IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NAVAJO NATION, Plaintiff, v. DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	Case No. 16-cv-00011 (TSC)

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

These consolidated cases arise from two successive contracts under the Indian Self-Determination and Education Assistance Act of 1975 ("ISDEAA") between the Navajo Nation and the Bureau of Indian Affairs' Navajo Regional Office ("BIA"). Those contracts transfer the funding and the programs, functions, services, and activities otherwise contractible for the Tribal Courts Program from the Federal Government to the Nation ("the 2012 Contract" and "the 2017 Contract;" collectively "the Contract"). Across six consolidated lawsuits, *Navajo Nation II–VII*, Plaintiff Navajo Nation ("the Nation") brings claims regarding six separate annual funding agreements under the 2012 and 2017 Contracts, seeking damages as to each. Although an enormous sum of money is at stake in this consolidated set of cases, the issues presented are straightforward and few of the facts are in dispute.

The Nation argues that it is entitled to over $100 million under the Contract by operation of the ISDEAA and BIA's implementing regulations. It contends that is so because it prevailed in a prior litigation before this Court and obtained contract damages following the BIA's declination of the Nation's exorbitant proposal under the 2012 Contract in 2014. That declination was held to be untimely, even though the proposal was submitted during a lapse in appropriations to the BIA, and the Nation was on notice as to the BIA's timing for a decision once appropriations were restored. Now, the full potential consequences of that holding are clear, as the Nation seeks to leverage its "deemed approved" damages for FY 2014 into over $100 million dollars in additional damages, as well as continued funding from BIA's limited appropriations for the indefinite future.

This Court should not permit such an egregious result, as nothing in statute or regulation requires it. BIA timely declined the huge sums sought by the Nation in each year following 2014, as BIA was entitled to do under ISDEAA and implementing regulations. Put simply, the Nation's

windfall in the first lawsuit before this Court does not entitle it to a windfall every year thereafter, *ad infinitum*. Nor was BIA obligated to include in the 2019 or 2020 annual funding agreements the two particular provisions raised in the latter half of the Nation's motion for summary judgment. ISDEAA and the Contract expressly contemplate that annual funding agreements are negotiated and that some provisions will only be included with the consent of *both* parties. Here, the parties did not agree on two particular provisions and those provisions are thus not part of the parties' agreement in 2018, 2019, and 2020. Neither ISDEAA nor BIA's implementing regulations require a different result.

For these reasons, the Court should deny the Nation's motion for summary judgment, grant Defendants' motion for summary judgment, and enter judgment for the United States in *Navajo Nation II–VII*.

BACKGROUND

I. Statutory and Regulatory Background

Congress created the ISDEAA to effect "an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. § 5302(b); *see also id.* § 5304(j) (requiring the BIA to enter into contracts with tribes "for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members"). Upon the request of a tribe by tribal resolution, the ISDEAA requires the BIA to enter into a self-determination contract with the tribe or a tribal organization to administer any program, function, service, or activity that is currently provided by the BIA for the benefit of the tribe. *Id.* § 5321(a)(1). BIA may only decline a tribe's request to contract in certain specified circumstances. *See id.* § 5321(a)(2).

A contract under ISDEAA, like the 2012 and 2017 Contracts, must provide funds to a tribe at the same level that BIA "would have otherwise provided for the operation of the programs" at issue if the agency had continued to provide the service itself. *Id.* § 5325(a)(1). This is generally known as the "Secretarial amount." The parties may also negotiate to set higher funding levels. *See Navajo Nation v. U.S. Dep't of Interior*, 852 F.3d 1124, 1130 (D.C. Cir. 2017). Indeed, the ISDEAA expressly allows tribes to request additional funding above the Secretarial amount. *See* 25 U.S.C. § 5325(a)(3)(B) ("On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this chapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph."). The ISDEAA also allows tribes to ask that BIA agree to *increase* the Secretarial amount. *See id.* § 5325(b)(5) ("The amount of funds required by [Section 106(a)] . . . may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this [Act] . . . ."). However, the ISDEAA does not require the BIA to award a self-determination contract with program funding that exceeds the amount of funds that the BIA would otherwise have expended on the particular program or service for the tribe. *Id.* § 5321(a)(2)(D). Nor can the BIA be required to reduce funding for programs and activities provided for one tribe in order to make funds available for a self-determination contract with another tribe. *Id.* § 5325(b).

The Contract here requires the parties to negotiate certain agreements called "successor annual funding agreements" each year, which are defined as the "negotiated agreement of the Secretary to fund, on an annual basis, the programs, services, activities and functions transferred to an Indian tribe or tribal organizations under [ISDEAA]," 25 C.F.R. § 900.6. By regulation, annual funding agreements ("AFAs") are distinct from ISDEAA "contracts." The latter term refers

to the "contract . . . entered into . . . between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law." 25 U.S.C. § 5304(j); *see* 25 C.F.R. § 900.6 (incorporating this definition of "contract"). Separate AFAs negotiated each year are incorporated into the Contract and determine the level of funding provided to the Nation under the Contract in a particular year. *See* Pl.'s SMF Ex. F, ECF No. 17-6 at Page 18 of 44;[1] *see also* Model Agreement § (f)(2)(B) at 25 U.S.C. § 5329(c).

Under the AFA process, the Nation makes a funding proposal prior to the year in question and the BIA may partially decline that proposal on various grounds authorized by law. In general, the agency may decline all or a portion of an ISDEAA proposal in only five circumstances, including if "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract" as determined under section 5325(a) of the ISDEAA. 25 U.S.C. § 5321(a)(2)(D); *see also* 25 C.F.R. § 900.32 (providing that these declination criteria are applicable to negotiation of annual funding agreements). Thus, BIA may decline a proposal that exceeds the Secretarial amount. If the agency declines an ISDEAA proposal, the agency must "state any objections in writing to the tribal organization." 25 U.S.C. § 5321(b). Further, if a proposal exceeds the funding amount allowed by the statute, the Secretary may "approve a level of funding authorized under section 5325(a) of this title" as part of the Secretary's power to approve any severable portion of a contract proposal. *Id.* § 5321(a)(4)(B).

Notwithstanding the narrow circumstances in which BIA is permitted to decline a proposed self-determination contract with a tribe, section 5329 of the ISDEAA provides additional leeway for BIA to negotiate particular terms of annual funding agreements with tribes. That provision

[1] Citations of "Page X of X" refer to the page number on the ECF headers for filed documents.

states that self-determination contracts shall "contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) of this section." 25 U.S.C. § 5329(a), (a)(1). That model agreement provides, among other things, that the "annual funding agreement under this Contract shall only contain . . . terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment." Model Agreement § (f)(2)(A) at 25 U.S.C. § 5329(c). According to the model agreement, the only other provisions to be included in annual funding agreements are those "to which the parties agree." *Id.* This language from the statute's model agreement is also present in the 2017 Contract between BIA and the Nation. *See* Pl.'s SMF Ex. F, ECF No. 17-6 at Page 18 of 44.

BIA has promulgated a number of regulations implementing the ISDEAA. Two categories of regulation are particularly relevant to these proceedings, those dealing with declination of contracts and annual funding agreements respectively. As to the former, BIA's regulations provide, *inter alia*, that the agency "may decline a proposal to contract, to amend an existing contract, [or] to renew an existing contract," 25 C.F.R. § 900.20, on any of the five grounds specified in the ISDEAA, including that the level of funding sought exceeds the Secretarial amount. *Id.* § 900.22(d). Such declinations, however, are ineffective "if a proposal is not declined within 90 days after it is received by the Secretary." *Id.* § 900.18. In that case, the proposal "is deemed approved and the Secretary shall award the contract or any amendment or renewal within that 90-day period and add to the contract the full amount of funds pursuant to section 106(a) of the Act." *Id.*

BIA's regulations separately deal with declination of annual funding agreements. *See* 25 C.F.R. § 900.20 (providing that "[f]or annual funding agreements, see § 900.32"). Section 900.32

provides that BIA may not decline a "successor annual funding agreement" if it is "substantially the same" as a prior annual funding agreement. 25 C.F.R. § 900.32. If the successor AFA is not "substantially the same" as a prior AFA, however, the declination criteria applicable to self-determination contracts apply. *Id.*

II. Factual Background

Seven of the Nation's proposed AFAs are relevant to these proceedings. The first is the 2014 proposed AFA that was at issue in *Navajo Nation I*, previously pending in this Court. That proposed AFA sought $17,055,517 for the Nation's Tribal Courts Program under the 2012 Contract, Defs.' Statement of Material Facts ("SMF") ¶ 2, a sum that was substantially larger than the Secretarial amount for the Nation's Tribal Courts Program. *See* Defs.' SMF ¶ 3. As the Court is aware, this prompted a dispute about whether the BIA had legally "received" the 2014 proposal because it was hand-delivered to an agency employee during a lapse in appropriations, whether the BIA's subsequent partial declination of that proposal was timely under section 900.18, and whether principles of equitable estoppel barred the Nation from prevailing on its claims. The parties cross-moved for summary judgment and the Court ruled for Defendants, declining to "sanction the Nation's gamesmanship in taking advantage of a government shutdown by rewarding it with the windfall that it seeks." *Navajo Nation v. Dep't of Interior* ("*Navajo Nation I*"), 174 F. Supp. 3d 161, 171 (D.D.C. 2016).

The D.C. Circuit reversed, holding that equitable estoppel did not bar the Nation's claims, that the BIA received the Nation's proposal on the date it was hand-delivered and, therefore, that the BIA's partial declination was untimely. *See Navajo Nation I*, 852 F.3d 1124, 1128–30 (D.C. Cir. 2017). The Court of Appeals did not, however, decide what measure of damages was required or appropriate. Instead, it simply held that the Nation was not *limited* to the amount the agency

would have otherwise spent on the program in obtaining relief from the Court. *Id.* at 1130. Following further briefing, this Court entered judgment for the Nation. The Court ordered that the Nation's 2014 proposed AFA was "deemed approved" and that the Nation was entitled to contract damages of $15,762,985 because those damages were "facially reasonable." Order at 7, ECF No. 48, *Navajo Nation I*, No. 14-cv-1909 (D.D.C. June 12, 2020).

While that litigation was playing out, the parties continued to negotiate annual funding agreements pursuant to the 2012 Contract and its successor, the 2017 Contract. Prior to each successive year—2015 to 2020—the Nation sent a proposed AFA to the Government that sought at least the amount sought in the 2014 proposal, $17,055,517. Pl.'s SMF Exs. A, D, F, H, J, M, ECF No. 17. In the 2015 proposed AFA, the Nation sought a substantially larger sum, over $19 million.[2] Pls.' SMF Ex. A, ECF No. 17. In response to each of those proposals, BIA issued a timely declination letter pursuant to 25 C.F.R. § 900.22, explaining that the amount sought by the Nation far exceeded the applicable funding level for the Contract and, thus, the Secretarial amount. Pl.'s SMF Exs. C, E, G, I, K, N, ECF No. 17. Each of these consolidated lawsuits followed.

Additionally, with respect to the 2018, 2019, and 2020 proposed AFAs submitted by the Nation, the parties did not agree to two particular provisions raised in the Nation's motion for summary judgment. The two provisions would commit BIA and Interior to "identify additional funds or to obtain an appropriation" to provide extra funding under the Contract. Pl.'s SMF Exs. H, J, M, ECF No. 17. BIA removed these provisions pursuant to the authority provided by section (f)(2)(A)(ii) of the model agreement set forth at section 5329 of the ISDEAA, which states that certain provisions may only be included in an annual funding agreement with the consent of both

[2] The Nation does not seek damages at this figure for 2015 in *Navajo Nation II*. *See* Compl., Prayer for Relief ¶ C (seeking damages of $15,759,069), ECF No. 1.

parties to the agreement. Model Agreement § (f)(2)(A) at 25 U.S.C. § 5329(c); *see also* Defs.' SMF ¶¶ 4–8. The removal of these provisions from the 2019 and 2020 agreements is challenged in *Navajo Nation VI* and *VII* (the Nation failed to include any claim regarding the 2018 agreement in *Navajo Nation V* or any other pleading). *See* Pl.'s Mem. at 2, 15, ECF No. 17 (stating that the Nation seeks review as to these provisions in *Navajo Nation VI* and *VII*).

ARGUMENT

I. BIA Properly and Timely Partially Declined Each of the Nation's Proposed AFAs as in Excess of the Secretarial Amount.

Unlike *Navajo Nation I*, there is no dispute that BIA timely issued its partial declination decisions on each of the proposed AFAs at issue in these lawsuits. Instead, the only dispute concerns whether those partial declinations were legally authorized. They were.

ISDEAA and BIA's regulations enumerate specific grounds upon which a Tribe's proposal may be declined by the BIA. Only one of those grounds need be considered here. Specifically, 25 U.S.C. § 5321(a)(2)(D) and 25 C.F.R. § 900.22(d) permit the Secretary to decline a proposal where "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 5325(a)" of title 25. Section 5325(a) establishes a "funding floor" for self-determination contracts that is commonly called the "Secretarial amount." *See Navajo Nation I*, 852 F.3d at 1130. Roughly speaking, the Secretarial amount constitutes the amount which BIA would otherwise have spent on the program in question. *See* 25 U.S.C. § 5325(a).

The Nation sought an amount far in excess of the Secretarial amount in each of the years 2015 to 2020. *See* Pl.'s SMF Exs. C, E, G, I, K, N, ECF No. 17. Accordingly, and invoking the authority of 25 C.F.R. § 900.22, BIA partially declined the funding requested by the Nation in

each of those years to the extent it exceeded the Secretarial amount for the Tribal Courts Program. *Id.*

The Nation contends that BIA's declinations were faulty, relying on two principal arguments, one rooted in statute, the other in BIA regulation.

First, the Nation asserts that the Secretarial amount was effectively increased to $17,055,517 in 2014 by virtue of BIA's untimely declination of that proposed AFA, as determined in prior litigation between these parties. Thus, the Nation contends that BIA was not permitted to invoke 25 U.S.C. § 5321(a)(2) or 25 C.F.R. § 900.22(d) to partially decline the proposed AFAs because the proposals were not actually "in excess of the applicable funding level for the contract, as determined under section 5325(a)." Pls.' Mem. at 8–11.

The Nation's argument fails because it misconstrues the relationship between the amount of funding that is *required* by section 5325(a) and the amount of funding that may be expended by agreement of the contracting parties. Section 5325(a) establishes that the amount of funds required to be provided under a self-determination contract is the amount the agency "would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract," as well as certain "contract support costs." 25 U.S.C. § 5325(a)(1), (2).

The statute does not define these required sums by reference to the sum provided in any prior year pursuant to the current or a previous contract. To the contrary, the statute provides that the parties may negotiate the level of contract support costs provided under a self-determination contract "[o]n an annual basis." *Id.* § 5325(a)(3)(B). The statute elsewhere provides that the "amounts of [self-determination] contracts may be renegotiated annually to reflect changed circumstances and factors, including, but not limited to, cost increases beyond the control of the tribal organization." *Id.* § 5324 (c)(2). Thus, far from indicating that contract funding levels are

a one-way ratchet, ISDEAA expressly contemplates that the amount provided under a self-determination contract may vary from year-to-year by negotiation of the parties. So long as the funds provided under a self-determination contract do not go below the amount the agency would have otherwise provided to operate the program if not for the contract, section 5325's funding requirement is satisfied.

The Nation responds by citing a parenthetical from the D.C. Circuit's opinion in *Navajo Nation I*, where the Court of Appeals summarized a district court holding that the "Secretarial amount is not immutable and can be increased by the Secretary." 852 F.3d at 1130 (citing *Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, 945 F. Supp. 2d 135, 150–51 (D.D.C. 2013)). But contrary to the implication of the Nation's citation, Pl.'s Mem. at 11, that statement did not represent a holding of the D.C. Circuit but, rather, was simply a parenthetical explanation of the holding in a different district court opinion. Instead, the Circuit's citation of that district court case was made in support of a different point: that the Secretarial amount required by section 5325(a) is a "funding floor, not a ceiling" and that, therefore, the Nation was not limited to that amount in obtaining damages on a deemed approved contract. *See Navajo Nation I*, 852 F.3d at 1130. The Circuit did not decide, and had no occasion to consider, whether such an award of damages would itself transform the Secretarial amount—or whether those damages would simply be *in excess of* the Secretarial amount. As discussed above, the statute provides no support for the separate proposition that the damages awarded in *Navajo Nation I* transformed the Secretarial amount required by ISDEAA.

Second, the Nation argues that a BIA regulation, 25 C.F.R. § 900.32, forbids the partial declinations because that regulation required the agency to adopt any "successor annual funding agreement" that was "substantially the same" as a prior annual funding agreement. Pl.'s Mem. at

10–11. Thus, the argument goes, because the Nation prevailed in *Navajo Nation I* regarding the "deemed approval" of its 2014 proposed AFA, all AFAs thereafter should be treated as "substantially the same" as that 2014 proposal and a new permanent funding level of $17,055,517 should be established for the Nation's Tribal Courts Program. This argument is meritless for numerous reasons.

1. To begin, the Nation's proposed 2015 AFA was not "substantially the same" as its proposed 2014 AFA and therefore any requirement to adopt the proposal triggered by section 900.32 is inapposite. The proposed 2015 AFA sought more than $2 million more than the proposed 2014 AFA. *Compare* Def.'s SMF ¶ 2 *with* Pl.'s SMF ¶ 3. And the proposed 2014 AFA and 2015 AFA did not seek funding on all the same grounds. For example, the proposed 2015 AFA included a $1.5 million request for "capital outlay" expenses, whereas the proposed 2014 AFA requested nothing for this purpose. *Compare* Pl.'s SMF Ex. A, ECF No. 17-1 at Page 25 of 25 *with* Defs.' SMF Ex. B, Att. B. The proposed 2014 AFA also sought $1.3 million for "repairs and maintenance," appearing to base this request on asserted needs for "significant repairs" at certain courthouses. *See* Defs.' SMF Ex. B, Att. A at 3 and Att. B. The proposed 2015 AFA sought far less for this purpose and based the request on a non-identical list of courthouses requiring such repairs. Pl.'s SMF Ex. A, ECF No. 17-1 at Page 21 of 25 and 25 of 25.

A proposed contract seeking $2 million more than a prior contract and seeking such funding on different grounds cannot plausibly be defined as "substantially the same" to that prior contract. Accordingly, any requirement imposed by section 900.32 to adopt substantially similar successor AFAs was not triggered *at all* by the proposed 2015 AFA and BIA was entitled under section 900.32 to consider the declination criteria anew. *See* 25 C.F.R. § 900.32 (providing that BIA "shall approve" a successor AFA only where it is "substantially the same as the prior annual

funding agreement"); *see also id.* ("Any portion of an annual funding agreement proposal which is not substantially the same as that which was funded previously (e.g., . . . different proposed funding amount . . .), . . . is subject to the declination criteria and procedures in subpart E."). As discussed above, one of those declination criteria—that the amount requested was in excess of the "Secretarial amount" for the Tribal Courts Program—fully supported the partial declination of amounts beyond the Secretarial amount of $1,296,448 (less an across the board reduction of $713). As for the AFAs in 2016–2020, none sought funds substantially the same as the far smaller Secretarial amount properly incorporated into the Contract in 2015 and, thus, any regulatory requirement to adopt the $17 million requested in 2016–2020 was not triggered by those AFAs either. The Nation's argument based on section 900.32 should thus be rejected at the threshold in all of these consolidated cases, *Navajo Nation II–VII*.[3]

2. Moreover, even if one accepted the Nation's interpretation of section 900.32 and its conclusion that the proposed 2015 AFA was substantially the same as the 2014 deemed approved AFA, the Nation's argument must fail as to the 2017–2020 AFAs for the additional reason that section 900.32's effect extends no further than one self-determination contract. Section 900.32 applies only to "successor annual funding agreements." 25 C.F.R. § 900.32. Such "successor" agreements follow an initial AFA, which is provided with and incorporated into a Tribe's contract proposal. *Compare* Model Agreement §§ (b)(14), (f)(2) at 25 U.S.C. § 5329(c).

There are *two* contracts at issue in these consolidated cases—the 2012 Contract governing the 2015–2016 AFAs at issue in *Navajo Nation II–III* and the 2017 Contract governing the 2017–

[3] In any event and even under the Nation's theory of the case, BIA's declination of the proposed 2015 AFA was valid under section 900.32 as to the portion of that proposal in excess of the $17,055,517 deemed approved in 2014. Indeed, the Nation does not seek damages from the Court beyond the amount deemed approved in 2014. *See* Compl., Prayer for Relief ¶ C (seeking damages of $15,759,069), ECF No. 1.

2020 AFAs at issue in *Navajo Nation IV–VII*. The 2017 AFA was accordingly not a "successor annual funding agreement" to the 2016 AFA because the 2017 AFA was entered pursuant to a different contract, the 2017 Contract. Thus, even if section 900.32 of BIA's regulations required a continued funding level of $17,055,517 for all successor AFAs under the 2012 Contract, that inequitable situation would end with the 2012 Contract's expiration. In short, the 2017–2020 AFAs were negotiated under a different contract than the one at issue in *Navajo Nation I* and, therefore, section 900.32 has nothing to say about the 2017–2020 AFAs vis-à-vis the 2014 AFA. For this reason too, the Government is entitled to judgment in *Navajo Nation IV–VII*.

3. Finally, regardless of the preceding defects in the Nation's argument, that argument must fail in full because it misconstrues the impact of section 900.32. That provision contemplates successor AFAs that are substantially the same as prior AFAs *to which the parties agreed*. But BIA never agreed to the $17,055,517 sought in the 2014 proposed AFA; it rejected that amount as in excess of the preceding year's funding level and the Secretarial amount, just as it did in each of the succeeding years. *See supra*. BIA's declination was found untimely to be sure, which resulted in an adverse judgment and an award of damages in *Navajo Nation I*. But the import of that untimely declination was not to transform the Nation's proposed 2014 annual funding agreement into the parties' operative agreement for purposes of section 900.32 (no injunction to award that contract was issued, for example). Instead, the untimely declination simply entitled the Nation to damages under the 2014 AFA, which the Nation obtained from this Court.

Adoption of the Nation's interpretation of section 900.32—that the regulation encompasses "deemed approved" AFAs and extends beyond individual self-determination contracts—would run counter to multiple provisions of ISDEAA, indicating that that interpretation should be rejected. *See Smith v. Brown*, 35 F.3d 1516, 1526 (Fed. Cir. 1994) (approvingly citing rule that

"regulations must be construed to avoid conflict with a statute if fairly possible"), *superseded on other grounds by* 38 U.S.C. § 7111; *cf. Rosen v. Brookhaven Capital Mgmt. Co.*, 113 F. Supp. 2d 615, 626 (S.D.N.Y. 2000) ("[T]he most appropriate approach to construing two provisions of a statute or regulation that may appear at odds is . . . to find a rational reading that gives expression to the fullest application of the Rule as a whole and enables the reasonable coexistence and application of the seemingly clashing provisions.").

If the Nation's position were correct, BIA would not only be obligated to continue funding the 2017 Contract at the requested level until the contract expires in 2022; the agency would be required to provide that same funding as to any future contract under the Tribal Courts Program so long as it was "substantially the same," no matter the future circumstances that might face the Department, the Nation, or any other tribes. An indefinite funding requirement that could last decades as to contracts that do not even exist yet cannot be squared with ISDEAA's specification that funding under self-determination contracts "may be renegotiated annually to reflect changed circumstances and factors." 25 U.S.C. § 5324(c)(2). Nor can it cohere with the fact that ISDEAA does not provide that the declination criteria specified in the statute should be applied any differently to an initial contract proposal and a renewal of funding. *See* 61 Fed. Reg. 2038, 2042 (Jan. 24, 1996) (stating that it was the "position" of the federal agencies involved in promulgation of these regulations "that nowhere in the [ISDEAA], as amended, is there a specific declination exemption for contract renewal proposals that are substantially similar to an expiring contract"). Contrary to these aspects of the statute, the Nation's interpretation would mandate a continuous funding stream at the 2014 level even if the need for funding of the Tribal Courts Program *decreased* in subsequent years (as a result of, for example, staffing cuts or reduced caseload).

Moreover, an indefinite funding requirement at the levels sought, regardless of circumstances, cannot be squared with the fact that BIA is "not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this chapter." 25 U.S.C. § 5325(b). The funding level awarded in the 2014 AFA was issued with *no* assessment of its impact on funding for other tribes in light of the fact that it was "deemed approved" rather than considered by the BIA. Defendants recognize that "the Government normally cannot back out of a promise to pay on grounds of insufficient appropriations." *See Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 632 (2005). But here the question is whether any promise to pay at these levels for all time was made at all (let alone for the duration of the 2012 Contract). ISDEAA's provisions, including its limitation on inequitable funding levels between tribes, show that no such promise was made.

The Federal Register publication promulgating section 900.32 further illustrates the inaccuracy of the Nation's interpretation. In that document, the Departments of Interior and Health and Human Services explained that "as a matter of practice," BIA had not "reviewed contract renewal proposals for declination issues" in the past. 61 Fed. Reg. 32,482, 32,487 (June 24, 1996). On the basis of that practice and comments received, the Departments "agreed that [the Indian Health Service] and BIA will not use the declination process in contract renewals where there is no material or significant change to the contract." *Id.* But the funding level the Nation seeks now was not the product of any BIA agreement after review; it arose by operation of regulation, one whose operation in this instance did indeed work a "material or significant change" to the prior funding levels under the 2012 Contract. There is nothing to suggest the drafters of this rule contemplated the scenario presented in this case, or the absurd result sought by the Nation, when section 900.32 was promulgated. *Cf. Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078,

1085 (9th Cir. 2007) ("plain language of a regulation" does not control if "such plain meaning would lead to absurd results" or "clearly expressed administrative intent is to the contrary" and such intent is "referenced in the published notices that accompanied the rulemaking process").

In sum, the Nation has raised no basis to overrule the BIA's partial declinations of the 2015–2020 proposed AFAs.

II. BIA Properly Excluded Certain Language From the 2019 and 2020 Agreements.

The Nation also contends that the BIA was obligated to agree to two particular provisions in the proposed annual funding agreements submitted by the Nation in 2019 and 2020. In effect, the Nation argues that BIA lacks any authority to negotiate regarding the terms of its agreements pursuant to ISDEAA unless one of the declination criteria set forth in section 5321 is met.

That is plainly incorrect. Indeed, the Nation's argument ignores the key provision of the statute, instead invoking the inapposite concept of "declination." *See infra*. The model agreement set forth at section 5329 of ISDEAA provides that annual funding agreements "shall only contain . . . terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment." Model Agreement § (f)(2)(A) at 25 U.S.C. § 5329(c). Beyond those categories, the only provisions to be included in annual funding agreements are those "to which the parties agree." *Id.* This language from the statute's model agreement is also present in the 2012 and 2017 Contracts. Defs.' SMF ¶¶ 1, 9.

The provisions about which the Nation complains do not "identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, [or] the time and method of payment." Instead, those provisions impose a purported duty on the Government to "identify additional funds or to obtain an appropriation"

that would go above and beyond "the amount allocated" under the contract. Pl.'s SMF Exs. H, J, M, ECF No. 17. ISDEAA and the parties' Contract therefore expressly provide that the two provisions about which the Nation complains could only be included in the annual funding agreement with BIA's agreement. And consistent with that fact, the parties negotiated as to this language's inclusion in the 2019 and 2020 AFAs. *See* Pl.'s SMF Ex. L, ECF No. 17-12 at Page 3 of 4 (referring to correspondence between BIA and the Nation regarding whether to include this language); Pl.'s SMF Ex. O, ECF No. 17-15 at Page 2 of 3 (referring to correspondence from BIA explaining the agency's position on the provisions). But ultimately, BIA did not agree and rejected these provisions, expressly invoking the authority of the ISDEAA Model Agreement provision discussed above. *See* Defs.' SMF ¶¶ 4–8. In light of this statutory and contractual authority, the Nation's arguments regarding the proper interpretation of the Anti-Deficiency Act are simply a red herring with which the Court need not engage. The Nation's contention that BIA's actions were *ultra vires* similarly misses the mark.

Setting aside the ISDEAA itself, the Nation also relies on another argument rooted in 25 C.F.R. § 900.32, asserting that because the language about which they complain was in the 2017 AFA, BIA was obligated to include that language in the 2018–2020 AFAs. Pl.'s Mem. at 13. This argument again misconstrues section 900.32. That provision concerns "declination," an authority that may be exercised by BIA only in five particular circumstances defined in 25 U.S.C. § 5321(a)(2) and 25 C.F.R. § 900.22. Wholly separate from those provisions, however, BIA may reject terms in annual funding agreements pursuant to section 5329 of the ISDEAA and the parties'

Contract. The concept of declination, including section 900.32 of BIA's regulations, is inapposite.[4]

In any event, this argument must fail because the Nation has not challenged the absence of these two provisions from the 2018 AFA. *See* Pl.'s Mem. at 2, 15 (stating that the Nation seeks review as to these provisions only in *Navajo Nation VI* and *VII*). Therefore, the factual predicate for the Nation's argument—that these two provisions were in the agreement immediately preceding the agreements being challenged—is false. The language the Nation seeks to reinsert in the 2019 AFA was not in the agreement that immediately preceded it in 2018 and the Nation does not state any claim that it should be included in the 2018 AFA. Thus, the fact that this language was in the 2017 AFA is irrelevant and no violation of section 900.32 could possibly be stated.

CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court grant their motion for summary judgment, deny Plaintiff's motion for summary judgment, and enter judgment for the United States.

[4] BIA purported to "decline" these two provisions in 2019. *See* Pl.'s SMF Ex. L, ECF No. 17-12 at Page 3 of 4. This inartful language notwithstanding, the agency expressly relied on section 5329 of the ISDEAA in not agreeing to the language in question. *See id.* at Page 2 of 4

DATED: September 10, 2020

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

ERIC R. WOMACK
Assistant Branch Director

/s/ James Powers
JAMES R. POWERS (TX Bar No. 24092989)
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Telephone: (202) 353-0543
E-mail: James.R.Powers@usdoj.gov

Counsel for Defendants