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. U.S. DEPARTMENT OF THE INTERIOR; KEVIN HAUGRUD, in his official capacity as Acting Secretary, United States Department of the Interior; and DARRYL LaCOUNTE, in his official capacity as Director, Rocky Mountain Regional Office, BIA, *et al.* Defendants.	Civil Action No. CV-16-11 and No. CV-16-60 GF-BMM (consolidated) NORTHERN ARAPAHO TRIBE'S COMBINED BRIEF IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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Pursuant to leave of Court (Doc. 145), the Northern Arapaho Tribe (NAT) submits the following combined brief in response to Defendants' Motion for Summary Judgment (Doc. 139) and in reply to Defendants' Response to NAT's Motion for Partial Summary Judgment (Doc. 140).[1]

I. INTRODUCTION

This Court issued a preliminary injunction against the Defendants ("BIA") to guard against further violations of the rights of the Northern Arapaho Tribe ("NAT") under the Indian Self-Determination and Education Assistance Act ("ISDEAA"). Specifically, the Court ruled that ISDEAA prevents the BIA from giving ISDEAA contracts to the Eastern Shoshone Tribe ("EST"), where EST purports to act on behalf of NAT and commandeers funding intended to serve NAT. Doc. 113 at 20, citing 25 U.S.C. §5304(l) ("where a contract is let or a grant made to an organization to perform services benefitting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant"). In response to the Court's injunction, the BIA adopts an equally unlawful position: that no formerly shared ISDEAA contracts

[1] Defendants' Motion for Summary Judgment addresses contract declination challenges by the NAT in *Northern Arapaho Tribe v. Haugrud [originally Jewell], et al.*, CV-16-60. Neither party has submitted summary judgment motions with regard to NAT's claims in *Northern Arapaho Tribe v. LaCounte, et al.*, CV-16-11.

may be made with either Tribe because of a BIA requirement that those contracts remain "shared."

This gambit from the BIA is nothing new. The BIA has fallen back on a classic tactic from the pre-ISDEAA era, disregarding what Congress intended. The legislative history of 25 U.S.C. §5304(l) squarely addresses what the BIA is now doing. A Tribe or tribal organization "needs to obtain tribal resolutions *only from the tribes it proposes to serve*... [t]o require tribal organizations to obtain resolutions from all tribes in a 'service area' is not consistent with the intent and the letter of the law." S.Rep. 100-274 (1988) at 20 (emphasis added).[2] BIA's notion that it may deem certain services to be "shared" (and thereby prevent an individual Tribe from contracting for its portion of those services) creates a "threshold criterion" for NAT, a practice "clearly inconsistent with the intent of the [ISDEAA]." *Id.* at 19.

BIA's notion also clashes violently with several additional provisions of the ISDEAA. Congress has declared "its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, ***individual*** Indian tribes and to the Indian people as a whole through the establishment of a ***meaningful*** Indian self-determination policy which will permit

[2] Copy attached hereto for the Court's convenience as Exhibit 120.

an orderly transition from the federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct and administration of those programs and services."
25 U.S.C.A. §5302(b) (emphasis added).

The government's duty is to "take a flexible approach which recognizes the diversity among tribes and the ***right of each tribe to set its own priorities and goals***." Reagan Statement on Indian Policy at 796-97 *cited in Navajo Health Foundation-Sage Mem'l Hosp., Inc v. Burwell*, No. CV 14-0958 JB/GBW, 2016 WL 7257245, at *43 (D.N.M. Nov. 23, 2016).

Ignoring these fundamental principles and the numerous statutory mandates narrowly circumscribing Defendants' discretion, Defendants persist in their claim that treating NAT as an individual Tribe is impossible; invent unauthorized "threshold criteria;" promote a baseless and oppressive interpretation of *Los Coyotes*; obfuscate their burdens under ISDEAA; and improperly rely on conclusory post-hoc justifications. Congress itself has been frustrated by the BIA's " bureaucratic recalcitrance" in implementing the ISDEAA. *Shoshone-Bannock Tribes of Fort Hall Reservation v. Shalala*, 988 F.Supp. 1306, 1315 (D.Or. 1997), on reconsideration, 999 F.Supp. 1395 (D.Or. 1998). To address BIA recalcitrance, Congress "circumscribe[d] as tightly as possible the

discretion of the Secretary." *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996) *amended* (Aug. 6, 1996).

The Secretary must provide detailed explanations for a declination at the time of declination; approve any portion of a proposal that it can; approve a proposal if a concern can be overcome through contract; show flexibility; and support an individual Tribe's approach as much as possible. Defendants have refused.

II. BIA BEARS THE BURDEN OF PROOF AND THE STANDARD OF REVIEW IS *DE NOVO*

The burden of proof under ISDEAA is clear: "[T]he Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof)." 25 U.S.C. §5321(e), *Pyramid Lake Paiute Tribe v. Burwell*, 70 F.Supp.3d 534, 541 (D.D.C. 2014).

Defendants contend, nonetheless, that the Court must apply the "arbitrary and capricious" standard of review set out in the Administrative Procedure Act ("APA"). Courts have found otherwise. A recent case provides an extensive review of the case law and concludes that "ISDEAA's text, its legislative history, and the general presumption favoring Indian tribes *dictates* a de novo review of ISDEA claims." *Navajo Health Foundation-Sage Mem'l Hosp.*, 2016 WL 7257245, at *25 (emphasis added). For the Court's convenience, the full analysis

follows:

> Only a few federal district courts have addressed whether the "arbitrary and capricious standard" of the Administrative Procedure Act, 5 U.S.C. §§ 701-06 ("APA"), applies to ISDEAA claims. ***The majority of district courts have concluded that ISDEAA's text, its legislative history, and the general presumption favoring Indian tribes dictates a de novo review of ISDEA claims***. See, e.g., *Pyramid Lake Paiute Tribe v. Burwell*, 70 F.Supp.3d at 542; *Seneca Nation of Indians v. Dep't of Health and Human Servs*., 945 F.Supp.2d at 141-42 & n.5; *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F.Supp.2d at 1066-67; *Cherokee Nation of Okla. v. United States*, 190 F.Supp.2d 1248, 1258 (E.D. Okla. 2001) (Seay, J.), rev'd on other grounds by, 543 U.S. 631, 125 S.Ct. 1172, 161 L.Ed.2d 66 (2005); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F.Supp. 1306, 1318 (D. Or. 1997). A minority of district court cases – three of which are unpublished – used the APA's arbitrary-and-capricious standard to review ISDEAA claims. See, *e.g., Citizen Potawatomi Nation v. Salazar*, 624 F.Supp.2d 103, 108 (D.D.C. 2009) (Kessler, J.); *Suquamish Tribe v. Deer*, No. CIV 96-5468 (W.D. Wash. Sept. 2, 1997) (Bryan, J.); *Cal. Rural Indian Health Bd., Inc. v. Shalala*, No. CIV 96-3526 (N.D. Cal. Apr. 24, 1997) (Jensen, J.); *Yukon-Kuskokwim Health Corp. v. Shalala*, No. CIV 96-155 (D.Alaska April 15, 1997) (emphasis added).

Navajo Health Foundation-Sage Mem'l Hosp., 2016 WL 7257245, at *25.

Notably, in *Citizen Potawatomi Nation*, the one reported case that applied the APA standard, the plaintiff had stated claims for relief under both ISDEAA and the APA, a circumstance the court concluded "buttress[ed]" applying the APA standard, "since Plaintiff itself has chosen to bring a portion of its case under the APA." *Citizen Potawatomi Nation v. Salazar*, 624 F.Supp.2d 103, 109 (D.D.C. 2009). NAT has made no APA claims in this case. Further, the canon requiring

that laws affecting Indians be construed liberally in favor of Indians was apparently not raised in *Citizen Potawatomi. Pyramid Lake,* 70 F.Supp.3d at 542.

In short, reported cases involving only ISDEAA claims, as in this case, agree that the applicable standard of review is *de novo,* and the burden of proof is on the Secretary to clearly demonstrate that his grounds for rejecting a contract proposal were valid.

III. DEFENDANTS' OBLIGATIONS TO NAT UNDER ISDEAA

The BIA "is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract..." 25 U.S.C. §5321(a)(1). The BIA may decline ISDEAA contracts only on one or more of the five specific grounds set out in the statute. 25 U.S.C. §5321(a)(2). When it does decline a proposal, BIA must "clearly demonstrat[e] the validity of the grounds for declining the contract proposal (or portion thereof)." 25 U.S.C. §5321(e). If a proposal is declined, the Secretary is required:

> To advise the Indian tribe or tribal organization in writing of the Secretary's objections, including a specific finding that clearly demonstrates that (or that is supported by a controlling legal authority that) one of the conditions set forth in §900.22 exists, **together with a detailed explanation of the reason** for the decision to decline the proposal and, within 20 days, any documents relied on in making the decision.

25 CFR §900.29(a) (emphasis added.) *See also* 25 U.S.C. §5321(a)(2).

The ISDEAA puts the burden of proof on the Secretary to clearly demonstrate the validity of his declination. *"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) (emphasis added). When these requirements are not met, the Secretary has failed to satisfy his burden of proof for declining the contract proposal. *Id*.

Furthermore, the BIA "shall provide any necessary requested technical assistance" to Tribes seeking to contract. 25 CFR §900.28; 25 U.S.C.§5321(b)(2). BIA must "afford Indian tribes... the flexibility, information, and discretion necessary to design contractible programs to meet the needs of their communities..." 25 CFR §900.3(b)(3). BIA must approve any portion of a proposal that it can (it must approve severable portions). 25 U.S.C. §5321(a)(4); 25 CFR §900.25. BIA cannot decline a proposal if a perceived obstacle to approval can be overcome through the contract. 25 U.S.C. §5321(b); 25 CFR §900.23. Failure to comply with the declination statutes renders contract proposals approved as a matter of law. *Cheyenne River*, 496 F.Supp.2d at 1068.

Post-hoc justification cannot cure an agency's declinations. If an agency

wants to properly decline the proposal, it must do 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 of Indians v. HHS*, 945 F.Supp.2d 135, 149 (D.D.C. 2013).

IV. THE BIA HAS PROVIDED NO GOOD REASON FOR DECLINING NAT'S CONTRACT PROPOSALS

BIA made no efforts to negotiate or to overcome perceived obstacles to contracting, provided no technical assistance,[3] and made no effort to contract for severable portions of programs. BIA declined NAT's funding proposals without

[3] BIA offered *pro forma* assistance in its letters acknowledging receipt of the judicial services (Doc. 138 at 20) and Meadowlark (Doc. 138 at 196) proposals, but not in its declination letters (Docs. 112-3 and 112-8) and did not respond to NAT's requests for meaningful assistance from qualified persons. *See* Doc. 98-3 (NAT's August 10, 2016, supplement: "...[t]o date, the Tribe has received no information, no assistance, and no communication from the BIA other than its denial of the proposal. The Tribe renews its request for technical assistance to avoid declination of the proposal...") and Doc. 127-3 (NAT's November 4, 2016, letter to BIA: "We ask again whether there is anyone with authority to work with us on behalf of the BIA who is qualified to discuss these jurisdictional matters. If so, please identify that person by name and his or her qualifications and legal experience."). In similar fashion, BIA offered only *pro forma* assistance regarding the Tribal Water Engineer and Fish and Game proposals and refused to identify anyone who might actually assist the Tribe or what his or her qualifications might be. NAT explained to the BIA that the agency "does not identify anyone with the skill or technical expertise to [provide technical assistance]," and asked BIA to identify someone with wildlife biology or water management expertise, AR 143-44. BIA failed to do so, failed to otherwise respond to NAT's request, and failed to actually provide any technical assistance.

explanation, evidence, or documents. Post-hoc justifications came for the first time in Defendants' court filings. Even if these justifications had been in BIA's declination letters, they provide no good reason for declining NAT's contract proposals.

A. Defendants' "New Program" Argument is Demonstrably False

NAT's improperly declined proposals were for existing, not new, programs.[4] Defendants' attempt to spin the NAT contract proposals as being for "new programs" and torture the holding in *Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025 (9th Cir. 2013).

Los Coyotes held that because BIA had no existing budget for law enforcement programs for the Los Coyotes Band of California,[5] the BIA could legally decline a Los Coyotes Band contract proposal to provide law enforcement services. There was no existing level of funding or service for the Tribe to assume.

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[4] NAT refers to its *proposals* as "new" in the general sense that they had not been submitted earlier *by NAT alone*. But the proposals clearly would allow NAT to continue to provide those services for its own members, formerly provided by shared programs through the defunct "tribal organization" known as the Joint Business Council (JBC).

[5] California is a P.L. 280 state and BIA therefore provided no law enforcement services to the Tribe. P.L. 83-280, 67 Stat. 588 (1953); P.L. 85-615, §1, 72 Stat. 545 (1958), delegates criminal jurisdiction to the following states over most Indian country crimes within those states: California, Minnesota, Nebraska, Oregon, Wisconsin and Alaska.

In short, under *Los Coyotes*, a "new program" is one for a type of service that BIA has not previously been providing and had no appropriation to support. "The Secretary is only required to fund the contract with the amount that the BIA would have otherwise spent on the program. In this case [*Los Coyotes*], the BIA would have provided no money for law enforcement on the reservation and the applicable funding level is therefore zero." *Los Coyotes*, 729 F.3d at 1036. NAT's proposals are different. They propose to assume portions of existing programs that have established levels of funding. Doc. 130-2 (TPA base funding).[6] The proposals are for a redesign, which ISDEAA envisions and encourages. 25 U.S.C. §5324(j); 25 CFR §900.3(b)(3). *Los Coyotes* does not apply.

B. BIA's Actions Belie Its Claim that Judicial Services Are Inseparable

The BIA denies judicial services funding on the ground that a separation of judicial services between the two Tribes is "infeasible." Doc. 140 at 12; Doc. 140-1 at ¶6. But the BIA itself has shown how feasible a separation is by installing a separate BIA-operated court ("SBC/CFR Court") to operate alongside the

[6] ISDEAA contract funds "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof..." 25 U.S.C. §5325(a)(1).

on-going Tribal Court system.[7] The BIA acknowledges, as it must, that NAT has the lawful right to operate a tribal court to provide services to its own members and that cases may be "transferred" to it by the SBC/CFR Court. Doc. 123 at 11, ¶7, Doc. 123-9 at 2 (Gourneau letter). The BIA has itself separated judicial services at Wind River, which underscores the absurdity of BIA's claim that doing so is "infeasible."

The BIA has created barriers and disincentives for the transfer of NAT cases to the Tribal Court. *See* Doc. 115 (BIA refuses to timely share police records with the NAT prosecutor or deliver inmates for arraignment, for example). Nevertheless, the two Courts coexist.[8] The BIA does not contest the fact that the Tribal Court continues to provide judicial services on the Wind River Reservation alongside the SBC/CFR Court. *See* Doc. 140 at 16, fn 8 ("the agency [has]

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[7] There is no dispute that the Tribal Court is imbued with the authority of the NAT as the judicial branch of the NAT. *See* Doc. 143 at ¶22 (Answer admits NAT may operate its own tribal court). BIA imposed the SBC/CFR Court system at the request of the SBC. *See* Doc. 140-1 at ¶16. Despite a Tribal Court ruling otherwise, Doc. 127-11 at 2-3, ¶¶4-7, the BIA believes that the SBC may legislate on behalf of the Eastern Shoshone Tribe (EST) and may invite a CFR Court to provide services for the EST.

[8] The cooperation between the two courts would be better if the Defendants had not ignored the cooperative agreement developed by the Chief Magistrate of the SBC/CFR Court and the Chief Judge of the Tribal Court. Exhibit 117 at ¶3. To date, three of four Magistrates appointed by the BIA have resigned from the job.

committed to recognizing the right of the NAT to operate its own tribal court...") and Exhibit 117 (second Declaration of the Hon. John St. Clair), attached hereto.

The BIA asserts elsewhere in its brief, without citation to authority, that there must be only one judicial system to adjudicate disputes "concerning members of the two Tribes." (Doc. 140 at 12; Doc. 140-1 at ¶6). This is an unlawful "threshold criterion" prohibited by Congress. *See* S.Rep. 100-274 (1988) at 24, 26. The assertion itself is opaque, at best. The BIA agrees NAT may authorize its own judicial system for its own members (Doc. 115-3 at 2; 140 at 16, fn 8), so Gourneau's statement must be read as an assertion that only a consolidated court system is viable for certain *kinds* of cases – perhaps those involving members of both the NAT and the EST as parties. Defendants do not explain their rationale. Nor do they present clear and convincing proof in support of any explanation. Even if this were a lawful criterion (which NAT does not concede), the assertion does not support BIA's declination of a contract to provide services for members of the NAT (and not to members of the EST). BIA recognizes that there will be "cases involving the Arapaho Tribe or Arapaho tribal members [that should transfer] to your court." Doc. 115-3 at 2. Whatever may be the percentage of cases in which parties are members of both Tribes, BIA must, even under its own flawed rationale, negotiate a contract for those cases it admits ought to be heard by

the Tribal Court.

C. The Claim that BIA Needs 100% of Funding to Provide Less Than 100% of Judicial Services is Spurious

The BIA asserts that NAT's proposals would, if approved, prevent the provision of services to EST because BIA needs 100% of the judicial services funding available at Wind River. Doc. 140-1 at ¶17; Doc. 140 at 16, fn.8, and 26. BIA presents no supporting explanation or evidence. In fact, cases being handled by the Tribal Court (right now) relieve the CFR Court of the bulk of the judicial services workload. Gourneau's claim that "most" NAT members "continue" to use the CFR Court (Doc. 140-1 at ¶17) is "completely incorrect." Exhibit 117 at ¶4.

The Tribal Court and SBC/CFR Courts have been operating simultaneously since October, 2016. Exhibit 117 at ¶10. During that period, the Tribal Court handled 121% of the average number of Arapaho civil[9] cases that it handled in 2015. Exhibit 117 at ¶6A. The Tribal Court handled 90% of the average number of Arapaho custody[10] cases it handled in 2015. Exhibit 117 at ¶6B. The Tribal Court handled 60% of the average number of Arapaho juvenile cases and 38% of

[9] "Civil" cases include, among other matters, divorces, personal injury and contract claims, adoptions, family violence protection, child support enforcement, guardianship, and probates. Exhibit 117 at ¶6A.

[10] "Custody" cases include private custody disputes, Indian Child Welfare Act transfers from State courts, and petitions for child protection. Exhibit 117 at ¶6B.

the average number of Arapaho criminal cases it handled in 2015. Exhibit 117 at ¶¶6(C) and (D). Only with respect to juvenile and criminal caseloads has the Tribal Court's caseload shown a noticeable decline since operation of the SBC/CFR Court. The decline is a result of BIA efforts to channel those cases away from the Tribal Court and into the SBC/CFR system. Exhibit 117 at ¶¶6C and D and Doc. 115-8. The Tribal Court continues to handle its usual civil and custody caseload for NAT members and significant juvenile and criminal caseloads despite BIA's best efforts to channel them elsewhere.[11] "It is very clear that the CFR court is not, in fact, handling 100% of the cases at Wind River." Exhibit 117 at ¶9.

Furthermore, the BIA's efforts seem to be less and less effective. "[T]ribal member criminal defendants are transferring to the Tribal Court in increasing numbers." Exhibit 117 at ¶6E.

In a troubling move, SBC/CFR Court files are being kept secret absent a Freedom of Information Act request or formal discovery ("you don't have a right to see those records"). Doc. 127-7 at 11, ¶28. Nevertheless, the approximate

[11] Because the civil cases do not require the BIA police to present parties for arraignment or provide police reports needed for criminal prosecutions, the BIA is less effective in obstructing the filing and handling of civil and custody cases in the Tribal Court.

relative workload of the SBC/CFR Court is evident. Based on observations by Tribal Court officials who share the courtroom and other facilities with the SBC/CFR Court staff, the SBC/CFR Court employs four (4) full time individuals: two judges, one prosecutor, and one court clerk. Exhibit 117 at ¶7. One judge (who is soon to be the only judge, Exhibit 117 at ¶3) and the prosecutor are husband and wife.[12] They, and at least one other judge, have served as legal counsel to the EST.[13] There appear to be funds to contract with private attorneys for public defender work, but none appears to have been appointed to date. *Id*.

By contrast, the Tribal Court employs fifteen (15) full time individuals: two judges, one on-call judge, five clerks, five people in the prosecutor's office, two in the public defender's office, and one probation officer. Exhibit 117 at ¶8.

If one assumes that each of the four SBC/CFR Court employees cost $100,000 per year,[14] and another $100,000 is earmarked for sporadic public

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[12] *See* https://www.amazon.com/wedding/jeremy-brave-heart-stephanie-whisnant-lander-july-2015/registry/K1SLCCLXHQFB, and https://fremontwy-recorder.tylertech.com/fremontwy-recorder/eagleweb/viewDoc.jsp?node=DOC270S97.

[13] SBC/CFR Judge Monteau (now resigned) is also a former attorney for the EST. Judges Stiffarm and Craven have also resigned, leaving only Judge Braveheart to preside over the SBC/CFR Court.

[14] The highest paying position, that of Magistrate of the SBC/CFR Court, was advertised by BIA to pay $71,012 to $92,316 per year. One deputy clerk

defender contracts, total SBC/CFR Court expenses might be as high as $500-$600,000. This amount is significantly below the annual funding amount of $2,117,434.04.[15] Based on this staffing information and estimated expenses, the BIA is spending about 28% of the total budgeted funds for judicial services at Wind River, leaving about 72% available to fund the NAT proposal.

NAT's proposal explains that it would handle 70% of the judicial services caseload. Doc. 98-3 at 5. Exhibiting classic "recalcitrance," BIA has installed a SBC/CFR Court system in conjunction with the Tribal Court and insists its court should have 100% of the funding to handle 30% of the caseload.

The BIA also says NAT did not demonstrate how the BIA could provide services to the EST with the "remaining funds" (those funds not contracted to NAT). Doc. 140 at 8, 18, 27, 28. The BIA's rationale is wrong-headed. First, it reverses the burden of proof placed squarely on the BIA under the ISDEAA, 25 U.S.C. §5321(e). Second, it ignores BIA's obligation to negotiate in good faith with NAT and to work with NAT to overcome contracting obstacles. 25 U.S.C. §5321(b)(2); 25 CFR §900.23. Third, it fails to address the substance of NAT's

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position was advertised to pay $32,318 to 42,012 per year. *See* Exhibit 118 (BIA job announcements for CFR Court at Fort Washakie, Wyoming), attached hereto.

[15] This is the 2015 budget figure referenced in a BIA-authored report on the court and submitted in NAT's proposal. *See* Doc. 98-3 at 5.

proposal. For example, NAT proposed that the Tribal and SBC/CFR Courts share the same courthouse, equipment and support staff and "cross-authorize judges and other court personnel" (anyone from the Tribal Court may provide services for the SBC/CFR Court, and vice-versa). Doc. 98-3 at 2-3. This approach provides significant cost savings for both Courts. *See* Exhibit 117 at ¶10. BIA's declination letter (and brief) completely ignore NAT's explanation of how the two systems can operate together within the existing funding. BIA exhibits a complete lack of flexibility and interposes obstacles. BIA also ignores actual caseloads and expenses of the Tribal Court and the SBC/CFR Court (discussed above). All of this impedes the flow of judicial services, creating waste and needless expense.

The BIA has failed to present any budget figures, cost estimates, operational assumptions, or other information to support its claim that the SBC/CFR Court cannot operate on a share of funding reasonably proportionate to its share of the caseload, as NAT proposed. Such failure is fatal to BIA's declination of the proposal. *Cheyenne River*, 496 F.Supp.2d at 1068.

Likewise, Defendants have provided no evidence that funding to EST would be reduced if NAT received a proportionate share of the funding for Meadowlark, Tribal Water Engineer (TWE) or Fish & Game. NAT and its members, constituting 70% of the tribal members on the Wind River Reservation, were the

basis for seeking its fair portion of the existing funding (regarding Meadowlark and Fish & Game, NAT sought to negotiate for greater funding for both Tribes without reducing funding for EST).

As shown above, Defendants' assertion that funding NAT's proposed contracts would "require" BIA to reduce funding to the EST is false as a matter of fact. Defendants also err as a matter of law. Defendants rely on 25 U.S.C. §5325(b), which says an agency "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available to another tribe... under this chapter." There are two basic types of funding under the ISDEAA: "direct program" funds (identified with a particular contract objective) and "contract support" funds ("CSF") (which benefit more than one contract objective). The court in *Ramah Navajo Sch. Bd.*, 87 F.3d 1338, ruled that 25 U.S.C. §5325(b) means only that the agency "... need not take money intended to serve non-CSF purposes under the ISDA in order to meet his responsibility to allocate CSF." *Id.* at 1345. Thus, this provision applies to CSF, not to the direct contract funding (non-CSF) portions of NAT contract proposals.

D. The ISDEAA Constrains BIA's Authority to Deem Certain Services as "Shared" and Deny NAT's Proposals on That Basis

Congress has forbidden the criterion that BIA now seeks to impose – that NAT's proposals have supporting resolutions from EST. NAT's proposals would

not serve EST. The legislative history of ISDEAA speaks directly to this point. Congress amended ISDEAA in 1988 because it was frustrated by the BIA's "bureaucratic recalcitrance" in implementing the law. *Shoshone-Bannock*, 988 F.Supp. at 1315. Congress said it is "clear from the definition of 'tribal organization' that a tribal organization **needs to obtain tribal resolutions only from the tribes it proposes to serve**. For example, if a tribal organization proposes to serve five tribes, then the tribal organization needs to obtain tribal resolutions of support from those five tribes only" (emphasis added). S.Rep. 100-274 at 20 (1988). One Tribe need not obtain permission from another to provide services to its own members, and BIA's insistence on this violates the law and policy of the ISDEAA.

At the root of BIA's arguments is the notion that BIA may deem certain services or programs formerly shared by the Tribes to be frozen in time and shared forevermore. Doc. 140-1, ¶7. This ignores ISDEAA's severability requirements. *See e.g.* 25 U.S.C. §5321(a)(4). Defendant Gourneau declares that judicial services, Fish & Game, and TWE contacts are for "shared programs," and therefore, the Tribes must agree to jointly operate them. Doc. 140-1 at ¶15. BIA cites to no authority for this proposition. Instead, BIA creates obstacles, claiming that the NAT proposals are "infeasible," seek more funding than is available,

would provide services or "benefits" to EST, or would "affect" EST such that the programs must be shared. As discussed elsewhere, none of these other arguments is credible.

When BIA is carrying out ISDEAA's requirement that contracts be provided to individual Tribes, BIA has certain corollary responsibilities:

> If a self-determination contract requires the Secretary to divide the administration of a program that has previously been administered for the benefit of a greater number of tribes than are represented by the tribal organization that is a party to the contract, the Secretary shall take such action as may be necessary to ensure that services are provided to the tribes not served by a self-determination contract, including program redesign in consultation with the tribal organization and all affected tribes.

25 U.S.C. §5324(i)(l).

But BIA goes too far in suggesting that §5324(i)(l) prevents the unbundling of formerly "shared" services. This suggestion misconstrues the section, which begins from the premise that ISDEAA generally "requires the Secretary to divide" such programs. When such division occurs, the BIA must consult with affected Tribes and ensure that services continue to flow to "tribes not served." But 25 U.S.C. §5324(i)(l) clearly does not create an administrative veto that BIA can exercise on behalf of "tribes not served" to defeat the proposal of an individual Tribe like NAT. S.Rep. 100-274 (1988) at 20.

E. The BIA Controls Its Own Requests for Funds

Defendants suggest that because they once lumped funding requests for both Tribes together, they cannot now contract separately with each to provide services to each. Doc. 140 at 12. But Congressional policy requires BIA to contract with "individual Indian tribes." 25 U.S.C. §5302(b). Defendants present no facts, let alone a clear demonstration,[16] and no legal arguments, let alone controlling legal authority,[17] that would allow BIA to depart from Congressional policy. Even if their suggestion were correct, the BIA is in control of how it "requests funds." BIA buttresses this very point in its interlocutory appeal, arguing that the relevant statutes "do not generally earmark funds for specific tribes, let alone grant tribes property interests in government funds." Doc. 11-1 at 37 (*NAT v. Haugrud, et al.*, No. 16-36049 (9th Circuit appeal). Thus, BIA is free to request funds separately for each Tribe.

What the BIA really seeks is a ruling from this Court that it may dictate to the Tribes how they structure their judicial branch, water department, wildlife protection, and counseling services for tribal youth by carefully wording BIA's

[16] 25 U.S.C. §5321(a)(2).

[17] *Id.*

own "requests" for federal funds.[18] This approach would unlawfully permit BIA to avoid the requirements of the ISDEAA.

F. BIA Cannot Tell NAT to "Go Fish"

The ISDEAA does not allow the BIA to engage in a game of "Go Fish," where Tribes must guess the precise funding level at their peril and be denied if their guess is off the mark. Rather, the ISDEAA requires BIA to work toward approval of contract proposals. Doing that requires negotiation, technical assistance, severance of program services wherever possible, negotiated alterations in the scope of proposals, and efforts to overcome perceived obstacles.

25 U.S.C. §5321(a)(4) provides that if a proposal seeks funding in excess of available funds, the proposal shall be approved "subject to any alteration in the scope of the proposal" that the BIA and Tribe "agree to." Defendants reason that because (1) the proposal was in excess of available funds, and (2) BIA did not agree to NAT's proposal, it may be declined. Doc. 140 at 28-29. This new rationalization does not withstand scrutiny.

BIA admits it "has continued to allocate funds" for judicial services, TWE

[18] BIA suggests that it must "consult" with each Tribe about reallocation of these funds. Doc. 140 at 12. This is puzzling, since BIA has not consulted with NAT about why it "requests" or allocates funds for "both" Tribes. NAT does not object to "consultation," as such, but BIA's suggestion is an effort to justify contract declination on grounds that are not permitted.

and Fish & Game. Doc. 140-1 at ¶15. None of NAT's proposals sought funds in excess of what was already allocated by BIA for services – rather, they sought to initiate negotiations about the amount of funds that *could* be made available to NAT. NAT's judicial services[19] and TWE[20] proposals sought only a *proportionate share* (70%) of available funds based on NAT's service population.

The Meadowlark[21] and Fish & Game[22] proposals sought negotiations for additional funding because prior levels of service have been inadequate. Those two proposals sought 100% of the funds allocated in prior years for those services at Wind River. BIA reasons that a request from one Tribe for 100% of the total funds available for both Tribes is a request for more than is available to each. The premise of this argument is that each Tribe is entitled to some share of the total available funds, a proposition with which NAT agrees and which the ISDEAA

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[19] Doc. 98-3 at 5; Doc. 112-1 at 8.

[20] Doc. 112-14 at 4.

[21] The Meadowlark proposal explains that it will serve only members of the NAT and "[b]ecause funding for the 'Meadowlark' program is low, and Northern Arapaho members comprise over 70% of the service population, this proposal is based on 100% of the FY 2016 budget." Doc. 112-6 at 5.

[22] The NAT Fish & Game proposal seeks 100% of prior years' funding because "federal funding... is woefully inadequate. ... Poaching by non-Indians has been a particularly widespread problem which must be reversed," and because in 2016, EST took possession of weapons, ammunition, vehicles and other property (including funds) when BIA contracted with SBC as JBC. Doc. 112-10 at 6.

expressly supports.[23] But tribes are entitled to *begin negotiations* at funding levels higher than BIA might prefer. *Seneca Nation of Indians*, 945 F.Supp.2d at 143. Tribes "shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive. ..." 25 U.S.C. §5325(a)(3)(B).

Unlike the BIA's declination letters, the NAT proposals demonstrate flexibility while protecting funding for EST. The Meadowlark proposal was expressly designed *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 Fish & Game and TWE budget proposals were expressly intended to "be revised pursuant to negotiations with the United States." Doc. 112-10 at 5, ¶2; Doc. 112-14 at 5, ¶2. Likewise, the court proposal was "presented in furtherance of negotiations with the BIA, if the BIA is willing to negotiate a contract for judicial services." Doc. 98-3 at 5.

The BIA engaged in no meaningful negotiations at all, searching instead for excuses on which to decline all of NAT's funding proposals. Under Defendants' approach, the BIA would never have to contract with a Tribe for any *portion* of

[23] BIA "shall approve any severable portion of a contract proposal," 25 U.S.C. §5321(a)(4).

services unless the BIA "agreed" to do so, a scheme directly contrary to that established in the ISDEAA.

Defendants' brief alleges for the first time (post-hoc) that Meadowlark was a "discretionary" grant under 25 U.S.C. §5322. Doc. 140 at 34. But all of the stated bases for declination rely on provisions of the preceding section, 25 U.S.C. §5321.[24] If §5322 were in fact a reason for declination, Defendants were required to say so, provide a detailed explanation, and show evidence supporting the allegation in their declination letter. They did not. Doc. 112-8. The ISDEAA does not require tribes to guess the precise funding source at their peril and be denied, post-hoc, if their guess is off the mark.

Defendants go to some length, in their brief, to justify their declinations of all of NAT's proposals, but the post-hoc rationales are untimely. Defendants failed to provide an explanation in their declination letters, which must be issued within 90 days of a proposal's submission. 25 CFR §900.18.

G. NAT's Contract Proposals Would Not Deprive EST of Services

The BIA argues that services it provides to the EST must continue, Doc. 140

[24] The first basis for declination was that the program would not be satisfactory under 25 U.S.C. §5321(a)(2)(A). Doc. 110-1. The second basis for declination was the "shared program" pretense, and the final basis was that the funding sought exceeded the applicable level under §5321(a)(2)(D).

at 27, as if NAT proposed otherwise. The NAT judicial services proposal expressly outlines how its services would coordinate with those "provided by either the BIA or the Eastern Shoshone Tribe (EST)." Doc. 98-3 at 2 and *passim*.[25] The NAT Court is designed to function independently but cooperatively with any Shoshone-focused judicial services. *Id.* Likewise, NAT's water resources proposal would provide services on behalf of NAT, which "will coordinate these services with either the Bureau of Indian Affairs, the Eastern Shoshone Tribe, or any other entity authorized to provide these services on behalf of members of the EST." Doc. 112-14 at 6. NAT's Fish & Game proposal also "is based on the assumption that either that Tribe [EST] or the BIA" will "take responsibility for the non-Arapaho share of the program." Doc. 112-10 at 7. The goal of NAT's Meadowlark proposal "is not to short-change funding or services to members of the other Tribe [EST]." Doc. 112-6 at 5.

BIA failed to clearly demonstrate with a specific finding its stated reason for declining the proposals. 25 CFR §900.29(a); 25 U.S.C. §5321(a)(2) and (e). Aside

[25] "The NAT proposes that its ISDEAA contract for judicial services include a provision addressing a choice by the EST, if one is made, to participate in the delivery of judicial services. Such a provision could allow EST to deliver services for its members in place of the BIA (to stand in the shoes of the BIA), but pursuant to the contract provisions as negotiated. This would ensure cooperative authorizations for the BIA police, judges, court staff, and other matters." Doc. 98-3 at 6 ("Contingency Planning").

from its unsupported statement that NAT's proposal would leave insufficient funds for EST services, outlined above, the BIA provides no basis for concluding that EST services would not continue under NAT's proposal. Even the Administrative Record is completely devoid of anything remotely resembling facts, figures, or documents justifying the BIA's decision.

H. Defendants Misread the Meaning of "Benefits" Under the ISDEAA

The BIA claims that NAT proposes to provide services which "benefit"[26] the EST, as if any "benefit" created for the broader community or the EST must be approved by the EST. This is a thinly disguised re-make of its argument that separation of services is not "feasible." Without explanation or authority, the BIA would expand the word "benefit" beyond its rational meaning or Congressional intent. Not every "benefit" to another Tribe or its members requires contract approval by that Tribe; if it did, the ISDEAA contracting system would be unworkable. Instead, NAT "needs to obtain tribal resolutions *only from the tribes it proposes to serve*" (emphasis added). S.Rep. 100-274 at 20. Using an example in the context of health services, Congress explained that:

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[26] Where a contract is made "to perform services benefitting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite. ..." 25 U.S.C. §5304(l).

> Another situation involves a tribal organization that proposes to serve one tribe. The tribal organization obtains [a] tribal resolution from that one tribe and enters into a contract with the Secretary. Under existing law, other individuals who are eligible for federal Indian health services but who may not be members of that particular tribe may utilize the services provided by the tribal organization, and [the] tribal organization is authorized to provide services to those eligible Indians. *It is the intent of the existing law that the Indian Health Service should not require the tribal organization to obtain resolutions from the tribes with which those individuals are affiliated*.

(Emphasis added.) *Id.* Agencies cannot decline proposals simply because they might provide some ancillary "benefit" to members of another Tribe.

The BIA admits that federal agencies have entered into 638 contracts with the NAT individually, to serve its members. *NAT v. LaCounte*, Doc. 120 at 6, ¶33 (Answer 1:16-cv-11-BMM). A host of these well-established, separate tribal programs already "benefit" EST and its members. An ISDEAA contract with Indian Health Services (IHS) funds the NAT "Wind River Family and Community Health Care System" (Clinic), which provides medical services to all who choose to use NAT's health facility. EST members who use the Clinic benefit directly from health services provided by NAT through the ISDEAA. *See* Exhibit 119, attached hereto.[27] The NAT child protection program benefits households in which

[27] The 638 contract requires NAT to provide services to any qualified person "in accordance with 42 C.F.R. Part 136." *Id.* at 7. Services must be provided "to persons of Indian descent belonging to the Indian community served by the local facilities and program," 42 CFR §136.12, which includes members of the EST or

both NAT and EST children reside. For example, when the NAT agency discovers neglect or abuse of an EST child, it provides emergency placement for that child and alerts the EST child protection agency for follow-up. The NAT Temporary Assistance for Needy Families (TANF) program provides "benefits" to EST members when they belong to a family in which the head of household is a member of the NAT. The NAT child support enforcement agency helps households meet their living expenses, including households with EST members. The EST departments of family services, child support, and TANF provide similar "benefits" to members of the NAT. In *Eastern Shoshone Tribe v. Northern Arapaho Tribe*, 926 F.Supp. 1024 (D.Wyo. 1996), the District Court ruled that NAT could establish its own housing authority to provide services to its members. There, Housing and Urban Development and the U.S. District Court rejected arguments that because both Tribes were "on" the same Reservation, and services to NAT members could benefit EST members, that services could not be divided. The NAT housing program provides both general and specific "benefits" to the EST. It eases the housing shortage and brings federal dollars into the Reservation economy. For those members of the EST who reside with NAT members, it provides safe, affordable housing. BIA improperly views such "benefits" as a

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any other Indian Tribe residing in the area.

basis to impose obstacles to the core objectives of ISDEAA.

Under BIA's overly expansive reading of "benefit," none of these programs would be possible unless both Tribes agreed to provide the services under a single, shared program. But Congress intended federal agencies to contract their services to individual Tribes to the greatest extent possible and established a set of rules to ensure that Tribes could overcome this kind of bureaucratic recalcitrance.

I. Defendants' "Territorially Based" Claim Makes No Sense

Defendants imply that NAT contract proposals are "territorially based," and, therefore, must be declined. Doc. 140-1 at ¶8 ("non-territorially based BIA programs operate[] solely for the benefit of that Tribe's members"). Defendants' declinations do not mention, let alone explain, such a rationale. This failure is itself fatal to the declination. 25 U.S.C. §5321(a)(2); 25 CFR §900.29(a). Gourneau's statement (Doc. 140-1) provides no explanation, either. Defendants themselves have separated judicial services between the Tribes despite the position in their brief that the proposals cannot be separated because they are "territorially based." Doc. 140-1 at ¶8. Again, none of the NAT proposals are to provide services to the EST: "NAT seeks to manage its own services," Doc. 113 at 13. The ISDEAA does not require approval by the EST of contracts which do not provide services to the EST. Such a reading of the ISDEAA turns it on its head.

See 25 U.S.C. §5304(l)[28]. Instead of trying to meet their obligations to negotiate with NAT and to overcome obstacles thereto, Defendants create illegal "threshold criteria" and offer only post-hoc justifications, which fail.

J. Contract Funding Will Not Alter Regulatory Systems

The BIA seems to believe that fulfilling its obligation to provide funding for services to NAT engenders questions about existing regulatory systems. The ISDEAA requires BIA to enter into self-determination contracts, 25 U.S.C. §5321(a)(1), subject only to specific statutory limitations. The ISDEAA does not purport to alter the scope of whatever regulatory authority a tribal program may, or may not, have.

Furthermore, NAT does not, in fact, propose to alter the regulatory approach taken by both Tribes with respect to these services. The Fish & Game proposal does not implicate an allocation of wildlife resources which differs from existing law or practices. Based on technical advice from the U.S. Fish and Wildlife Service, the laws of both Tribes regulate hunting and fishing. S&A LOC Title XVI. NAT would continue to set and observe hunting and fishing seasons "with

[28] "...where a contract is let or grant made to an organization to perform services benefitting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant."

the advice and recommendations of the United States Fish and Wildlife Service." Doc. 138 at 134.

Nor does the Tribe's TWE proposal attempt to alter established regulation. Water rights in the Big Horn basin, including the Reservation, were established in 1988 and remain in effect. *In re: The General Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988) (aff'd sub nom *Wyoming v. United States*, 492 U.S. 406 (1989)). The Tribes' Water Code governs and protects those rights.[29] Each Tribe appoints six members to the Shoshone and Arapaho Wind River Water Resources Control Board, which serves "as the primary enforcement and management agency responsible for controlling water resources on the Reservation." S&A LOC 11-8-2(A)(1). NAT has not proposed to alter that system. Instead, NAT's proposal would fund technicians to monitor water use – not to regulate water use in violation of established water rights or regulatory systems.

Arguments that wildlife or water are "unitary" resources that must be "shared" mix apples and oranges. BIA is obligated to fund services to each

[29] "Existing uses, established duties of water, and relative priorities concerning the use of Reservation water are to be protected and preserved. ..." S&A LOC 11-8-1(F). The S&A LOC is available on Westlaw and at shoshone-arapaho-tribal-court.org.

individual Tribe. Approving NAT's contracts does not alter the laws both Tribes have put into place to regulate these resources cooperatively. NAT's proposals seek only to fund services for NAT which are consistent with existing rights and laws governing the use of those resources.

Defendants also seem to complain that NAT proposes to provide judicial services to the EST, and in a way that regulates EST members. For example, with respect to criminal matters, Defendants point out that NAT proposed to serve members and agencies of NAT *and* such others "as may come within the jurisdiction of the Tribe." Doc. 140 at 31; Doc. 112-1 at 3. It is axiomatic that courts may handle cases that come within their jurisdiction. But the reference in NAT's proposal to others who "may come within the jurisdiction" of the NAT refers to non-EST members and non-Indians, not to members of the EST or the EST itself.[30] Indeed, NAT's proposal presumes that judicial services to EST will be provided by the BIA (or the EST) and not by the NAT. Doc. 98-3 at 2-4. NAT specifically proposed that its ISDEAA contract "allow EST to deliver services for

[30] NAT acknowledges that Tribes may assert criminal jurisdiction over members of other Tribes for crimes committed within their territories. *U.S. v. Lara*, 541 U.S. 193, 199 (2004). Therefore, Defendants reason, NAT proposed to exercise jurisdiction over members of the EST and, therefore, EST must consent to that exercise. That NAT and EST may have concurrent jurisdiction over certain criminal defendants does not mean that NAT has, in fact, proposed to exercise that jurisdiction.

its [EST] members. ..." Doc. 98-3 at 6. NAT criminal prosecutions would not extend to EST members.[31]

Defendants do not even try to address that portion of the NAT proposal to provide judicial services in the *civil* context, such as: (1) appeals from NAT administrative agencies, (2) abuse or neglect of NAT children in cases brought by the NAT child protection agency, and (3) commercial and domestic/family disputes involving members of the NAT. Doc. 98-3 at 4. Even if handling criminal cases were problematic (which it is not), the BIA must work to approve severable portions of a proposal. 25 U.S.C. §5321(a)(4). Here, BIA declined NAT's entire proposal even though neither its declination nor its brief explains why NAT cannot continue to provide judicial services for its members in these civil cases.

NAT's Meadowlark proposal would provide individual drug/alcohol counseling services to NAT youth in coordination with a drug court program. BIA does not seem to confuse regulatory systems with individual counseling in the way it has done with respect to the other proposals.

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[31] BIA proposed "creating a procedure for transfer of cases involving the Arapaho Tribe or Arapaho tribal members to your [Tribal] court... and cases concerning the Eastern Shoshone Tribe or Eastern Shoshone tribal members to the CFR court." Doc. 115-3 at 2. The CFR Chief Magistrate and Tribal Court Chief Judge did just that, proposing that "[o]nce the CFR prosecutor receives the BIA police or incident reports regarding Shoshone tribal members, he or she proceeds... [with prosecution of those members]." Doc. 115-8 at 3.

K. NAT's Proposals Explain How the Courts or Programs Would Interact

Defendants claim that the NAT proposal does not explain how the two Courts would interact. Doc. 140 at 17. The assertion again ignores important parts of the proposal. Based on its budget, structure, personnel and cross-authorization, the proposal is positioned to fit like a puzzle piece into the structure of any EST-focused judicial services. Doc. 98-3. Defendants ignore, and so do not refute, the explanation that NAT's proposal has, in fact, provided. Doc. 98-3 at 2-4.

Defendants can hardly claim the two Courts *cannot* interact cooperatively – the SBC/CFR and Tribal Court Chief Judges agreed early in the process on a protocol "to facilitate comity and to cooperate with the establishment of a CFR Court to provide services to the Shoshone Tribe." Doc. 115-8 at 2-3, ¶¶2-4.[32] The plan includes presentation of criminal detainees by BIA Law Enforcement to each Court for arraignment and copies of police or arrest reports to the tribal prosecutor. *Id*. Detainees who are members of the EST will be referred by the tribal prosecutor to the SBC/CFR prosecutor for arraignment in the SBC/CFR Court. *Id.*

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[32] The BIA assertion also misses the fact that courts regularly resolve the scope of their own personal jurisdiction. *See U.S. v. United Mineworkers of Am.*, 330 U.S. 258, 291 (1947) (courts have jurisdiction to determine their own jurisdiction). Courts regularly sort out their concurrent jurisdictions ("first to file" a complaint, conflicts of law provisions). NAT's proposal for cross-authorization was designed to make virtually all potential conflicts of this nature a moot point.

Later, the Defendants themselves (without the SBC/CFR Chief Judge) proposed a second "protocol to govern the allocation and transfer of cases between the CFR Court and the tribal court." Doc. 140 at 16, fn 8. Now the agency argues that what it has already done is simply not possible.

The Meadowlark program provides individualized counseling services to NAT youth and can be readily coordinated between NAT and the BIA or EST through a simple referral process. Like the judicial services proposal, NAT's Fish and Game and TWE proposals will "cross-authorize and share staffing, equipment and other resources with the BIA." Doc. 138 at 149.

Examples of programmatic coordination abound in other contexts, where each Tribe provides services to its own members. *See* Doc. 131 at 27-30 (explaining programs for social services, child protection, child support, etc.). Had the BIA engaged in good faith negotiations, or worked to overcome perceived obstacles to the proposal, these examples offer solid models for coordination. Instead, BIA makes an assertion that is readily disproved by its own record, creates another unlawful "threshold criterion" for contract approval, and then tries to invert the burden of proof.

L. NAT Has the Power to Establish Its Own Courts

The BIA admits NAT may lawfully establish its own court system, then

ignores NAT law that does so and relies on inconsistent arguments about the S&A LOC. Defendants point out that the S&A LOC established the shared Tribal Court system (Doc. 140 at 14), then assert that the S&A LOC has not been amended to reflect a separate and new judicial system (Doc. 140 at 17), and that NAT has not withdrawn from or otherwise amended the S&A LOC (Doc. 140 at 25 and 32). These points are not an explanation about how the BIA could justify declination. 25 U.S.C. §5321(a)(2); 25 CFR §900.29(a).

Furthermore, these points misconstrue and ignore NAT law and rely on logically inconsistent arguments about the S&A LOC. The S&A LOC did establish the Tribal Court system, but NAT has expressly amended with superseding legislation its authorization of the Tribal Court with respect to services that Court may provide to members of NAT. NAT has established its own Courts (17 N.A.C. 101 *et seq.*) in ways which harmonize it with the S&A LOC. *See* Doc. 127-11 at 3, ¶8 ("The Shoshone and Arapaho Tribal Court continues to operate and provide services to members of the Northern Arapaho Tribe pursuant to the laws of that Tribe. *See* 17 N.A.C. 101, *et seq.*"). For example, NAT's criminal code reincorporates the criminal laws of the S&A LOC and incorporates by reference provisions of the S&A LOC which do not directly conflict with Arapaho law. *See* N.A.C. Titles 20-23 and 17 N.A.C. §603(c). NAT has also appointed the

Honorable John St. Clair to continue to serve the NAT as its Chief Judge. Doc. 98-3 and 17 N.A.C. §603(e) comment. BIA's assertion that NAT has "not withdrawn from or otherwise amended" the S&A LOC (Doc. 140 at 25) disregards these important provisions of Arapaho law. And BIA has not provided a "detailed explanation" (25 CFR §900.29(a)) of why this would matter, even if it were true. NAT law explains how the NAT Code and S&A LOC should be construed and harmonized.

BIA seems to argue that NAT (1) can assert its inherent authority to establish its own tribal court only by amending the S&A LOC, but (2) cannot amend the S&A LOC without approval of the EST. BIA's recognition that NAT may authorize, and in fact has authorized, its own judicial system conflicts directly with any assertion that EST must approve of it. After all, BIA asserts that the SBC may unilaterally amend or rescind Title I of the S&A LOC (which, as the BIA says, establishes the Tribal Court). *See* Doc. 140-1 at ¶16 (EST withdrew its recognition of the Shoshone and Arapaho Tribal Court and "[t]he BIA thus commenced operation of a CFR Court...").[33]

[33] BIA also believes that unilateral action by the SBC authorizes BIA to impose a CFR Court on NAT, over NAT's objection (CFR Court established by BIA "for the benefit of all Indians on the Wind River Reservation"), a proposition that goes too far. *See* Doc. 115.

M. BIA Complains That NAT Would Serve Only its Own Members, Even Though That Is a Core Objective of ISDEAA

BIA letters declining the proposals for Meadowlark, Fish & Game and TWE cite factor 25 U.S.C. §5321(a)(2)(A) ("service to be rendered to the Indian beneficiaries... will not be satisfactory") as one of the reasons, followed by the conclusory statement that "[t]he proposal as submitted will only serve Northern Arapaho Tribe members." Docs. 112-8, 112-12, 112-16. The declination letters then each state the obvious fact that the Tribes have common ownership of some Reservation resources, but provide no *explanation* of how that fact supports Defendants' conclusion that serving only NAT (the Indian beneficiary) would be unsatisfactory to NAT. BIA's assertion that it will not accept any proposal without agreement and resolutions from both Tribes clashes directly with what Congress intended. S.Rep. 100-274 (1988) at 20.[34]

Conversely, nothing in ISDEAA requires that a proposal serve more than one Tribe. In fact, ISDEAA seeks to empower *individual* tribes. 25 U.S.C. §5302(b). That a program only serves one Tribe is not one of the statutory reasons for declination. *See* 25 U.S.C. §5321(a)(2). NAT manages numerous federally or

[34] This is part of the on-going effort by BIA to subject the sovereignty of each Tribe to the veto power of the other, or to insist on action by both Tribes as if they were consolidated – a pattern that has been consistent in much of the BIA's behavior.

state funded programs solely for its members including Community Service Block Grant, Indian Child Welfare Act, TANF and others. *See* Doc. 131 at 27-30.

NAT's proposals sought to serve only NAT, and not EST or its members.[35] BIA does not explain how proposals to serve NAT's own members, a primary objective of the ISDEAA, must be declined.

V. THIS COURT'S PRELIMINARY INJUNCTION DOES NOT JUSTIFY DECLINATION

This Court entered a preliminary injunction ordering that: "in accordance with the [BIA Superintendent] Gourneau Letter (Doc. 97-1), Defendants shall refrain from approving 638 contracts for multi-tribal, shared services without the approval, via tribal government resolution, of both the Northern Arapaho Tribe and the Eastern Shoshone Tribe." Doc. 113 at 24. 25 U.S.C. §5304(l) provided a statutory basis for the ruling, mandating that "where a contract is let or grant made to an organization to perform services benefitting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant." The BIA had issued ISDEAA contracts to *only* the EST for services to *both* Tribes, but without the approval of NAT. Defendants had done

[35] Three proposals identify the people to be served as "10,000 members of the Northern Arapaho Tribe." Doc. 112-6 at 2 (Meadowlark), Doc. 112-10 at 4 (Fish and Game), and Doc. 112-14 at 4 (TWE). The judicial services proposal would serve NAT and "allow EST to deliver services for its members. ..."

this by contracting with the former "tribal organization" known as the Joint Business Council (JBC).

After ignoring the requirements of 25 U.S.C. §5304(l) for more than a year, Defendants now ascribe such a broad reading to it and to this Court's related preliminary injunction (Doc. 113) that arguably no ISDEAA contracts could be let to either Tribe individually. Defendants assert that "this Court's October 17, 2016, preliminary injunction precluded the BIA from awarding a contract that would allow the NAT to exercise jurisdiction over the EST or otherwise *affect* EST interests." (Emphasis added.) Doc. 140 at 18.

ISDEAA prevents one Tribe from providing *services* to another, over its objection. 25 U.S.C. §5304(l). It does not prevent one Tribe from providing any services which have any *effect* on another Tribe or its members. Having an effect on a member of another Tribe is not one of the five bases for declination of ISDEAA proposals. 25 U.S.C. §5321(a)(2). And as this Court has recognized, the interests of the EST are not affected to a degree that would render them either necessary or indispensable parties under Fed.R.Civ.P. 19. Doc. 113 at 13 ("NAT does not seek the award of contracts to the exclusion of EST. NAT seeks to manage its own services. EST possesses no legal interest in governing NAT. In fact, 25 U.S.C. §5304(l) prevents one tribal organization from providing services

that benefit more than one Indian tribe without the approval of both tribes.").

As discussed earlier, examples of programmatic coordination abound in other contexts, where each Tribe provides services to its own members. *See* Doc. 131 at 27-30. Even Defendants recognize that "Department of Family Services" and "meth project" services are funded for each Tribe separately by the BIA. Doc. 140-1 at ¶8. Defendants would improperly expand the statute's references to the delivery of "services" to include ancillary "effects" that those services might have on others. BIA fails to explain the basis for its approach, let alone clearly demonstrate the validity of its grounds for declination. 25 U.S.C. §5321(a)(2).

The Order does not require that any programs or services be shared. The Tribes may decide to provide services to members of both Tribes under a "shared" program, but in that event, they must agree about the administration of those services. Importantly, the Court's Order does not say that because a program once was provided by both Tribes through a multi-tribal or shared organization, that it always must be so.

The authority of each Tribe to operate its own programs is recognized as a matter of tribal law as well:

> Neither Tribe may undertake or make unilateral spending or management decisions regarding programs which the Tribes have agreed to share without the consent of the other Tribe. However, nothing in this Decree requires that formerly shared programs remain

> shared, or that any future programs must be shared, under a single tribal organization or entity consisting of both Tribes. Indeed, programs for the benefit of either Tribe or its members may be funded separately by each Tribe or by third parties and may be operated by each Tribe separately. In the alternative, if both Tribes agree, programs may be operated together, or cooperatively.

Doc. 127-11 at 7 (*Northern Arapaho Tribe v. Shoshone Business Council*, Tribal Court No. CV-16-0052, Final Judgment and Decree and Permanent Injunction).

The Court specifically referenced the Gourneau letter and "more explicitly, the terms of §5304(l)" of the ISDEAA in its Order. Gourneau's letter addressed ISDEAA programs that had been authorized and administered through the now-defunct JBC. The JBC had been a "tribal organization" under 25 U.S.C. §5304(1), established to perform services for more than one Tribe. Before dissolution of the JBC, a handful of programs had been jointly run – shared – by the Tribes, with members of both Tribes being the intended beneficiaries. They were "multi-tribal" in that more than one Tribe was running them (via the JBC), and they were intended to serve more than one Tribe. This is consistent with the definition of "multi," or more than one. *See* https://www.merriam-webster.com/dictionary /multi. Likewise, "shared" means the characteristic of using, experiencing, occupying, or enjoying with others. *See* https://www.merriam-webster.com /dictionary/shared. The programs were "shared" when they were administered together, serving both Tribes.

Consequently, "multi-tribal, shared services" means those services that are provided with the goal of benefitting both the NAT and the EST through a single program funded by the 638 contract. Defendants improperly read the Court's reference to past multi-tribal services, formerly provided by the JBC, as a requirement that NAT now design and provide services to *both* Tribes (which would, in turn, require approval by the EST).

Under the ISDEAA, the designation of a program as "multi-tribal, shared" can only reasonably be made at the time of each contract proposal, upon review of whom it intends to serve (its intended beneficiary). If the proposal will serve more than one Tribe, all those Tribes must approve the proposal. If the contract will serve only one Tribe, the ISDEAA does not authorize the BIA to veto it because an unserved Tribe has not approved. Indeed, the ISDEAA expressly anticipates that programs once shared might someday be divided, and any Tribe no longer to be served by the ISDEAA contract will continue to receive services. 25 U.S.C. §5324(i) ("Division of administration of program"). ISDEAA also allows a Tribe to re-design programs to meet the needs of the Tribe to be served. 25 U.S.C. §5324(j) ("Proposal to redesign program..."). Divisions of services and re-designs are anticipated and encouraged by the ISDEAA, and do not provide a basis for declination. In its single-minded effort to deny all of NAT's proposals, BIA turns

the ISDEAA on its head.

Tribes are entitled to "effective and meaningful participation in programs and services *designed* to benefit them." *Council for Tribal Employment Rights v. United States*, 112 Fed.Cl. 231, 249 (2013), aff'd, 556 F.App'x 965 (Fed. Cir. 2014) (emphasis added). NAT's proposals are designed to benefit NAT and its members, not another Tribe.

The NAT and EST each govern themselves and there is no joint constitution consolidating their respective governments. Doc. 113 at 3. Self-determination, consequently, is not a joint undertaking between the Tribes; it is an exercise for each Tribe to undertake by itself. Self-determination is unlawfully precluded when the BIA demands that the Tribe seeking a contract procure another Tribe's approval when the services are not going to be provided to the other Tribe.

VI. CONCLUSION

Prior to the enactment of ISDEAA, the BIA provided direct services to Tribes, largely to fulfill federal trust responsibilities and treaty obligations. *Cohen's Handbook of Federal Indian Law* §22.01[3] at 1384 (2012 ed.). In the case of the two Tribes at Wind River, some of those direct services were provided to the two Tribes "jointly," in line with BIA's mistaken and now discredited policy of treating the two Tribes as if they were confederated. Defendants now point to

that policy, which was rooted in bureaucratic convenience and not law, to justify their argument that the funds for judicial services, among others, cannot be divided. Amendments to the ISDEAA in 1988 made clear that Congress would no longer tolerate the BIA's unfettered discretion in matters of self-determination. *Shoshone-Bannock*, 988 F.Supp. at 1315. As a relic of the pre-ISDEAA era, the BIA's approach to these matters cannot now justify its refusal to carry out statutory mandates. Even absent statutory guidance, courts will scrutinize agency criteria to ensure that they are "rationally aimed at an equitable division of funds." *Cohen* at §22.01[3] at 1384, citing *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 572 (9th Cir. 1980) (invalidating IHS distribution method that consistently deprived California Indians of adequate funds). BIA's failure to comply with the ISDEAA renders NAT's contract proposals approved as a matter of law. *Cheyenne River*, 496 F.Supp.2d at 1068.

For the reasons set forth above, NAT's Motion for Partial Summary Judgment should be granted and Defendants' Motion for Summary Judgment should be denied. NAT's contract proposals should be deemed approved.

DATED February 28, 2017.

/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 February 28, 2017, 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 11,101 words, excluding the caption and certificates of service and compliance.

DATED this 28 day of February, 2017.

/s/ Andrew W. Baldwin
Andrew W. Baldwin