Andrew W. Baldwin (*pro hac vice*)
Berthenia S. Crocker (*pro hac vice*)
Kelly A. Rudd (*pro hac vice*)
Mandi A. Vuinovich
Baldwin, Crocker & Rudd, P.C.
P.O. Box 1229
Lander, WY 82520-1229
andy@bcrattorneys.com
berthenia@bcrattorneys.com
rudd@bcrattorneys.com
mj@bcrattorneys.com
ph. (307) 332-3385
fax (307) 332-2507
Attorneys for Plaintiff Northern Arapaho Tribe

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

NORTHERN ARAPAHO TRIBE, for itself and as *parens patriae* Plaintiff, vs. DARRYL LaCOUNTE, LOUISE REYES, NORMA GOURNEAU, RAY NATION, MICHAEL BLACK and other unknown individuals in their individual and official capacities, Defendants.	)	Civil Action No. CV-16-11 and No. CV-16-60 GF-BMM (consolidated) NORTHERN ARAPAHO TRIBE'S OPENING BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

Defendants wrongfully declined the Northern Arapaho Tribe's ("NAT") contract proposals for judicial and youth/drug counseling services under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. §5301 *et seq*. [CV-16-60 GF-BMM]. Despite the clear language of ISDEAA and its implementing regulations requiring that individual Tribes be granted contracts to manage services previously provided by the Bureau of Indian Affairs ("BIA"), the BIA has outright rejected the NAT proposals for services to NAT members that were previously managed through a tribal organization (Joint Business Council). Defendants claim, without citing authority, that a program that has previously been "shared" with the Eastern Shoshone Tribe ("EST") cannot be managed in its independent parts where each Tribe provides services to its own members. In fact, the Tribes independently administer numerous federally or state funded services for their own members.

The Wind River Reservation, with its two unconfederated Tribes, does present atypical circumstances requiring more flexibility by the BIA. However, the United States created this situation in 1879 and cannot now use it as an excuse to infringe on tribal sovereignty or violate the clear language and intent of ISDEAA. ISDEAA establishes a presumption in favor of approving self-

determination proposals by individual Tribes.

BIA's consistent failures to administer ISDEAA lawfully and its systematic violations of the rights of contracting Tribes triggered Congress to narrowly circumscribe the Secretary's authority to decline contract proposals and exercise discretion in the administration of ISDEAA. Defendants' declinations of NAT's proposals before this Court are part of that pattern of wrongful contract administration and violation of rights that Congress outlawed. Defendants failed to consult, provide technical assistance, or engage in negotiations with NAT regarding NAT's contract proposals.

Defendants declined the proposals in violation of ISDEAA's strict requirements and persistently erected barriers to contract approval. Under ISDEAA, such violations require that the contract proposals be deemed approved.

II. SUMMARY JUDGMENT STANDARD

A motion under Fed.R.Civ.P. 56 should be granted where the moving party shows there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

III. NO MATERIAL FACTS IN DISPUTE

Defendants' Answer to NAT's Amended Complaint places no material facts in dispute. Defendants effectively agree that the claims are appropriate for

summary judgment. Repeatedly, Defendants refer the Court to documents already before the Court or assert that NAT's claims are legal conclusions.[1] Defendants do not deny the existence of the declination letter and refer the Court to the BIA letter for a full and accurate description of its contents. Doc. 117 at 5, ¶12 (Answer).

Significantly, contrary to their assertion in the April 19, 2016, declination letter that NAT could not complete or maintain judicial services serving only members of the NAT, Defendants subsequently admitted that NAT has a right to maintain its own Tribal Court and may transfer cases involving members of the EST to the CFR Court. Doc. 123 at 11 (Def. Resp. Brief PI Motion), ¶7, Doc. 123-9 at 2 (Gourneau letter).

IV. THE NAT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

A. Indian Self-Determination and Education Assistance Act (ISDEAA)

ISDEAA establishes presumption that contracts be awarded to Tribes.

Upon submission of a proposal for a self-determination contract, "the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification

[1] Defendants deny NAT's claim that the BIA's April 19, 2016, declination letter for judicial services was based on an "unsupported conclusion," but the claim is essentially a legal conclusion.

to the applicant that contains a specific finding that clearly demonstrates" one or more of five specific factors listed in the statute. 25 U.S.C. §5321(a)(2). This presumption in favor of approving self-determination contracts constrains Defendants' ability to decline contracts. "Upon the request of any Indian tribe, therefore, the Secretary of the Interior is mandated by the ISDEAA to enter into a 638 contract for services or programs deemed contractible under the ISDEAA, unless one of five statutory exceptions applies." *Hopland Band of Pomo Indians v. Norton*, 324 F.Supp.2d 1067, 1071 (N.D. Cal. 2004).

Each ISDEAA provision "shall be liberally construed for the benefit of the tribes... to transfer funding and the related functions" contractible under ISDEAA to the Tribe. 25 CFR §900.3(a)(5). In administering ISDEAA, the Secretary must "afford Indian tribes... the flexibility, information, and discretion necessary to design contractible programs to meet the needs of their communities consistent with their diverse demographic, geographic, economic, cultural, health, social, religious and institutional needs." 25 CFR §900.3(b)(3). It is not within the BIA's purview to impose requirements for contract approval based on past practice or for the convenience of the BIA. Additionally, the Secretary must approve any severable portion of the contract proposal. 25 U.S.C. §5321(a)(4), 25 CFR §900.25. If the Secretary declines part of a proposal that seeks a level of funding

in excess of the applicable level, then the Secretary is required to approve the contract at the level authorized under ISDEAA. 25 CFR §900.26.

Throughout ISDEAA, Congress also underscored the importance of tribal sovereignty and autonomy, which inhere in NAT's efforts to manage its own judicial and youth/drug counseling services. ISDEAA directs the Secretary to enter into self-determination contracts "upon the request of *any* Indian tribe." 25 U.S.C. §5321(a)(1) (emphasis added). The Federal Government has a commitment and responsibility to "individual Indian tribes" to develop "strong and stable tribal governments." 25 U.S.C. §5302(b). Recognizing the inherent institutional proclivity of an agency to retain control of its programs, the regulations require the Secretary to "make best efforts to remove any obstacles which might hinder Indian tribes... including obstacles that hinder *tribal autonomy* and *flexibility* in the administration of [638] programs." 25 CFR §900.3(b)(1) (emphasis added), *Shoshone-Bannock Tribes of Fort Hall Reservation v. Shalala*, 988 F.Supp. 1306, 1316-17 (D.Or. 1997) ("difficult to imagine … an agency [having] a greater self-interest than when determining whether, and how much, of its own authority and funding must be surrendered to a third party").

Authority to decline limited to five statutory exceptions.

The Secretary's authority to decline an application is very limited.

25 U.S.C. §5321(a)(2). ISDEAA is designed to "circumscribe as tightly as possible the discretion of the Secretary[.]" *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996), *accord Pyramid Lake Paiute Tribe v. Burwell*, 70 F.Supp.3d 534, 542 (D.D.C. 2014), *appeal dismissed*, No. 15-5076, 2015 WL 5237730 (D.C. Cir. Aug. 14, 2015). Declination is not within the Secretary's discretion; it is limited to five exceptions and the Secretary must clearly demonstrate, with specificity, her reasoning for the declination. 25 U.S.C. §5321(a)(2).

Secretary must show declination is lawful by clear and convincing evidence.

"The Secretary has 'the burden of proof to establish by clearly demonstrating the validity of the grounds for declining [a] contract proposal (or portion thereof).' 25 U.S.C. §[5321](e)(1)." *Pyramid Lake Paiute Tribe* at 542. Courts adjudicating ISDEAA declination claims "have thus required the Secretary to establish 'by clear and convincing evidence' the validity of the grounds of his or her declination decision." *Navajo Health Found.-Sage Mem'l Hosp., Inc. v. Burwell*, No. CIV 14-0958 JB/GBW, 2015 WL 9777785, at *22 (D.N.M. Oct. 26, 2015), *citing S. Ute Indian Tribe v. Leavitt*, 497 F.Supp.2d 1245, 1252 (D.N.M. 2007) (Johnson, J.). "Simply reciting the declination criteria is absolutely insufficient. The law requires a detailed explanation of the Secretary's rationale

for his decision and a disclosure of the facts or documents on which he relied for his decision." *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F.Supp.2d 1059, 1068 (D.S.D. 2007).

If the Secretary declines a contract in full, she must provide technical assistance "to overcome the Secretary's stated objections." 25 CFR §900.30. The Secretary cannot decline a contract without taking affirmative action to negotiate a contract with the Tribe that is acceptable. *Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs*., 945 F.Supp.2d 135, 144 (D.D.C. 2013) (required to assist in remedying deficiencies), *Navajo Health Found.-Sage Mem'l Hosp., Inc. v. Burwell*, 100 F.Supp.3d 1122, 1189 (D.N.M. 2015) (25 U.S.C. §5321(b)(2) "contains no 'futility' exception." Failure to provide technical assistance is violation of ISDEAA that makes success on the merits of the claim likely).

The majority of courts agree that in ISDEAA cases, the Court's review is *de novo*. *Seneca Nation*, 945 F.Supp.2d. at 141. *Accord, Cheyenne River Sioux Tribe*, 496 F.Supp.2d at 1067. *See also, Shoshone-Bannock Tribes*, 988 F.Supp. at 1318 (concluding that ISDEAA's text and legislative history and the presumption favoring Indian rights favor *de novo* review).

B. Defendants' Declination of the Judicial Services Contract Proposal was Ineffective

Defendant Gourneau's April 19, 2016, letter (Doc. 112-3) declining NAT's judicial services contract proposal for FY 2017-2019 failed to provide controlling legal authority or to clearly demonstrate the validity of the stated reason for the declination, as required by 25 U.S.C. §5321(a)(2). It provides in relevant part:

> [T]he proposal...is hereby declined for the following reason:
>
> 25 CFR, Part 900.22(c): The proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract.
>
> The Bureau of Indian Affairs has issued a contract to the Eastern Shoshone Business Council on behalf of the Joint Business Council to administer judicial services for the Wind River Reservation pursuant to the express provisions of the Law and Order Code of the Shoshone and Arapaho Law and Order Code of the Shoshone and Arapaho Tribes of the Wind River Indian Reservation. Inherent sovereign authority was exercised by both the Eastern Shoshone and Northern Arapaho Tribes' [*sic*] when the Shoshone and Arapaho Law and Order Code was approved and enacted in 1987. This specific Law and Order Code has not been amended and/or changed to reflect a separate and new judicial code for the Wind River Reservation as proposed by the Northern Arapaho Business Council.

Doc. 112-3.

No legal authority, controlling or otherwise, is cited in support of the declination. The cited regulation, 25 CFR §900.22(c), merely parrots the statute identifying the declination factor, which is insufficient as a matter of law.

Cheyenne River Sioux Tribe, 496 F.Supp.2d at 1068. ("Simply reciting the declination criteria is absolutely insufficient.")

Defendants also do not clearly demonstrate the validity of the cited declination factor. In fact, Defendants' rationale for the declination is fundamentally flawed because it relies on Defendant's *ultra vires* and illegal act: the issuance of a contract for judicial services for members of both Tribes to the Shoshone Business Council ("SBC") on behalf of the non-existent Joint Business Council and without the approval of the NAT. That illegal action does not and cannot justify the declination.

The final two sentences of the justification also fail to demonstrate, leave alone "clearly demonstrate," that the NAT cannot properly complete or maintain the proposed contract. The second sentence in the paragraph is at best a *non sequitur*, in no way relevant to whether the NAT can complete or maintain the proposed contract ("inherent sovereignty was exercised" by both Tribes in enacting the Law and Order Code). The final sentence provides no controlling legal authority that the Shoshone and Arapaho Law and Order Code must be amended in order for NAT to establish its own code, applicable to its own tribal members in its own court. The sentence presumes there must be one code for both Tribes and that

it may be amended only by both Tribes.[2] Furthermore, each Tribe has in fact enacted separate legislation and operates its own separate programs for its own members.

Finally, concurrent jurisdiction is common. *See*, *e.g.*, 21 C.J.S. Courts §276 (State courts are presumed to have concurrent jurisdiction with federal courts over cases arising under federal law). A separate code established by the NAT is not *ipso facto* invalid, nor does one code have to reference the other.

In sum, Defendants provided no specific finding that clearly demonstrates that NAT's judicial services proposal cannot be properly completed or maintained. Defendants failed to meet their burden of proof of showing the validity of the declination by clear and convincing evidence.

The Secretary has the responsibility to take affirmative action to negotiate a contract with the Tribe that is acceptable. 25 CFR §900.30, *Seneca Nation*, 945 F.Supp.2d. at 144. Having received no technical assistance from BIA to overcome the Secretary's stated objections, as required by 25 CFR §900.30, NAT sought engagement with Defendants in an effort to address perceived concerns that were

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[2] The BIA did not apply this presumption when the SBC resolved unilaterally to repeal those portions of Title I of the LOC that establishes a Tribal Court for the EST and asked the BIA to establish a CFR court. *See* Doc. 123-9 (Gourneau letter).

not stated in the declination letter. As reflected in NAT's cover letter to its proposal Supplement, Doc. 98-3 at 1, this was an effort to get the Secretary to negotiate regarding the existing proposal. When Defendants failed to take mandated action and the new fiscal year was rapidly approaching, NAT attempted to overcome obstacles to the Secretary's vague declination. The Supplement was just that, a supplement, and not a new contract proposal. Thus, the declination letter provided on April 19, 2016, remains the declination letter of record for the judicial services contract proposal.

Defendants' subsequent failures to provide technical assistance to overcome stated objections were additional violations of the ISDEAA.

C. Defendants' Declination of the Youth and Drug Services Contract Proposal was Ineffective

NAT proposed to provide drug court/youth counseling services to its own members. Defendant Gourneau's declination letter fails to clearly demonstrate or support by controlling legal authority the Defendants' reasons for declination.

Pertinent parts of the letter include:

> "[T]he service to be rendered to the Indian beneficiaries ...will not be satisfactory." 25 USC 450f(a)(2)(A); 25 CFR 900.22(a). The proposal as submitted will serve only members of the Northern Arapaho Tribe.
>
> ...

> The NABC proposes to provide services formerly or currently provided to members of the [NAT] by the "Meadowlark" program of the Shoshone and Arapaho Tribes. We have previously notified the [NABC] that the BIA would not accept proposals to operate shared programs from one Tribe or tribal organization without agreement between the tribes on the operation of that program, as well as resolutions from both Tribes. *See* 25 USC 450b(l).
>
> Furthermore, the Indian Self-Determination Act ("ISDA") required the BIA to, upon proper request of a Tribe or tribal organization, transfer a program it is currently operating to the Tribe. Under 25 USC 450f(a)(2)(d) and [] 25 CFR 900.22(d), however, the BIA is authorized to reject a proposal if the Tribe requests more money than the BIA is currently spending on the program, or if there is no current federal program at all. *Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1035 (9th Cir. 2013). In this instance, the NABC is requesting 100% of the funding to serve only Northern Arapaho members. The BIA is not required to reduce funding for programs serving a tribe to make funds available to another tribe. 25 USC 450j-l(b).

Doc. 110-1.

The first basis for declination is that the program will not be satisfactory, citing 25 CFR §900.22(a), 25 U.S.C. §450f(a)(2)(A) [25 U.S.C. §5321]. A short sentence follows, stating that the proposal will only serve members of the NAT. Nothing in ISDEAA requires that a proposal serve more than one Tribe. ISDEAA seeks to empower individual tribes. 25 U.S.C. §5302(b). Defendants cite no legal authority supporting their bare statement of fact or explaining how that fact justifies declination. That a program only serves the members of one Tribe is not one of the statutory reasons for declination. *See* 25 U.S.C. §5321(a)(2). In fact,

NAT manages numerous federally or state funded programs solely for its members including Community Service Block Grant, Indian Child Welfare Act, Temporary Assistance to Needy Families and others. *See infra* pp. 20-23. Defendants even admit federal agencies have entered into 638 contracts with the NAT individually. Doc. 120 at 6, ¶33 (Answer 1:16-cv-11-BMM).

Defendants fail to carry their burden of proof of demonstrating with clear and convincing evidence the validity of this basis for declination.

The second basis for declination is the "shared program" pretense. Defendants torture this Court's Preliminary Injunction of October 17, 2016, contending that any services that had previously been provided in a joint, multi-tribal fashion were now required by the Court's Order to continue to be considered joint, shared programs. As the Court well knows, its Order did no such thing. This Court's Preliminary Injunction merely required that *if* the programs were going to be administered jointly, *then* approval from both Tribes was required. Doc. 113 at 24. It did not state that all previously shared programs must continue to be shared. Such an order would be overbroad and in conflict with inherent tribal sovereignty and with the numerous ISDEAA provisions or regulations that focus on the importance of tribal self-determination, autonomy and flexibility in designing programs. *See, e.g.*, 25 U.S.C. §5321(a)(1), 25 U.S.C.

§5302(b), 25 CFR §900.3(b). Defendants fail to carry their burden of proof of demonstrating with clear and convincing evidence the validity of this basis for declination.

The third basis for declination is that the budget proposed in NAT's youth and drug services contract equaled the amount granted in the previous year for the youth and drug services program that served both Tribes. NAT clearly stated in its proposal that "[t]he goal is not to short-change funding or services to members of the other Tribe, but to open negotiations about how to expand funding for both Tribes to better meet actual needs." Doc.112-6 at 3.

The declination fails for several reasons. The Secretary must approve any severable portion of a proposal that does not support a declination finding. 25 CFR §900.25. Specifically, a declination based on the level of funding only applies to the level of funding; it does not serve as justification to decline the entire proposal. If the Secretary declines the part of the proposal that seeks funding in excess of the applicable level, then the Secretary is required to approve a level of funding authorized under ISDEAA. 25 CFR §900.26. Further, if the Secretary declines a contract in full, she must provide technical assistance "to overcome the Secretary's stated objections." 25 CFR §900.30. No such offer of assistance was made in the declination letter nor has any such assistance been provided. The Secretary cannot

decline a contract without taking affirmative action to negotiate a contract with the Tribe that is acceptable. *Seneca Nation*, 945 F.Supp.2d at 144, *Navajo Health Foundation-Sage Hosp.*, 100 F.Supp.3d at 1189 (failure to provide technical assistance is violation of ISDEAA, makes success on the merits of the claim likely).

The NAT sought engagement and requested technical assistance to overcome any objections. Doc. 112-6 at 1 (Proposal). None has been offered to date, despite the requirements of 25 CFR §900.30.

Finally, Defendants assert that *Los Coyotes* provides authoritative legal support for the declination. Again, Defendants contort the facts and misconstrue the meaning of "program" in an effort to avoid their responsibilities and mandates under ISDEAA.

Los Coyotes involved a California-based Tribe's efforts to gain 638 funding for law enforcement services. However, California – not the BIA – provided law enforcement services to the Tribe. No BIA law enforcement "program" existed for BIA to transfer to the Tribe. *Los Coyotes,* 729 F.3d at 1035. Consequently, it was lawful to decline the Tribe's application, citing 25 U.S.C. §5321(a)(2)(D).

This is not the case on the Wind River Reservation. BIA has been funding youth and drug counseling services for years. Moreover, contrary to Defendants'

assertion that approving NAT's request would be illegal, 25 U.S.C. §5325 does not prohibit the government from entering into an agreement with the NAT for the requested funding. *Yurok Tribe v. Dep't of the Interior*, 785 F.3d 1405, 1412 (Fed. Cir. 2015) (where the BIA has funded a type of program elsewhere, 25 U.S.C. §5325 does not prohibit the government from entering into an agreement funding such a program with the Tribe).

Dividing a formerly shared contract for services does not create a new "program" as the term is used under *Los Coyotes*. ISDEAA is clear: Tribes may assume "programs or portions thereof." 25 U.S.C. §5321(a)(1) (emphasis added). Tribes may also "redesign a program." 25 CFR §900.14, 25 CFR §900.20.

Los Coyotes might apply if BIA had not previously funded youth/drug services (or judicial services) on the Wind River Reservation. But it has. NAT's proposal to run its own youth/drug services (or judicial services) is a portion of the previous youth/drug services program, slightly re-designed. It is not a new "program" as the term is used in *Los Coyotes*. To contend otherwise ignores Congress' mandate to provide individual Tribes with the resources to run their own programs, to allow Tribes flexibility in administering programs, and to strictly limit the BIA's ability to erect false barriers blocking Tribes from achieving that goal. *Ramah Navajo Sch. Bd.,*, 87 F.3d at 1344 ("Congress … clearly expressed …

its intent to circumscribe as tightly as possible the discretion of the Secretary" to establish any additional requirements).

By useful comparison, the Indian Health Service regulations address situations where a Tribe withdraws from a multi-Tribal ISDEAA contract, much like the situation the NAT faces. The regulations provide that the "withdrawing Indian Tribe is entitled to its Tribal share of funds supporting those PSFAs [Programs, Services, Functions and Activities] that the Indian Tribe will be carrying out under its own contract. …" 42 CFR §137.237. The same principle applies here: NAT is entitled to its tribal share of funds supporting the PSFAs that it will carry out under its own contract.

Defendants also assert that they are "not required to reduce funding" for programs serving a Tribe to make funds available to another tribe, citing 25 U.S.C. §450j-1(b) [25 U.S.C. §5325(b)]. This is a red herring. While the Secretary may not be required to reduce funding to another Tribe or tribal organization, 25 U.S.C. §5325(b), the Secretary is required to approve a contract proposal by an individual Tribe to serve its members for any programs unless one of the five statutory declination factors apply. 25 U.S.C. §5321(a)(2). NAT is not asking BIA to reduce funding for another Tribe; NAT simply asks to be properly funded for services for its members (and that EST be properly funded for its members).

Doc.112-6 at 3 (Proposal).

Defendants' installation of a CFR Court, at SBC's request, also reveals their argument about inadequate funding to be specious. Defendants accept unquestioningly that they must provide EST with a CFR Court, even though a CFR Court has not existed for decades on the Reservation. Yet, Defendants sweepingly decline NAT's need to fund its own court, even though Defendants are required to approve a level of funding that is authorized under ISDEAA. 25 CFR §900.26. Defendants effectively assert that the CFR Court the SBC requested takes priority over and displaces NAT's needs for a tribal court.

Defendants fail to acknowledge that the EST's share of the judicial or youth/drug services funding was not 100% of the total amount previously spent on the program.[3] Defendants ignore the fact that they are reducing or excluding NAT's funding in order to satisfy EST's request for the CFR Court. The Secretary is required under ISDEAA to approve Secretarial-level funding and to work with NAT to overcome obstacles, not flatly decline proposals.

The BIA's own funding report verifies that it has divided social service and

[3] More realistically, it was about 30%, based on respective populations of the Tribes. NAT has approximately 10,182 members (about 70%) of the Reservation's population. EST has approximately 4,336 members (about 30%) of the Reservation's population. Doc. 120 at 4, ¶13 (Answer 1:16-cv-11-BMM).

educational funding to assist individual tribal members into separate programs for each Tribe, and has done so on a per-population basis overall. Attached are the BIA "Tribal Priority Allocation" (TPA) reports of base funding provided to Tribes in the Rocky Mountain Region for fiscal years 2015, 2016 and 2017. Exhibit 111. The reports show funding for social services, Indian Child Welfare Act programs, "other" social services, student scholarships, Johnson O'Malley (JOM) (student services)[4] and job placement programs. Seventy percent of the total funding from the BIA for these services in each of these three years was provided to the NAT.[5] Thirty percent was provided to the EST. Seventy percent of all tribal members on the Reservation are enrolled in the NAT. Doc. 17-3 at 2 (Goggles Declaration); Doc. 120 at 4, ¶13 (Answer 1:16-cv-11-BMM).

Defendants ignore a long history in which each Tribe, with federal, state or tribal funds, provides services to its own members separately from the other Tribe. This history clearly demonstrates the feasibility of providing separate services through separate programs, and includes, without limitation, the following

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[4] JOM funding was provided to each Tribe on a 50-50 basis; other programs providing services were divided at various other percentage rates.

[5] Total TPA budget for social, education and job programs was $917,348 in 2015. Seventy percent ($647,396) of that was earmarked for NAT. The total TPA budget for these items in 2016 and 2017 was $923,833 each year. Seventy percent ($651,885) of those totals was earmarked for NAT in each of those years.

examples:

1. In 1989, both Tribes entered into a single agreement with the State of Wyoming to provide funding for social services to members of both Tribes. In 1999, the shared program split into two separate programs, each Tribe funded separately to provide services to its own members.[6] *See* 1999 letter from Wyoming Department of Family Services regarding the program split, Exhibit 112. Since then, each Tribe has provided social services to its own members under separate programs.

2. The BIA funds Indian Child Welfare Act ("ICWA") services through separate "638" contracts with each Tribe providing services to its own members. Doc. 129 at ¶14 (Thomas Declaration).

3. The U.S. Department of Health and Human Services ("HHS") (Administration for Children and Families) funds the NAT directly to provide services to members of the NAT through the Community Services Block Grant (CSBG) program. *See* agreements attached as Exhibit 113.

4. Each Tribe has separate agreements with HHS to provide welfare

[6] Occasionally, a child may not be enrolled in either Tribe; in those instances, the EST and NAT programs work cooperatively to decide which program will provide services to that child. The child's family connections with members of either Tribe are an important factor in the decision.

services to its own members under the federal program called Temporary Assistance to Needy Families (TANF) (CFDA #93.558 and 93.714).[7] *See* Exhibit 114 (letter to LaCounte and resolution for TANF funds) and Exhibit 115 at 8 (NAT's 2016-2019 TANF plan, showing delivery of services to members of the NAT).

5. The NAT and BIA have entered into "638" contracts to provide General Assistance to members of the NAT, separate and apart from services provided to members of the EST.

6. NAT and BIA have entered into "638" contracts to provide child care development services to members of the NAT, separate and apart from services provided to members of the EST (CFDA #93.596).

7. The NAT and EST each operate its own, separate child support enforcement agencies with funding from HHS (CFDA #93.563). Each program administers family support according to separate laws of each Tribe and presents matters to the Tribal Court for adjudication or enforcement. *See* Dec. of McKay, Doc. 115-13 at ¶¶2-6 and Exhibit 116 at ¶¶2-3 (second dec. of McKay). Generally, the NAT program serves children enrolled in the NAT and the EST program serves

[7] "CFDA" means "Catalog of Federal Domestic Assistance."

children enrolled in the EST. Exhibit 116 at ¶3 (second dec. of McKay).[8]

8. The BIA provides funding to the NAT for scholarship and educational services to members of the NAT through a "638" contract with Sky People Higher Education, the NAT's higher education program for its members. *See* Exhibit 111 (TPA charts showing separate scholarship funding for NAT).

Defendants' claim that they cannot divide self-determination programs based on the tribal membership served is specious.

Although 25 U.S.C. §5321(a)(2)(d) allows the Secretary to decline a proposal because the amount of funding is in excess of the Secretarial amount, courts have also recognized that the Secretarial amount is a floor, not a ceiling, for funding. *Yurok,* 785 F.3d at 1412. Tribes may negotiate for higher funding as needed. *Seneca Nation*, 945 F.Supp.2d at 143. NAT sought to negotiate and Defendants were required to engage with NAT to negotiate, overcome obstacles, and approve the contract at an acceptable funding level. 25 CFR §900.3(b)(1), 25 CFR §900.26. Defendants refused.

Finally, stating that a contract is declined because it will affect another Tribe's funding does not constitute an allowed reason for declination. 25 U.S.C.

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[8] As it is with child protective services, if a child is not enrolled in either tribe, the EST and NAT programs work cooperatively to decide which program will provide services to that child. *Id.*

§5321(a)(2). Rather, "[i]f a contract affects the preexisting level of services to any other tribe, the Secretary shall address that effect in the Secretary's annual report to Congress under section 106(c)(6) of the Act." 25 CFR §900.24.

In sum, none of the reasons provided in the declination letter clearly demonstrates or provides adequate supporting legal authority showing the Defendants properly denied the application. Defendants have failed to meet their burden of proof of showing the validity of the declination by clear and convincing evidence.

D. Improper Declination Results in Contract Deemed Approved Based on Terms of Proposal

The Secretary has only 90 days after receipt of a proposal to decline it in accordance with ISDEAA and the regulations. 25 U.S.C. §5321(a)(2), 25 CFR §900.16, 25 CFR §900.21. When the Secretary fails to follow the required declination procedures, the contract proposal is deemed approved by operation of law. *Cheyenne River Sioux Tribe*, 496 F.Supp.2d at 1068, *accord Seneca Nation*, 945 F.Supp.2d at 152. The "Secretary shall award the contract ....and add to the contract the full amount of funds pursuant to section 106(a) of the Act." 25 CFR §900.18.

Numerous courts have concluded that Congress intentionally provided strong remedies, including the deemed approval of contracts on the terms of the

proposal, because of "*those agencies' consistent failures over the past decade* to administer self-determination contracts in conformity with the law." *Ramah Navajo Sch. Bd.*, 87 F.3d at 1344 (emphasis in original). "In effect, if the Secretary does not timely respond to a[n ISDEA] proposal, the proposal is deemed approved and the Secretary is directed to award a contract *based on the terms of the proposal*." *Yurok Tribe*, 785 F.3d at 1408 (emphasis added); *accord*, *Navajo Health Found.-Sage Mem'l Hosp., Inc. v. Burwell*, No. CIV 14-0958 JB/GBW, 2015 WL 9777785, at *33 (D.N.M. Oct. 26, 2015). In fact, "[t]he ISDEA's text and its legislative history demonstrate that the Court's sole remedy when a federal agency unlawfully declines [a] contract proposal is to order the agency to fully fund the proposal." *Id*.

Defendants received NAT's judicial services proposal on January 20, 2016. They had until April 19, 2016, to properly decline it. 25 CFR §900.21. Defendants failed to lawfully decline NAT's judicial services contract proposal and associated pre-contract support cost proposal within the 90-day time period. Therefore, both were approved based on the terms of the proposal after the statutory 90-day period had run.

Defendants received the youth/drug services contract proposal on June 28, 2016. Doc. 110-1 at 1. Defendants had until September 26, 2016, to properly

decline that proposal. 25 CFR §900.21. Defendants failed to lawfully decline NAT's youth/drug services contract proposal and associated pre-contract support cost proposal within the 90-day time period. Therefore, both were approved based on the terms of the proposal after the statutory 90-day period had run.

E. Defendants' Affirmative Defenses Fail

NAT's claims are ripe.

NAT submitted its judicial services proposal on January 20, 2016, and its youth/drug court services proposal on June 24, 2016. Both proposals were declined. ISDEAA provides that a Tribe may immediately file an action in District Court upon the declination of an ISDEAA contract proposal. 25 U.S.C. §5321, *Shoshone-Bannock Tribes*, 988 F.Supp. at 1316 (Congress intended to allow Tribes to save time by shortcutting appeal process). NAT's claims are ripe.

NAT's claims are not moot.

Defendants' allegation that this case is moot is untethered from the facts and the legal standards for mootness. "[A] case is not moot if any effective relief may be granted." *Karuk Tribe of California v. U.S. Forest Serv*., 681 F.3d 1006, 1017 (9th Cir. 2012), *citing Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006). "The party asserting mootness has the heavy burden of establishing that there is no effective relief remaining for a court to provide." *Tinoqui-Chalola*

Council of Kitanemuk & Yowlumne Tejon Indians v. U.S. Dep't of Energy, 232 F.3d 1300, 1303 (9th Cir. 2000).

The Court clearly has effective remedies at its disposal. This case concerns the declination of contract proposals for Fiscal Year 2017, which began October 1, 2016, and runs through September 30, 2017, and beyond.[9] The funding of contracts performed during that period is the central issue. The proposed periods of funding have not yet ended and the Court can find the contracts deemed approved by operation of law, making them effective during the proposed funding period. Additionally, if the appropriation has lapsed or is insufficient, the Court can provide money damages. 25 U.S.C. §5321, *Shoshone-Bannock Tribes*, 988 F.Supp. at 1315. These damages, including the contract support funding being withheld as a result of the unlawful declinations, are essential relief that the Court is empowered to provide. 25 U.S.C. §5331(a).

Defendants continue to withhold self-determination rights and funding under ISDEAA, forcing NAT to incur significant expenses in its efforts to provide meaningful services to its members. The injury is ongoing and increasing each day. Mootness claims are spurious.

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[9] The judicial services contract proposal is for October 1, 2016, through October 1, 2019, Doc. 112-1 at 8; the youth/drug services proposal is for FY 2017, Doc. 112-6 at 3.

This Court's October 17, 2016, Preliminary Injunction does not apply to these applications.

As addressed above, Defendants have adopted a tortured reading of the Court's Preliminary Injunction in order to block NAT's exercise of its inherent sovereignty. The Court ordered Defendants to refrain from approving "638" contracts for "multi-tribal, shared services" without the approval from both Tribes. Doc. 113 at 24. Now, Defendants refuse to approve NAT's proposals to provide solely NAT-focused services if that type of service (e.g., judicial) was formerly provided via a joint contract serving both Tribes, alleging that the proposals are for "multi-tribal, shared services." Defendants imply the term "multi-tribal, shared services" permanently defines judicial and youth/drug counseling services, regardless of whether the services proposed are actually for more than one Tribe or used jointly. This makes no sense. The ISDEAA provision the Court specifically relied on in issuing its Order applies where services are to benefit "more than one Indian tribe." 25 U.S.C. §5304(l). NAT's contract applications are for services to benefit only the NAT. By its own terms, the Preliminary Injunction does not apply to contract proposals serving only one Tribe.

F. Post Hoc Justification for Judicial Services Declination is Ineffective.

Apparently recognizing their declination of the judicial services proposal

was ineffective under 25 U.S.C. §5321 and 25 CFR §900 *et seq*., Defendants attempted to cure it through their May 5, 2016, letter. Doc. 112-5. However, time had already run; the contract proposal had been deemed approved by operation of law.

The judicial services contract proposal was received by Defendants on January 20, 2016. Doc. 117 at 4. If Defendants wanted to properly decline the proposal, they "should have done so within the statutorily provided 90 days." *Maniilaq Ass'n v. Burwell*, 72 F.Supp.3d 227, 240 (D.D.C. 2014), *citing Seneca Nation*, 945 F.Supp.2d at 149. "The Secretary's written notice to the tribe must explain the reasons for a declination; she may not rely on post-hoc justifications." *Pyramid Lake Paiute Tribe*, 70 F.Supp.3d at 542.

The May 5, 2016, letter was generated after the 90-day period that ended April 19, 2016, in which the Secretary could have properly explained the reasons for the declination. Consequently, the May 5, 2016, letter does not legally supplement the reasons stated in the April 19, 2016, letter. It was too late. It has no effect. The contract proposal was already deemed approved by operation of law.

V. CONCLUSION

NAT's contract proposals for judicial services and youth/drug counseling

services, and associated pre-contract support costs proposals, were declined by Defendants in violation of ISDEAA. Consequently, the contracts are deemed approved by operation of law under the terms as proposed in the applications.

DATED December 13, 2016.

/s/ Andrew W. Baldwin
Andrew W. Baldwin
Berthenia S. Crocker
Kelly A. Rudd
Mandi A. Vuinovich
Attorneys for Plaintiff
Northern Arapaho Tribe

/s/ Mandi A. Vuinovich
Andrew W. Baldwin
Berthenia S. Crocker
Kelly A. Rudd
Mandi A. Vuinovich
Attorneys for Plaintiff
Northern Arapaho Tribe

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2016, I electronically filed the foregoing filing. Notice of this filing will be sent by email to all parties of record by operation of the Court's electronic filing system. Parties may access this filing

through the Court's CM/ECF System.

/s/ Andrew W. Baldwin
Andrew W. Baldwin

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 6,238 words, excluding the caption and certificates of service and compliance.

DATED this 13th day of December, 2016.

/s/ Andrew W. Baldwin
Andrew W. Baldwin