UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NAVAJO NATION, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	)	Civil Action No. 20-1093 (DLF)

REPLY IN FURTHER SUPPORT OF
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants United States Department of the Interior and its Secretary, David L. Bernhardt, respectfully file this Reply in Further Support of Defendants' Cross-Motion for Summary Judgment.

ARGUMENT

This case involves Plaintiff's claim for a mandatory injunction directing Defendants to approve the 2020 Successor Annual Funding Agreement ("SAFA") and Statement of Work ("SOW") proposed by Plaintiff. Under 25 U.S.C. § 5331(a), however, the District Court has the discretion to order injunctive relief only against an action by a federal agency that is "contrary to this chapter or regulations promulgated thereunder." Here, Plaintiff failed to plead that Defendants acted contrary to the statute or regulations, let alone establish that fact in its summary judgment motion.

At the core of Plaintiff's argument is the fatal flaw that the Tribe has the right to bring this action even though it chose not to appeal the Recommended Decision, which is final. The statute on which Plaintiff relies, 25 U.S.C. § 5321(b)(3), does not apply here. Section 5321(b)(3) applies to the situation where a tribe still has the right to pursue an administrative appeal of the

BIA's decision. That is why the section allows a tribe to "proceed directly to" District Court "in lieu" of such administrative appeal. Here, after the Recommended Decision became final, Plaintiff no longer had the option to file an administrative appeal. This civil action, therefore, was not "in lieu" of an administrative appeal, and so the statute does not authorize a suit in this Court.

As explained in Defendants' opening brief, the Recommended Decision is final and binding on both parties and has superseded the initial BIA decision. Defendants complied with the Recommended Decision by providing all of the funding to Plaintiff. Plaintiff drew down the funding but now refuses to comply with the remainder of the Recommended Decision—that the parties negotiate "and perfect" the terms of the 2020 SAFA and SOW "so that it complies" with Section 108(f)(2) of the Indian Self-Determination and Education Assistance Act of 1975, Model Agreement § (f)(2) at 25 U.S.C. § 5329(c). The Court should reject Plaintiff's inappropriate effort to accept one portion of the Recommended Decision (regarding funding), and contest the validity of the other portion (regarding contract terms).

I. PLAINTIFF SOUGHT THE ENFORCEMENT OF THE RECOMMENDED DECISION IN THE COMPLAINT

Despite Plaintiff's effort to rewrite its Complaint, there can be no doubt that its pleading takes issue with the BIA's initial decision—which has been superseded by the Recommended Decision—and not the Recommended Decision itself. Plaintiff alleges that BIA has not complied with the Recommended Decision, Compl. ¶ 17, and that the Court should issue an injunction mandating that the Recommended Decision be implemented by awarding the funding identified in that decision, *id.* ¶ 24-26. Plaintiff's opposition proves this point by conceding that the "essence" of its Complaint was to challenge the initial BIA declination, not the Designated Representative's now-final Recommended Decision. Opp. at 3 (citing Compl. ¶¶ 20-21).

Having drawn down the entire $717,736.77 in funding from Defendants, Plaintiff on summary judgment has pivoted from seeking to enforce compliance with the Recommended Decision in the Complaint to raising a new claim challenging part of the Designated Representative's remedy. Plaintiff now argues that the portion of the Designated Representative's recommendation that the parties negotiate the terms of the 2020 SAFA and SOW is contrary to 25 U.S.C. § 5321(a)(2) because the Designated Representative had only one option, and that was to declare that the contract that Plaintiff proposed is approved. That claim plainly was raised for the first time on summary judgment.

II. PLAINTIFFS MAY NOT CHALLENGE THE RECOMMENDED DECISION UNDER 25 U.S.C. § 5321(b)(3).

Defendants disagree with Plaintiff's interpretation of the relevant statute and regulations because it seeks to minimize the effect of its failure to appeal the Recommended Decision within 30 days. Plaintiff's position is that the finality of the Recommended Decision means only that it could not take an administrative appeal of that decision, but that it had every right to challenge the Recommended Decision in District Court. Opp.[1] at 7. On this point, Plaintiff relies on 25 U.S.C. § 5321(b)(3).

That interpretation is incorrect. Section 5321(b)(3) does not apply to the situation, as here, where an Indian tribe or tribal organization requests an informal conference pursuant to 25 C.F.R. § 900.154, and the Recommended Decision becomes final (because the tribe or tribal organization does not appeal the Recommended Decision within 30 days). Under that process, the Designated Representative must prepare a written report summarizing the events at the informal conference and include a recommended decision. 25 C.F.R. § 900.156. That

[1] Citations to "Opp." refer to the Reply Brief in Support of Plaintiff's Motion for Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment, filed November 19, 2020. ECF No. 16.

recommended decision becomes final unless the Indian tribe or tribal authorization appeals the initial decision of the DOI or DHHS agency with the IBIA within 30 days. 25 C.F.R. § 900.156. Here, Plaintiff did not appeal the agency's initial declination decision, so it became final and binding on the parties.

Once the Recommended Decision became final, Plaintiff no longer had the right to pursue an administrative appeal of the BIA's initial declination decision. That fact is dispositive. The right to appeal to District Court in Section 5321(b)(3) applies to the situation where an Indian Tribe or tribal organization still has an option to appeal an initial decision to decline to award a self-determination contract to the Interior Board of Indian Appeals ("IBIA").[2] 25 C.F.R. § 900.150.

The statute cited by Plaintiff, 25 U.S.C. § 5321(b)(3), provides that the tribe or tribal organization may initiate an action in District Court "*in lieu of filing such appeal*"—referring to the administrative appeal from "a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity to appeal on the objections raised." 25 U.S.C. § 5321(b)(3) (emphasis added). That statute does not authorize a tribe to commence a lawsuit in this Court after the Designated Secretary issues a Recommended Decision after an informal conference, and that Recommended Decision becomes final. At that point, the tribe no longer may file an administrative appeal, 25 C.F.R. §§ 900.156(b), 900.157, and thus the tribe forfeits its right to commence an action in District Court because it is not "in lieu" of an administrative appeal. Here, Plaintiff declined to pursue an administrative appeal and allowed the Recommended Decision to become final, so filing this lawsuit was not "in lieu" of such an

[2] The IBIA appeals process is governed by 25 C.F.R. 900.160, and involves the right to a hearing, discovery, legal representation, and other rights commonly found in civil litigation, 25 C.F.R. § 900.164.

appeal. Defendants are unaware of any provision that authorizes a civil action in District Court to challenge a Recommended Decision that has become final.

III. NO FEDERAL OFFICER OR AGENCY VIOLATED ANY STATUTE OR REGULATION REGARDING PLAINTIFF'S PROPOSED CONTRACT.

Even if Plaintiff's interpretation of the statute were correct, its claim for relief under 25 U.S.C. § 5331(a) fails because the Designated Representative did not violate any statute or regulation by ordering the parties to negotiate a resolution of their differences regarding the 2020 contract terms. The informal conference process is "a way to resolve issues as quickly as possible, without the need for a formal hearing." 25 C.F.R. § 900.153. There are no statutes or regulations that limit the remedies that may be recommended as part of this process. If the tribe disagrees with the Recommended Decision, it may appeal the initial BIA declination decision to the IBIA within 30 days, 25 C.F.R. § 900.156(b), in accordance with the process summarized above. If the tribe does not appeal, the Recommended Decision becomes final. 25 C.F.R. § 900.157.

Plaintiff's summary judgment motion is based on the flawed argument that the Designated Representative was required to approve the 2020 SAFA and SOW as proposed by Plaintiff. This should have been the only outcome of the informal conference, Plaintiff argues, because the Designated Representative disagreed with the BIA's initial basis for declining the proposal—that the 2020 proposal was substantially different than the 2019 version. But that merely reflects Plaintiff's disagreement with the Designated Representative's findings—findings that it could have appealed but chose not to do so. Now those recommendations are final and binding, and there is no basis for Plaintiff's request for a mandatory injunction under 25 U.S.C. § 5331(a). Indeed, if a tribe were able to challenge the final outcome of an informal conference, it would disrupt the statutory scheme that allows for District Court actions only in lieu of

administrative appeals, and the agency's regulations regarding an informal conference, 25 C.F.R. §§ 900.156(b), 900.157, would be rendered meaningless.

* * *

In sum, Plaintiff has not established, even if it had raised its summary judgment claims in its complaint, that it properly brought this action under 25 U.S.C. § 5321(b)(3) or that the Designated Representative violated any statute or regulation by recommending that the parties "work together, in good faith, to perfect the" 2020 SAFA and SOW. Indeed, the Designated Representative's proposed remedy of requiring the parties to work out their differences is final. The parties should return to the negotiating table.

CONCLUSION

For the reasons set forth above and in Defendants' Opening Brief, the Court should deny Plaintiff's Motion for Summary Judgment and grant Defendants' Cross-Motion for Summary Judgment.

Dated: December 16, 2020

Respectfully submitted,

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