue to rely on the "unilateral modification" executed by the BIA purporting to replace the Nation's Proposal with one to the BIA's liking. *See* Compl. Ex. J (Doc. 1-13 at pp. 2-3 of 30).

result of the negotiated rule making overseen by Congress, *see* 25 U.S.C. § 450k(c), (d); 25 C.F.R. § 900.1, the Secretary construes 25 U.S.C. § 450f(a)(2) as imposing a mandatory duty to act, with significant consequences for inaction, *see* 25 C.F.R. §§ 900.17-.19; *cf. Marshall v. N.L. Indus., Inc.*, 618 F.2d 1220, 1224-25 (7th Cir. 1980) (in contrast, where agency regulation construed 90-day statutory limit as *not* mandatory but "merely directory because instances will of course occur where the 90-day period cannot be met," Secretarial interpretation controlled).

In this respect, the ISDEAA regulatory scheme differs from others. For example, the Federal Acquisition Regulations provide that "[i]f an emergency or unanticipated event interrupts normal Government processes so that proposals cannot be received at the Government office designated for receipt of proposals by the exact time specified in the solicitation, and urgent Government requirements preclude amendment of the solicitation closing date, the time specified for receipt of proposals will be deemed to be extended to the same time of day specified in the solicitation on the first work day on which normal Government processes resume." 48 C.F.R. § 15.208(d). Other agencies, but not the BIA, tolled certain time periods during the partial furlough. For example, the International Trade Commission ("ITC") published a Notice entitled "Tolling of Activity in Antidumping and Countervailing Duty Proceedings" stating that the ITC was unable to operate from October 1, 2013 to October 16, 2013 and providing that "all statutory deadlines pertaining to activities conducted under the authority of Title VII of the Tariff Act of 1930 (including antidumping and countervailing duty investigations and reviews) will be tolled 16 calendar days." 78 Fed.

Reg. 64,011 (Oct. 21, 2013). Similarly, the NLRB granted *sua sponte* an extension of time to file or serve any document for which the grant of an extension is permitted by one day for each day that the agency was closed. 78 Fed. Reg. 61,869, 61,870 (Oct. 4, 2013). Immediately upon a resumption of funding on October 17, 2013, the FCC issued a Public Notice extending certain deadlines. Ex. C. The EEOC notified claimants during the partial shutdown that if they were "in a state where there is no state fair employment practice agency . . ., the time limit for filing a charge is 180 days. **These time limits may not be extended because of the shut-down.**"[5] The BIA attempted nothing of the kind, and even its internal, unpublished "Contingency Plan Fact Sheet," *see* Compl. Ex. I (Dkt. 1-12, p. 4 of 4) and internal Q&A sheet (Opp. Ex. C), did not purport to extend or toll the 90-day period for contract declination under the ISDEAA.

The only exception to the 90-day requirement under the ISDEAA is when a tribe consents voluntarily and in writing to an extension. The Nation did not consent to any extension, so "the 90-day deadline applies." 25 C.F.R. § 900.17.

2. The Secretary's resort to the Anti-Deficiency Act is unavailing.

The Secretary's contention that the 90-day period did not begin to run when the Nation hand-delivered its proposal to BIA Self-Determination Specialist Slim is based primarily on the Appropriations Clause and related provisions of the Anti-Deficiency Act ("ADA"), notably 31 U.S.C. § 1342. The Government's invocation of the ADA has failed in every ISDEAA case known to the Nation. In *Ramah Navajo Chapter*, 132 S. Ct. 2181,

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[5] "EEOC Shutdown," http://www.eeoc.gov/eeoc/shutdown_notice.cfm. (emphasis in original).

the Court rejected the Secretary's argument that requiring the Government to reimburse tribes for certain ISDEAA costs they incurred would violate the ADA, stating that the ADA's requirements "apply to the [Government] official, but they do not affect the rights in this court of the citizen honestly contracting with the Government." *Id*. at 2193 (internal quotation marks omitted). The Government's contention that the ADA precluded it from approving an amended proposal was rejected in *Southern Ute*, where the court observed that the ISDEAA permits contracting in advance of appropriations and ruled that a lack of sufficient funding for certain contract support costs did not permit the Government to decline to approve an ISDEAA contract proposal. 657 F.3d at 1079-80. The opinion in *Southern Ute Tribe v. Leavitt*, 497 F.Supp. 2d 1245, 1254-56 (D.N.M. 2007), *aff'd*, 657 F.3d 1071 (10th Cir. 2011), analyzes in great detail the reasons why the Government's ADA argument failed, stating that its position "is, in essence, an assertion that the appropriations law amends or repeals the substantive provisions of the ISDEA [*sic*]," and was "actually contrary to the very purpose of the Appropriations Clause . . . [under which] only the legislative branch and not the executive branch of government may make ultimate decisions regarding public funds." *Id*. at 1255-56. Similarly, the Government's contention that a tribe's damages for inadequate ISDEAA contract funding could not be awarded because doing so would violate limitations in appropriations acts was rejected in *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003), *aff'd*, 543 U.S. 631 (2005), because the judgment fund was available to pay a judgment even if the fiscal year appropriation lapsed. *Id*. at 1093; *accord Council of Athabascan Tribal Gov'ts v. United States*, 693 F.Supp. 2d 116, 124-25 & n.4

(D.D.C. 2010); Memorandum Op. (Dkt. 38), *Tunica-Biloxi Tribe of La. v. United States*, No. 1:02-cv-02413-RBW, slip op. at 18-22 (D.D.C. Dec. 9, 2003).

Fundamentally, the ADA addresses issues far removed from the question of the effect of the BIA's receipt of the Nation's contract proposal on October 4, 2013. The ADA was enacted to ensure that Government agents would not unlawfully create contractual liability on the part of the Government, *see Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947), and, in 31 U.S.C. § 1342 relied on here by the Secretary, to shield Congress (and the Court of Federal Claims) from claims by "private persons" who might perform "voluntary" services and then file pay claims founded on moral considerations or quasi-contract for which pay is not available, *see, e.g., Designation of Disbursing Clerk for the Dep't of Labor*, 30 Op. Atty. Gen. 129, 131 (1913) (statute "has no application to the performance of additional service by a clerk in executive department without additional compensation, but refers to voluntary services rendered by *private persons* without authority of law") (emphasis in original).[6] Thus, this Court in *United States v. US Airways Group, Inc.*, 979 F.Supp. 2d 33

[6] *Employment of Retired Army Officer as Superintendent of Indian Sch.*, 30 Op. Atty. Gen. 51, 52-55 (1913) (explaining derivation of "emergency" clause in statute and concluding "it is evident that the evil at which Congress was aiming was not appointment or employment for authorized services without compensation, but the acceptance of unauthorized services not intended or agreed to be gratuitous and therefore likely to afford a basis for a future claim upon Congress"); *Matter of Nathaniel C. Elie*, 65 Comp. Gen. 21, 23 (1985) (agency prohibited from accepting voluntary services of person no longer employed by Government); *United States v. Morse*, 292 F.273, 277 (S.D.N.Y. 1922) (rejecting position that person was working unlawfully as Special Assistant to Attorney General while being paid by another federal agency); *Hagan v. United States*, 671 F.2d 1302, 1305 (Ct. Cl. 1982); *but see* Ex. F hereto at 3-4; *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 5 Op. O.L.C. 1 at *11 (1981) (cited at Opp. at 17).

(D.D.C. Oct. 1, 2013), rejected the Government's position that its attorneys were prohibited from working except in emergency situations, during the very partial shutdown at issue here.

Slim's receipt of the Nation's ISDEAA proposal on October 4, 2013 implicates neither of the concerns underlying 31 U.S.C. § 1342. In receiving the Nation's ISDEAA contract proposal, Slim did not purport to create or impose any contractual or other monetary liability on the Government. Nor was or is the United States potentially liable to Slim for a pay claim founded on moral considerations or quasi-contract – regardless of whether § 1342 is limited to "private persons" or extends to government employees – because Slim was concededly an "exempt" employee authorized to work during the partial furlough and paid in full for his time as such. Opp. Ex. B ¶¶ 9-10; *infra* at 20 (discussing Slim's "exempt" status).

Thus, the authorities relied on by the Government for the proposition that the Nation hand-delivered its Proposal to Slim at its peril are inapposite. All three deal with disputes over a Government official's authority to *enter into contracts* binding on the United States.[7] None addresses the simple receipt of a contract *proposal* by an agency, the issue here.

3. The Secretary received the Nation's Proposal on October 4, 2013.

When the Secretary fails to act on an ISDEAA contract proposal within 90 days and

[7] *See* Opp. at 19-20 (*citing Doe v. United States*, 95 Fed. Cl. 546, 583 (2010) (no contract formed by military officials who occupied home of Iraqi plaintiff); *Ascom Hasler Mailing Sys., Inc. v. United States Postal Serv.*, 815 F.Supp. 2d 148, 164-68 (D.D.C. 2011) (genuine issues of material fact precluded summary judgment on issue of whether USPS officials had implied actual authority to contractually bind the Government); *Jumah v. United States*, 90 Fed. Cl. 603, 612 (2009) (Drug Enforcement Agency official lacked authority to contractually bind the United States to pay confidential source)).

is challenged on that basis, the Government understandably looks for creative ways to avoid liability. In *Yurok*, the defense was that the Secretary never actually received the proposal because it was sent to the wrong office (the tribal *compacting* office under Title IV of the ISDEAA instead of the tribal *contracting* office under Title I), used the wrong terminology, was ambiguous, and did not include required elements of a contract proposal under the ISDEAA. Br. of Appellee U.S. Department of Interior, *Yurok Tribe v. United States Department of Interior*, No. 14-1529 (Fed. Cir. filed Nov. 6, 2014), Dkt. 21 at 26-33. The Secretary framed the issue as "whether BIA ever received a 'proposal' from the Tribe." *Id.* at 33. The Federal Circuit rejected all of these grounds. *Yurok*, 2015 WL 2146614 at *4.

Similarly, the Secretary contends here that the Nation's Proposal was not received by the BIA on October 4, 2013 even though it was hand-delivered to the BIA's Indian Self-Determination Specialist Slim in his office on that day. The Secretary urges that because Slim was able to work on some ISDEAA contracts but supposedly not on others because of the partial shutdown he could not receive the Nation's Proposal in any capacity. This defense simply reflects the BIA's "consistent failures . . . to administer self-determination contracts in conformity with the law," S. Rep. No. 100-274 (1987) at 37, and the unreasonable "layers of bureaucracy and rules," S. Rep. No. 103-374 (1994), attempted to be imposed by the BIA that motivated Congress to repeatedly constrain the Secretary's discretion under the ISDEAA, *see Ramah Navajo School Bd.*, 87 F.3d at 1344.

Slim's unconditional acceptance of the Nation's Proposal hand-delivered to him on October 4, 2013 constituted receipt by the Secretary on that day. The question is whether the

Proposal was received by the agency, not whether it was received by a particular person authorized to work on it or even whether it was sent to the correct office. The Secretary's Internal Agency Procedures Handbook for Non-Construction Contracting Under Title I of the [ISDEAA] ("Handbook") defines "agency" as the "individual operating divisions or bureaus of . . . the DOI . . ." Handbook at 1-2.[8] The BIA is obviously a "bureau" of the Department of the Interior. The Handbook expressly triggers the 90-day deadline for acting on contract proposals such as the Nation's proposed successor 2014 AFA on the date of receipt by the agency.

In the section entitled "Successor AFA that is Substantially the Same," the Handbook provides that "[t]he awarding Official shall approve and sign a successor AFA . . . within 90 days after its *receipt by the agency*." Handbook at pp. 5-15 (emphasis added). Regarding a "Successor AFA that is NOT Substantially the Same," the Handbook states: "[a] proposed successor AFA, or portion thereof, that is not substantially the same as the previous AFA is subject to the declination criteria and procedures in § 102 of the ISDA [25 U.S.C. § 450f], and Subpart E of the regulations [25 C.F.R. §§ 900.20-33], *which means the 90-day deadline for action applies*." *Id*. at pp. 5-15 (emphasis added). Therefore, according to the agency's Handbook, the 90-day period regarding the Nation's proposed 2014 successor AFA ran from "its receipt by the agency" on October 4, 2013. And the Handbook does not purport to toll the 90-day deadline even if a proposal is delivered to the wrong office; rather, it takes a strict

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[8] Copies of relevant pages of the Handbook are attached hereto as Exhibit D. The Handbook was cited as persuasive of the agency's duties in *Seneca*, 945 F.Supp. 2d at 145 n.6 and *Navajo Health Foundation - Sage Mem. Hosp., Inc. v. Burwell*, No. CIV 14-0958 JB/GBW, __ F.Supp. 3d __, 2015 WL 1906107 at *54 (D.N.M. Apr. 9, 2015).

view of the BIA's duty to respond within 90 days of receipt *even by an office without authority to process proposals*. Handbook at p. 5-3 ("If a proposal is received at an office which is not the office which has the authority to process that proposal, the proposal should be immediately forwarded to the correct office . . . by overnight mail *because the 90-day time frame began upon initial receipt of the proposal.*") (emphasis added). If the BIA needed additional time to review the Nation's Proposal because of the partial shutdown or otherwise, it could have made a timely request to the Nation for an extension, but it did not do so. The Nation's silence cannot fairly be interpreted to be the requisite consent to a request that the Government did not make.

The Secretary's attempt to compartmentalize Slim should be rejected. *See generally Red Lake Band of Chippewa Indians v. U.S. Dep't of the Interior*, 624 F.Supp. 2d 1, 20 (D.D.C. 2009) (rejecting Secretary's contention that official lacked authority to promise to seek federal funding for ISDEAA contract). Along with 5,283 other BIA and Bureau of Indian Education employees (out of a total of 8,143), *see* Ex. E hereto, Slim continued to work for the BIA, as its Indian Self-Determination Specialist, during the partial shutdown. The temporary lapse of annual appropriations for the BIA is irrelevant because Slim was an "exempt" employee whose salary was funded from multi-year appropriations. Opp. at 9. Such "exempt" employees are authorized by law to continue working for the agency notwithstanding a lapse of appropriations. *See* United States Office of Personnel Management, "Guidance for Shutdown Furloughs" (Oct. 11, 2013) at 2 ("**Who are 'exempt' employees? A**. Employees are 'exempt' from furlough if they are *not affected* by a lapse

in appropriations. This includes employees who are not funded by annually appropriated funds.") (bolding in original; italics added) (Ex. F hereto). In addition, the Department of the Interior's "Contingency Plan of Operations in the Absence of FY 2014 Appropriations" (Sept. 26, 2013) expressly provides that excepted personnel would be authorized to conduct contracting activities, stating (at unnumbered page 7) that 473 BIA employees funded by a non-lapsing source would be exempt and "[a] limited number of management and administrative personnel would be deemed excepted from furlough to *respond to inquiries from tribal governments*; to provide for limited financial management, *contracting*, . . .") (emphases added) (Ex. G hereto at [unnumbered] p. 7).

So even assuming for the sake of argument that Slim was not authorized to *work on* the Nation's Proposal, *see* Opp. at 18, his receipt of the Proposal on October 4, 2013 constituted "receipt by the agency" triggering the 90-day deadline. In *Electronic On-Ramp, Inc. v. United States*, 104 Fed. Cl. 151 (2012), the plaintiff sent a courier to hand-deliver its proposal to a federal agency. The courier arrived at the agency an hour before the deadline but was prevented by agency security from entering. The court ruled that the proposal was timely because it was under government control after the courier arrived at the facility and logged in at security, stating "a proposal can be received at the government installation when an offeror's courier logs in with a security guard or front desk and proffers the proposal for delivery." *Id*. at 162. In our case, the Nation's official was not prevented by BIA security from delivering the Proposal to Slim; the BIA security officer logged in the Nation's official and *facilitated* his hand-delivery of the Proposal to the BIA's Indian Self-Determination

Specialist in his office on October 4, 2013.

"[A] document is 'received' when delivered to the proper address." *Khor Chin Lim v. Courtcall Inc.*, 683 F.3d 378, 381 (7th Cir. 2012). In *Lim*, the court rejected the contention that a party may defer "receipt" of a document by failing to open the envelope containing it, stating that "[d]elivery to the address on file . . . is the normal meaning of receipt in law. No authority of which we are aware holds that a litigant may defer 'receipt' of a document by failing to open the envelope containing it." *Lim*, 683 F.3d at 381. As with the rule construed in *Lim*, there is nothing in the ISDEAA or its implementing regulations that "suggests that 'receive' has an unusual meaning." *Id*.

The purported fact that other BIA employees did not review the Proposal until October 17, 2013, is irrelevant to the agency's receipt on October 4, 2013. In *California Marine Cleaning, Inc. v. United States*, 42 Fed. Cl. 281 (1998), the court ruled for a contract bidder over the Government's objection that its bid was filed late, stating that a "timely bid does not become late simply because the government overlooks the bid in a bid box; rather, if the bid is timely *delivered* to the *place* specified . . . for *receipt* of bids, the bid is timely and must be considered for award, even if the bid is not discovered and opened until after the scheduled bid opening." *Id*. at 297 (emphases added). Similarly, whether Slim himself did or did not work on reviewing the Nation's Proposal has no bearing on Slim's receipt of that Proposal on behalf of the Secretary on October 4, 2013. *See Sheviakov v. INS*, 237 F.3d 1144, 1148 (9th Cir. 2001) (in cases involving hand-delivery of papers to clerk's offices staffed by only one person, "we would treat papers as received when they arrived at the

clerk's office, even though it is physically impossible for the deputy clerk to be present and within sight of the counter at all times during business hours"). When Ms. Quintero, a second BIA Indian Self-Determination Specialist in Slim's office, Opp. Ex. B ¶ 1, started work on the Proposal is irrelevant. Under both the Handbook and *Yurok*, the 90-day period starts to run upon initial receipt even when a proposal is delivered to the wrong office.[9]

The Secretary's failure to comply with 25 C.F.R. § 900.15(a), (b), Opp. at 20, is no reason to deny the Nation summary judgment. The Secretary violated the regulation and its language is mandatory. "Upon receipt of a proposal, the Secretary shall: (a) Within two days notify the applicant in writing that the proposal has been received; (b) Within 15 days notify the applicant in writing of any missing items required by [25 C.F.R.] § 900.8 . . ." 25 C.F.R. § 900.15. Acting Regional Director DeAsis could easily have given the Nation the required notifications for *this* Proposal, just as he did on October 1, 2013 (the first day of the partial shutdown) regarding the Nation's ISDEAA forestry contract proposal. *See* Ex. I ¶ 4 and Att. 1 thereto. But the Secretary failed to do so.

The cases cited at pages 19-22 of the Secretary's Opposition are not to the contrary. In *Aircraft Owners and Pilots Ass'n v. Hinson*, 102 F.3d 1421, 1429 (7th Cir. 1996), the court found that a party violated a court rule specifying a time for filing papers, which

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[9] In this case, the Proposal was delivered to the Self-Determination Contracting Office of the BIA's Navajo Regional Office. Thus, the Secretary cannot even argue here, as it did unsuccessfully in *Yurok*, that the Nation's Proposal was delivered to the wrong BIA office. Had Duncan hand-delivered the Proposal on October 17, 2013, when Quintero was presumably at work, a security officer sitting at the same BIA security desk would have logged Duncan in and directed Duncan to the same BIA Self-Determination Contracting Office where Quintero works alongside Slim.

required the filings to be in the hands of the Clerk by a designated time. In our case, the Proposal was literally in Slim's hands on October 4, 2013. In *Tech Hills II Associates v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963, 968 (6th Cir. 1993), *abrogated by Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999), the court ruled that service of process on the security guard of the person actually authorized to accept service was ineffective. In this case, the BIA security guard assisted Duncan in hand-delivering the Proposal directly to Slim. The concern in *Ascom*, 815 F.Supp. 2d at 167, was the actual authority or implied actual authority of a federal employee to contract. As shown above, Slim did have authority to *receive* the Proposal, even if he could not finally approve it.

4. If the Court does not disregard Quintero's Declaration entirely, fact issues preclude summary judgment for the Secretary.

The Nation's Proposal should be deemed approved because it was received by the agency on October 4, 2013, the Secretary had 90 days from that day to approve or disapprove the Proposal unless the Nation consented to an extension, the Nation did not consent, the Secretary did not act within the 90 days, and the governing regulation provides that such inaction results in the Proposal being deemed approved, *e.g., Seneca*, 945 F.Supp. 2d at 152; *Maniilaq*, 2014 WL 5558336 at *10, "based on the terms of the proposal," *Yurok*, 2015 WL 2146614 at *1. The Secretary's position that Slim had no authority to receive the Nation's Proposal is based on contentions and conclusions stated in the Quintero Declaration. Those assertions are admittedly based on hearsay and cannot provide a proper foundation for either denying the Nation's motion or granting the Secretary's cross motion. *See, e.g., Fed. R. Civ. P.* 56(c)(2), (4); *Gleklen v. Democratic Cong. Campaign Comm.*, 199 F.3d 1365, 1369 (D.C.

Cir. 2000); *Shakur v. Schriro*, 514 F.3d 878, 889-91 (9th Cir. 2008) (denying summary judgment where affidavit of movant was conclusory and based on hearsay, especially given the applicable standard of proof); *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996) (affirming District Court's striking of conclusory affidavit based on hearsay in summary judgment context). But if this Court decides that BIA Indian Self-Determination Specialist Slim's authority to receive a Self-Determination contract for the agency is a relevant question and is in genuine dispute, the Secretary's cross-motion for summary judgment must be denied because of issues of fact concerning his authority, and the Nation should be allowed to pursue discovery on that issue.

Even if the Nation were contending that Slim effectively *contracted* with the Nation by his receipt of the Nation's Proposal (which the Nation is *not*), factual issues regarding Slim's authority (including his implied actual authority) preclude a grant of summary judgment in favor of the Secretary. *See* Ex. A ¶¶ 6-8; *see Ascom*, 815 F.Supp. 2d at 166-69; *accord Lublin Corp. v. United States*, 98 Fed. Cl. 53, 59 (2011) (issue of implied actual authority to contract precluded summary judgment)*; Cruz-Pagan v. United States*, 35 Fed. Cl. 59, 60-61 (1996) (Government affidavit that DEA agent did not have contracting authority to enter into award agreement was insufficient to support summary judgment because actual authority can be implied). In this case, there are sufficient facts in the record supporting the express or implied actual authority of Slim to receive the Proposal for the agency. *See, e.g.*, Ex. A ¶¶ 6-8; Ex. D at p. 5-2; Ex. G at (unnumbered) p. 7 (stating that BIA would except employees from furlough to engage in "respond[ing] to inquiries from tribal

governments" and "contracting"). To substantiate its position that Slim had the requisite authority, the Nation would request production of relevant documents (including Slim's job description, communications from and to the BIA during the partial shutdown, instructions given to Slim and other BIA employees regarding their work then) and depose Slim and other BIA employees in his office, including Slim's fellow Indian Self-Determination Specialist Quintero (*see* Opp. Ex. B at ¶ 1), and Frances Price, referred to in Quintero's declaration (*see id.* at ¶ 18). *See* Ex. H (Declaration of Counsel).

The contrary contentions and conclusions in the Quintero Declaration are not undisputed. Quintero claims that there was a "closed" sign on the front door of the federal building (also suggesting that Quintero came to work on October 4, 2013 and other days during the partial furlough), but Duncan states that he saw no such sign and the Secretary has stipulated that Duncan entered the building and was allowed to go to Slim's office, where Slim was working. Quintero's conclusions regarding the authority of exempt and excepted employees contradicts the Department's own explanation of what services would be provided by the BIA during the partial shutdown. *See, e.g.,* Ex. G at (unnumbered) p. 7. Quintero's ultimate supervisor at the Navajo Regional Office, the Regional Director, signed and sent on October 1, 2013 (the first day of the shutdown) a letter to the Nation regarding an ISDEAA contract proposal dealing with forestry. Ex. I ¶ 4 & Att. 1. The Secretary supplied no declaration of Slim but only that of Quintero, another Indian Self-Determination Specialist in his office who admittedly provided the information asserted in her declaration based on hearsay, Opp. Ex. B ¶ 1; did not state the tasks that Slim actually performed between October

1 and October 16, 2013; and did not provide his job description – litigation decisions especially conspicuous in light of the Secretary's statutory burden to justify her contract declination by clear and convincing evidence. *See* 25 U.S.C. § 450f(e); *Seneca*, 945 F.Supp. 2d at 151; *Ascom*, 815 F.Supp. 2d at 164-68. Depositions and document discovery will show what Slim and others at the BIA actually did and were authorized to do during the furlough and whether Slim was directed to take or not to take certain actions while on duty as an "exempt" employee then.

These facts and documents are relevant to Slim's authority, including his implied actual authority. They are within the exclusive control of the Secretary, and the Nation has not yet had the opportunity to conduct discovery on these facts, given the course of proceedings in this litigation. Therefore, if this Court determines that Slim's authority is a genuine issue relevant to either the Nation's motion or the Secretary's cross-motion, the Nation should be accorded the opportunity to conduct discovery. *See, e.g., Covertino v. United States Dep't of Justice*, 684 F.3d 93, 100 (D.C. Cir. 2012) (stating test under *Fed. R. Civ. P.* 56(d)); *Richie v. Vilsack*, 287 F.R.D. 103, 105-07 (D.D.C.2012) (applying *Covertino*); *McCray v. Maryland Dep't of Transp.*, 741 F.3d 480, 483-84 (4th Cir. 2014); *Burlington N. Santa Fe R. Co. v. Assiniboine and Sioux Tribes of Ft. Peck Res.*, 323 F.3d 767, 773-74 (9th Cir. 2003).

C. The Secretary's Equitable Defenses Are Unavailing.

1. The Nation is not estopped by silence from relying on the plain language of ISDEAA and the Secretary's regulations.

For several reasons, the Secretary's attempt, through invocation of equitable estoppel doctrine, to blame Navajo Nation government officials for the BIA's failure to follow its own regulations must fail. "There is 'a clear presumption in this Circuit against invoking the [equitable estoppel] doctrine against government actors in any but the most extreme circumstances.'" *International U., United Gov. Sec. Officers of Am. v. Clark*, 704 F.Supp. 2d 54, 60 (D.D.C. 2010) (alleged negligence and provision of erroneous information not sufficiently "extreme" to estop government official). The Secretary has the burden of proof on the affirmative defense of estoppel. *Abb Daimler-Benz Transp. (North Am.), Inc. v. National R. Passenger Corp.*, 14 F.Supp. 2d 75, 94 (D.D.C. 1998). To satisfy that burden, the Secretary must show that (1) there was a "definite representation" to the BIA, (2) the BIA relied on the conduct or statements of the Nation in such a manner as to change the BIA's position for the worse, (3) such reliance was reasonable, and (4) the Nation engaged in "affirmative misconduct." *See Keating v. FERC*, 569 F.3d 427, 434 (D.C. Cir. 2009).[10] The doctrine focuses on representations of material facts, not interpretations of law. *See, e.g., United States v. Philip Morris, Inc.*, 300 F.Supp. 2d 61, 71 (D.D.C. 2004); *accord Adventist Living Ctrs., Inc. v. Reinhart Institutional Foods, Inc.*, 52 F.3d 159, 162 (7th Cir. 1995).

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[10] The Secretary pled the affirmative defense of unclean hands but does not pursue that defense now. The Secretary's burden to show unclean hands is even more onerous than is required to equitably estop the Nation; it requires a "showing of truly unconscionable and brazen behavior." *Saint-Jean v. District of Columbia*, 846 F.Supp. 2d 247, 258 (D.D.C. 2012).

The Nation made no "definite representation" to BIA of fact *or* law, and the Secretary does not argue that it did. The Nation's silence did not give rise to estoppel because there was no duty to speak, *see Tech 7 Syst., Inc. v. Vacation Acquisition, LLC*, 594 F.Supp. 2d 76, 86 (D.D.C. 2009), and the Secretary does not identify any such duty. In *Morris Communications, Inc. v. FCC*, 566 F.3d 184, 191-92 (D.C. Cir. 2009), the court rejected the attempt to equitably estop a government agency because it made no definite representation and, "while the Commission's three-year silence is egregious, it does not constitute 'affirmative misconduct.'" *See also Electronic Privacy Info. Ctr. v. National Sec. Agency*, 795 F.Supp. 2d 85, 93 (D.D.C. 2011) (NSA not equitably estopped from refusing to respond to FOIA requests even though it had voluntarily done so in past years, citing *Morris*).

The Secretary could not have reasonably relied on anything the Nation did (or did not) do. To show reasonable reliance, the Secretary must show that she did not know, nor should she have known, that any alleged representations made by the Nation were misleading. *Genesis Health Ventures, Inc. v. Sebelius*, 798 F.Supp. 2d 170, 184 (D.D.C. 2011) (*citing Heckler v. Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 59 (1984)). This is not a case where a private party was misled by a federal agency about the proper construction of a law or rule. This is a case where the agency claims the other party must help the *agency* interpret and apply its own unambiguous regulations, where the Secretary has her own battery of legal counsel. So even if the Nation *had* made a definite representation to the Secretary about her own regulations, any reliance on it would not be reasonable. *See Lucchesi v. Bar-O Boys Ranch*, 353 F.3d 691, 697 (9th Cir. 2003) (reliance

on government notice was not reasonable because the plaintiff was represented by an attorney and counsel should have been aware of time limits imposed by state tort claims act).

The Secretary and declarant Quintero turn history on its head in suggesting that the BIA was doing the Nation a favor in postponing a decision on the Nation's Proposal until or after the 90-day deadline. *See, e.g.,* Opp. at 24 and Ex. B thereto at ¶¶ 17, 22. Before 1988, tribes would submit contract proposals that seemingly went into black holes at the BIA. In response, Congress amended the ISDEAA, first in 1988 and again in 1994, to ensure that the Secretary would act promptly and to add strong remedies so that the tribes could enforce those time limits. *See Babbitt*, 87 F.3d at 1344; S. Rep. No. 100-274 (1987) at 24 (amendment directs agencies to approve contracts within 90 days unless Secretary can clearly demonstrate that one of five declination criteria applies), 37 (explaining need for strong remedies to compel approval of contracts); S. Rep. No. 103-374 (1994) at 5 (amendments to clarify the mandatory nature of the 90-day deadline). The Secretary confirmed the mandatory nature of the 90-day limit in the regulations adopted after the 1994 amendments and confirmed that the Secretary's failure to act within that time would automatically result in the contract being deemed approved. 25 C.F.R. § 900.18; 61 Fed. Reg. 32,482, 32,486 (June 24, 1996). As noted above, there is only one exception in the statute and in the regulation: the voluntary and express written consent of the tribe. 25 U.S.C. § 450f(a)(2); 25 C.F.R. § 900.17-.18; *Sage*, 2015 WL 1906107 at *34.

The lack of reliance is underscored by the Secretary herself. The Secretary concedes that she could have issued the declination at any time after November 7, 2013, using the same

rationale for doing so as she ultimately did on January 15, 2014. Opp. at 25 and Ex. B thereto at ¶ 18. Indeed, the BIA apparently would have issued its declination even *after* its *post hoc* and self-defined deadline of January 15, 2014 if Navajo employee Shortey's call to the BIA's Self-Determination office that afternoon had not served to remind them of the Proposal. Opp. Ex. B ¶ 18. The BIA's apparent "[c]onfusion does not establish reasonable reliance." *Butler v. City of Huntington Beach*, 25 Fed. Appx. 568, 569 (9th Cir. 2001).

In this case, the Nation made no definite representation to the BIA. It merely submitted its Proposal and awaited agency action. The Nation had no duty to state to the BIA the Nation's position that the regulations required BIA to act by January 2, 2014; the BIA is the Nation's trustee, not the other way around. The Nation engaged in no affirmative misconduct. The Secretary did not reasonably rely on even the silence of the Nation; she is represented by counsel and should have known that ISDEAA and her own regulations allow an extension of the 90-day deadline in only one instance – if the tribe consents. And the Secretary did not change her position for the worse in reliance on anything the Nation did. There is no basis for estopping the Nation here.

2. The ISDEAA and Regulations preclude equitable tolling of the 90-day deadline.

In a footnote, the Secretary asserts that the 90-day period should be equitably tolled. Opp. at 20 n.4. Doing so would contravene the mandatory and unequivocal language of the statute and the governing regulation. *See* 25 U.S.C. § 450f(a)(2); 25 C.F.R. § 900.18. The unreported case cited by the Secretary in that footnote, *Herman v. International U. of Bricklayers and Allied Craftsmen*, No. 96-753 (GK), 1998 WL 1039418 (D.D.C. Oct. 26,

1998), is unpersuasive for at least four reasons. First, the doctrine was used to alleviate the hardship caused by a shutdown on a private citizen, not a federal agency. *Id*. 1998 WL 1039418 at *2-*3. Second, the authorities did not provide what consequences, if any would flow from a citizen's failure to file within the required 60-day period, *id.* at *5, but in this case the governing regulation clearly specifies the adverse consequences for the BIA's failure to act within the 90-days of its receipt of a proposal: "A proposal that is not declined within 90 days is . . . deemed approved and the Secretary shall award the contract . . ." 25 C.F.R. § 900.18. Third, the court in *Herman* found that it had discretion to extend the deadline in favor of the citizen but, in this case, the statute and regulation do not permit such flexibility both because of their plain language and because of Congress' clearly expressed intent to hold the Secretary to strict compliance with the required procedures. *See Seneca*, 945 F.Supp. 2d at 152 ("When the Secretary fails to respond to an amendment proposal to a self-determination contract within the allotted 90 days, the proposal *automatically* becomes part of the parties' Contract.") (emphasis added). Fourth, requiring the Secretary to comply with her own regulations and Handbook will impose no "draconian result," Opp. at 21 n.4, where she concedes that she could have timely issued the same declination at any time after November 7, 2013. *See* Opp. at 24-25. *Best Key Textiles Co. Ltd. v. United States*, 942 F.Supp. 2d 1367 (Ct. Int'l Trade 2013), is also inapposite because it also concerned the *Government* shortening the time for required notice *against a citizen* and the need to alleviate the resulting inequity.

D. The Nation's Proposal Is Fully Consistent with the ISDEAA.

The Nation's Proposal for FY 2014 requested the minimum amount of funding required to perform the 15 listed tasks and objectives that the Nation had been performing under its prior ISDEAA contracts with the Secretary. *See* Opp. Ex. B ¶ 7; Compl. Ex. B Att. A at 2 (Doc. 1-5 at p. 22 of 30) ("All of the below objectives and tasks were included and accepted in CY 2012 AFA . . . and are included here for CY 2014 without further change."). In prior years, the Nation in effect subsidized the Secretary by providing over 90% of the money needed to perform those tasks. Ex. B hereto ¶¶ 4, 21. The Nation signaled its dissatisfaction with the routine "take-it-or leave-it" approach of the BIA in the 2012 and 2013 AFAs, which the Nation signed under protest, *id.* ¶ 22, and its 2014 AFA proposal reflected the Nation's insistence that the Secretary comply with the ISDEAA's mandate that the contract be funded at no less than the amount that the Secretary herself would have been required to spend. *See id.* ¶ 20.

As the Federal Circuit recently observed, "if the Secretary does not timely respond to [an ISDEAA contract] proposal, the proposal is deemed approved and the Secretary is directed to award a contract *based on the terms of the proposal*." *Yurok*, 2015 WL 2146614 at *1 (emphasis added). In any event, the information supplied by Chief Justice Yazzie demonstrates the reasonableness of the Proposal. In summary, the Nation handles over 51,000 cases per year, serving an area the size of West Virginia with 12 District Courts, a circuit riding District Court and a Supreme Court. Many of the facilities are dilapidated and in urgent need of repair and maintenance. The budget for salaries and fringe benefits for the

approximately 223 total judicial branch employees totals $13,323,358, or an average of $59,746 per year per employee. There is no rational basis for the Secretary to conclude that she could run this entire system for $1,292,532.

The Ninth Circuit decision cited by the Secretary, *Los Coyotes Band of Cahuilla and Cupeno Indians v. Jewell*, 729 F.3d 1025 (9th Cir. 2013), is not to the contrary. Most fundamentally, the Secretary in that case *timely* declined the Band's proposal. In this case, the focus is not whether the Nation's Proposal should have been approved, but is instead on the consequences of the BIA's dereliction of its duties under the ISDEAA and its implementing regulations. *See Yurok*, 2015 WL 2146614 at *5 (holding contract was deemed approved because Secretary failed to act on it within 90 days, stating "*Los Coyotes* does not absolve the government's inaction because it *could have declined* the proposal") (emphasis in original); *Seneca*, 945 F.Supp. 2d at 147 ("The Secretary had the contractual right to say 'no' for 90 days; she cannot now complain about the consequences of failing to do so."). Second, the Los Coyotes Band tried to contract programs that were not contractible because there was no existing BIA law enforcement services offered on its reservation; the Nation's Proposal for its Judicial Branch is contractible because it is an existing BIA-funded program that the Secretary is authorized to administer under the Snyder Act, 25 U.S.C. § 13. *See* 25 U.S.C. § 450f(a)(1)(B); *Hopland Band of Pomo Indians v. Norton*, 324 F.Supp. 2d 1067, 1072 (D.D.C. 2004).

IV. CONCLUSION

For the above reasons and for the reasons stated in the Nation's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment, this Court should grant summary judgment to the Nation on its three claims for relief and deny the Secretary's motion for summary judgment or, if the Nation's motion is not granted and the Secretary's cross-motion is not denied, defer consideration of the summary judgment motions for the Nation to take discovery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2015 I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record in this matter.

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