

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA**

SANTEE SIOUX NATION
108 Spirit Lake Ave. W
Niobrara, NE 68760,

Plaintiff,

v.

ROSELYN TSO, in her official capacity as
DIRECTOR OF THE INDIAN HEALTH SERVICE;

UNITED STATES INDIAN HEALTH SERVICE;

XAVIER BECERRA, in his official capacity as
SECRETARY OF HEALTH AND HUMAN
SERVICES;

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES;

UNITED STATES DEPARTMENT OF THE
TREASURY, BUREAU OF THE FISCAL
SERVICE;

TIMOTHY GRIBBEN, in his official capacity as
COMMISSIONER BUREAU OF FISCAL
SERVICE;

THE UNITED STATES OF AMERICA.

Defendants.

Civil Action No.

**PLAINTIFF’S BRIEF IN SUPPORT OF MOTION FOR EMERGENCY TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

I. INTRODUCTION

Plaintiff, the Santee Sioux Nation (the “Tribe” or the “Nation”) brings this Emergency Motion for Temporary Restraining Order and Preliminary Injunction against defendants, United States Department of Health and Human Services (HHS), Indian Health Services (IHS) and United

States Department of the Treasury Bureau of Fiscal Services (USDOT-BFS), seeking an order restraining defendants from their ongoing unlawful seizure (i.e. “offset”) of federal funds that the Tribe relies on to provide health care and other essential services to its tribal members. To date, the total amount unlawfully seized is over \$17 million. This has pushed the Tribe’s entire health care, social welfare and agricultural programs towards insolvency. Verified Complaint, at ¶ 80.¹ The Tribe requests a Temporary Restraining Order requiring Defendants to immediately cease their unlawful offset of the Tribe’s essential federal funding, and to immediately restore the funds unlawfully offset to date, pending a full evidentiary hearing on the Tribe’s Preliminary Injunction.

II. FACTS

A. The Santee Sioux Nation

The Santee Sioux Nation is a federally-recognized Indian tribe, organized under Section 16 of the Indian Reorganization Act of 1934 and governed by its Constitution as approved, with amendments, by the Secretary of the Interior on August 30, 2002. Complt., at ¶ 17. The ancestral homeland of the Santee Sioux Nation (formerly the Santee Sioux Tribe of Nebraska) is located in present-day Minnesota. *Id.* In 1862, the Tribe’s members were facing starvation after the federal Indian Agent, Thomas J. Golbraith, diverted and withheld provisions that were promised to the under the Tribe’s treaties with the United States. Roy W. Meyer, *History of the Santee Sioux*, pp. 110-115 (Univ. of Neb. Press, 1993). Golbraith’s withholding of provisions lead to the 1862 armed conflict between the starving Santee Sioux and the U.S military. *Id.* Following the 1862 conflict, thirty-eight Santee Sioux were hanged in Mankato, Minnesota—the largest mass-execution in U.S. history. *Id.* at 129. Immediately thereafter, the U.S. government abrogated its prior treaties with the Santee Sioux and forcibly relocated them first to present-day South Dakota and later to present-

¹ Citations to the Verified Complaint hereafter are referenced as “Complt.”

day northeastern Nebraska. *Id.* at 133-174. The land in Nebraska on which the Santee Sioux were relocated has always been ill-suited for farming, and what little arable land that existed on the reservation was flooded by the federal government in order to provide hydroelectric power to surrounding non-Indian communities. Compl. at ¶ 18. The Santee Sioux Reservation is severely economically depressed and has been designated by the federal government as a Historically Underutilized Business Zone, or "HUBZone." Small Business Administration, HUBZone Map, (July 2023) <https://maps.certify.sba.gov/hubzone/map>.

Title to the vast majority of the Santee Sioux Nation's land is held by the United States, and thus, unlike States, the Tribe has no tax base to fund its governmental programs and services. Compl. at ¶ 19. Disadvantage and poverty on the Santee Sioux Reservation are high. *Id.* A third of Santee Sioux Nation families with children under the age of five live in poverty. *Id.* Historically, 23% of individual Santee Sioux Nation Tribal members live in poverty throughout their adulthood. *Id.* Unemployment rates on the reservation consistently hover at well over 70%. *Id.* For many Santee Sioux Tribal members, the federally- funded assistance they receive from the Tribe is their only source of material well-being. *Id.*

The Nation relies almost exclusively on federally-funded grants and programs to provide life-sustaining health and social service programs and services to its members. *Id.* at ¶ 20. The Tribe also contracts with IHS and BIA to provide treaty and statutorily-based federal programs and services to its members. *Id.*

B. IHS and the Tribe Enter into Agreement to Settle Debt Resulting from IHS Misguidance

1. IHS instructs the Tribe on the use of depreciation to finance construction bonds

The Tribe contracts with HHS to provide health care to its members. Complt. at ¶ 20. The IHS is an agency within the HHS, and is responsible for providing federal health services to American Indians and Alaska Natives. Indian Health Service, About IHS, (last visited Nov. 20, 2023), <https://www.ihs.gov/aboutihs/>. The contracts entered into with HHS and carried out by IHS are governed by the Indian Self Determination and Education Assistance Act, or ISDEAA. 25 U.S.C. §§ 5301, et seq.; Complt. at ¶ 4. The ISDEAA allows Tribes and tribal organizations to contract with the HHS to plan, conduct, and administer one or more individual programs, functions, services, or activities, or portions thereof, that the federal agencies would otherwise provide for the Tribe or tribal organization because of their status as Indians. 25 U.S.C. § 5321. The ISDEAA mandates that the Secretary of HHS contract with the Tribe to provide direct program funding to carry out HHS's treaty and statutory obligations to provide health care services to the Tribe's members, referred to as the "secretarial amount," representing "the amount the Secretary would have expended had the government itself [continued to] run the program." *Id.*; see *Arctic Slope Native Ass'n v. Sebelius*, 629 F.3d 1296, 1298-99 (Fed. Cir. 2010), *vacated on other grounds* 133 S.Ct. 22 (2012); 25 U.S.C. § 5325(a)(1).

In addition to the "secretarial amount," ISDEAA requires HHS to fund contract support costs on awarded contracts. 25 U.S.C. § 5325(a)(2). Contract support cost funding "shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which (1) normally are not carried on by the respective Secretary in his direct operation of the program; or (2) are provided by the Secretary in support of the contracted program from resources other than those under the contract." *Id.*

ISDEAA defines contract support costs more specifically as follows:

The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include costs of reimbursing each tribal contractor for reasonable and allowable costs of –

1. Direct program expenses for the operation of the Federal program that is the subject of the contract, and
2. Any additional administrative or other expenses related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract, except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.”

25 U.S.C. § 5325(a)(3)(A). Expenses in subparagraph (1) are generally referred to as “direct contract support costs” and are attributable directly to the contract at issue. Complt. at ¶ 25. Expenses in subparagraph (2) are generally referred to as “indirect contract support costs” which are costs attributable to more than one contract objective. *Id.*

Approximately fifteen years ago, the Santee Sioux Nation explored the possibility of constructing a Health and Wellness Center on the Santee Sioux Reservation in order to provide health care services to its members and others eligible in the surrounding communities. *Id.* at ¶ 37. At the time, the nearest IHS health care facility was located approximately 51 miles from the Santee Reservation. *Id.* The health status of the Santee Sioux members and American Indians residing in the Santee Sioux Service Area was typical of an economically depressed and medically underserved area. *Id.* at ¶ 38. Residents of the service area were dying from unintentional accidents and diseases at rates exceeding those of the general population in the United States. *See, Id.* at ¶ 39, 40.

To address these conditions, the Tribe and IHS made a determination of need for a health care facility in Santee (“Facility”) and IHS certified that the Facility “is consistent with the applicable IHS Area Health Facilities Master Plan and that the Aberdeen Area IHS supports and

recommends the proposed project.” *Id.* at ¶ 41. The Tribe worked with IHS throughout the process of planning, designing, constructing, equipping, leasing, and operating the Facility. *Id.* at ¶ 37. The Facility opened in 2011. *Id.* at ¶ 43.

Around 2008, the Tribe was concerned with its ability to carry the debt proposed in the construction of the Facility. Decl. of John H. Banks, Managing Director, D.A. Davidson & Co. (Dec. 30, 2015), attached to Compl. as Exhibit B at ¶ 12. It raised those concerns with IHS officials at both the area and central office level. *Id.* In response, IHS advised the Tribe to include depreciation in calculating its ISDEAA indirect contract support cost payments, in order to help fund the bond issuance used to finance construction of the Facility. Compl. at ¶ 42. IHS assured the Tribe that such indirect contract support cost payments would be available over the life of the Joint Venture Construction Program Agreement (“JVCPA”) entered into between the Tribe and IHS to finance the planning and construction of the Facility. Banks Decl. at ¶ 8-10.² Further, throughout the bond placement process, the Tribe was repeatedly assured by IHS that that Facility revenue (which included depreciation payments from IHS) would be sufficient to repay the debt. *Id.* at ¶ 12. Based on the explicit directions and repeated assurances by IHS, the Tribe placed bonds for sale with investors. *Id.* at ¶ 6-17. These bonds would not have been placed, and investors would not have purchased them, had the Tribe and its investors known that IHS would renege on its advice a mere five years into the project, claiming, long after multi-million-dollar commitments had been made by the Tribe, that the use of depreciation payments to finance construction of the Facility would be disallowed. *Id.* at ¶ 17.

2. The Tribe and IHS settle the Tribe’s contract support cost shortfall claims

The Tribe filed contract support cost shortfall claims against the IHS in 2012, and thereafter

² The JVCPA is basically a no-cost lease whereunder the Tribe owns and IHS uses the Facility. Compl. Ex. A at Art. IV(A).

engaged continuously and regularly with IHS in negotiating a settlement for the next four years. Compl. at ¶ 44, 45. These settlement communications involved dozens of emails and paper correspondence with agency officials and IHS attorneys, telephone calls, and at least one in-person meeting in Aberdeen, South Dakota. *Id.* at ¶ 45. Throughout these four years of communication, the Tribe's attorneys were regularly copied on correspondence received from IHS. *Id.* at ¶ 44-46. The primary issue discussed was the inclusion of depreciation payments to help fund construction of the Facility. *Id.* at ¶ 45.

In 2016, IHS contracting officer Carol Diaz denied the Tribe's contract support cost shortfall claims. *Id.* at ¶ 46. The Tribe's attorney was copied on that denial. *Id.*

The Tribe's attorneys appealed the denial and IHS and the Tribe's attorneys entered an appearance and agreed to stay the claim pending settlement. *Id.* at ¶ 47.

After four years of negotiations, the settlement agreement finally agreed upon by the parties contained the following language:

Going forward, the Parties agree that the ISDEAA does not authorize the payment of contract support costs for the [Facility construction] costs in the Contractor's [indirect cost] pool and that the Contractor is responsible to pay these costs under the JVCP agreement. Accordingly, starting with the Contractor's negotiation with [Interior Business Center] of its next indirect cost rate, the Contractor agrees to not include the JVCP costs in its indirect cost pool. The Contractor further agrees to negotiate a separate agreement with IHS for the repayment of any overpayment of contract support costs under its FY 2015 and FY 2016 ISDEAA agreements that resulted from the inclusion of JVCP costs in the Contractor's indirect cost pool. **This repayment agreement shall identify the repayment amount negotiated by the Parties and provide for repayment over not less than four (4) fiscal years. Both Parties are equally responsible for ensuring that the requirements of this paragraph are met.**

Compl. Ex. F (Settlement Agreement at ¶ 7. (emphasis added)).

C. The Tribe Performs Under the Settlement Agreement

To recapture (i.e., repay) overpayments of contract support costs resulting from the inclusion of depreciation in its indirect cost pool in fiscal year 2015, and pursuant to the Settlement

Agreement, in 2016 and 2017, the Tribe entered into negotiations with the Department of Interior, Interior Business Center, in order to perform paragraph 7 of the Settlement Agreement. Noonan Decl. at ¶ 7. As a result of those negotiations, the Tribe agreed to a reduction in its indirect support cost payments totaling \$2,357,787 for fiscal years 2015-2018. *Id.* at ¶ 5.

D. IHS Violates the Settlement Agreement by Unilaterally Issuing Modification 33

On November 16, 2016, less than one month after entering into the Settlement Agreement, which made both parties equally responsible to negotiate repayment of any overpayment over not less than four years, IHS claims that it sent the Tribe a letter regarding the Tribe's FY 2015 ISDEAA agreement, stating that, due to an administrative oversight, the Tribe was "overpaid by \$3,244,061 on indirect [Contract Support Cost] funding" due to "depreciation in Tribe's indirect cost (IDC) pool that is related to the separate joint venture agreement" and demanding that the Tribe "remit a check payable to the 'Indian Health Service' in the amount of \$3,244,061 by January 15, 2017" Compl. Ex. G. at p. 2. Significantly, neither the Tribe nor its attorneys received this letter. Compl. at ¶ 53; Declaration of Roger Trudell, at ¶ 4; Declaration of Ben Fenner, at ¶ 4; Declaration of Patty Marks at ¶ 4.

On that same date, IHS issued Modification 33, decreasing the Tribe's total contract amount "in the amount of \$3,244,061 from \$27,812,322.00 to \$24,568,261.00" Noonan Decl. at ¶ 5. *This resulted in the Tribe effectively over-paying the same alleged debt:* first through negotiating and being paid on reduced indirect contract support cost rates, effectively repaying IHS in the amount of \$2,357,787.00 and second by IHS's unilateral issuance of Modification 33, which reduced the Tribe's funding agreement amounts in subsequent contract years by \$3,244,061.00. *Id.*

E. IHS Attempts to Bring a Contract Disputes Act (CDA) Claim against the Tribe

On June 19, 2017, IHS allegedly asserted a claim under the Contract Disputes Act, 41

U.S.C. §§ 7101 et seq., demanding immediate repayment in one lump sum of \$3,782,216. (“2017 Claim”) Compl. at ¶ 59. *Like its November 16, 2016 letter (supra), the June 19, 2017 CDA Claim was never received by the Tribe. Id.*; Trudell Decl. at ¶ 4. *Also, the Tribe’s attorneys responsible for negotiating the Settlement Agreement were not copied on it and did not receive it Fenner Decl. at ¶ 4; Marks Decl. at ¶ 4.* Yet James M. Cribari and Melissa A. Jamison, the two HHS/IHS attorneys responsible for negotiating the Settlement Agreement with the Tribe’s attorneys over the four-year period from 2012-2016 were copied on the 2017 Claim. Compl. at ¶ 59, 84. No one from IHS, including its legal counsel ever reached out to the Tribe or its legal counsel to notify or discuss this incredibly massive (and illegitimate) claim – a claim that had already been vastly overpaid by the Tribe. The Tribe’s attorneys first learned of this action taken by IHS on October 3, 2022. *Id.* at ¶ 60. By then it was too late.

F. Unlawful Offsets of the Tribe’s Health Care, Social Services, and Agricultural Program Funds

Beginning in November 2022, IHS sought to enforce its illegitimate claim through private collections and, finally, a series of treasury offsets that have pushed the Tribe’s entire health care system towards insolvency, and that now threatens the Tribe’s social welfare and agricultural programs and its most vulnerable members. Compl. at ¶¶ 72, 73, 76, 80, 92.

IHS first initiated two rounds of offsets of the Tribe’s ISDEAA payments, both in violation of 31 U.S.C. § 3716(c)(3)(B). *See* Treasury Offset Program, Payments Exempt from Offset by Disbursing Officials, (last visited Nov 15, 2023), <https://fiscal.treasury.gov/files/debt-management/dmexmpt.pdf> *4 (listing Tribal Law 93-638 Contract/Compacts as payments exempt from offset). The total amount of these offsets exceeded \$11,663,229.00. *Id.* at ¶ 71. The first round of unlawful offsets of the Tribe’s ISDEAA payments occurred in November 2022 and totaled \$5,665,335.00. *Id.* at ¶ 72. Although those funds were restored on or about March 23,

2023, the Tribe was unable to access funding needed to operate its health care programs for its tribal members for over four months, causing severe and irreparable injury to the Tribe and its members. *Id.* at ¶ 72. The second round of unlawful offsets of the Tribe's ISDEAA payments occurred on October 12, 2023 and totaled approximately \$5,930,155.72. *Id.* at ¶ 73. Although those funds were partially restored on or about October 27, 2023, the Tribe was unable to access funding needed to operate its health care programs for its tribal members for over two weeks, causing severe and irreparable injury to the Tribe and its members. *Id.*

To date, the IHS has refused to discontinue the treasury offsets, and has recently caused the USDOT-BFS to offset at least \$751,119.00 of the Tribe's federal grant and program funding – funding that is essential to provide necessary social services for its members. *Id.* at ¶ 73. The federal funds that were offset included funds intended for the Nation's Elderly Nutrition program, the Nation's Daycare program, its Emergency Medical Services (EMS) program, its Temporary Assistance for Needy Families (TANF) program, its Head Start program, its Substance Abuse and Mental Health Services (SAMSHA) program, its Independent Living program, its Child Welfare Social Services program, its Behavior Health program, its Tribal Youth Suicide & Early Prevention program, and its Community Health Services program. *Id.* at ¶ 75. The total amounts of the diversions/seizures/offsets for these essential programs exceeds \$682,000.00 since October 1, 2023. *Id.* In addition, defendants offset at least \$69,119.00 in federal funding intended for the Tribe's agricultural program since June 9, 2023. *Id.* at ¶ 76. None of these funds have been returned to the Tribe, despite numerous demands to do so. *Complt.* at ¶ 75. Furthermore, the offsets are ongoing, and IHS has informed the Tribe that it intends to continue the offsets. *Fenner Decl.* at ¶ 7.

Without the above-referenced funds that were seized without notice by Defendants, the

Tribe is unable to operate the federally-funded social service programs referenced above, and hundreds of tribal members, including elders and impoverished families with children, will suffer immediate and irreparable injury. Compl. At ¶ 77. In addition, the offset funds are needed to pay the wages of dozens of tribal employees, whose families rely on such wages for essential needs, including food, housing, transportation and heating fuel. *Id.* Moreover, the as the result of the seizure of the Nation’s agricultural payments, the Nation is unable to pay its agricultural employees, feed its livestock, maintain its equipment, and if such seizures/offsets continue the Nation risks defaulting on loans used to purchase land utilized for crops and livestock. *Id.*

III. ARGUMENT

A. Applicable Legal Standards

1. Standard for Granting Temporary Restraining Order/Preliminary Injunction

A court issues a preliminary injunction in a lawsuit to preserve the status quo and prevent irreparable harm until the court has an opportunity to rule on the lawsuit’s merits. *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 & n. 5 (8th Cir. 1981) (en banc)). “Success on the merits has been referred to as the most important of the four factors.” *Roudachevski v. All-American Care Centers, Inc.*, 648 F.3d 701, 706 (8th Cir. 2011). However, it is a flexible analysis, in which “no single factor in itself is dispositive.” *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998). Rather, the court weighs on a sliding scale the case’s particular circumstance to determine “whether the balance of equities so favors the movant that justice requires the court to intervene.” *Dataphase*, 640 F.2d at 113. Here, all four factors weigh in favor of injunctive relief.

2. Standard of Review for APA Claims

The APA entitles “a person suffering legal wrong because of agency action, or adversely

affected or aggrieved by agency action ... to judicial review thereof.” 5 U.S.C. § 702. Under the APA, a reviewing court must set aside an agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A). An agency action is arbitrary or capricious when “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Veh. Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). If the agency itself has not provided a reasoned basis for its action, the court may not supply one. *Id.*

Under the APA, final agency action may consist of agency inaction. *See* 5 U.S.C. § 706(1) (authorizing court to “compel agency action unlawfully withheld or unreasonably delayed”); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 61 (2004) (hereinafter “SUWA”) (“Failures to act are sometimes remediable under the APA”). To establish agency inaction subject to review under the APA, the Plaintiffs must show that the agency failed to carry out a mandatory, nondiscretionary duty. *See SUWA*, 552 U.S. at 64 (“a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.”).

3. **Applicable Canons of Construction**

In construing the statutes and regulations at issue in this case, the Court must adhere to the “principle deeply rooted in [our] Indian jurisprudence” that “statutes are to be construed liberally in favor of the Indians.” *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767–768 (1985)). Congress codified this canon in the “Rule of construction” section of the ISDEAA. 25 U.S.C. §5321(g).

This canon also applies to federal regulations, as “[t]he trust relationship and its application

to all federal agencies that may deal with Indians necessarily requires the application of a similar canon of construction to the interpretation of federal regulations." *HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1245 (10th Cir. 2000), *as amended on denial of reh'g and reh'g en banc* (Mar. 30, 2000). This is explicit in the regulations governing contracts under the Indian Self Determination and Education Assistance Act, which express the policy of the Secretary to "liberally construe" the regulations "for the benefit of Indian tribes." 25 C.F.R. §900.3(b)(11).

Furthermore, "deference to which [an agency's] interpretation may otherwise be entitled is muted by the Indian canon of construction, which counsels that statutory ambiguities are to be resolved in favor of Indians." *Koi Nation of N. California v. United States Dep't of Interior*, 361 F. Supp. 3d 14, 42 (D.D.C. 2019).

B. The Tribe is Likely to Succeed on the Merits of its Claims

1. First Claim for Relief: APA – FDCPA Procedural Violations

The head of a federal agency may collect a claim through administrative offset only after giving the debtor notice and due process. 31 U.S.C. §3716(a). The IHS Manual also explicitly requires due process in communicating with debtors. For example, Indian Health Manual Part 9, Chapter 4 – Debt Management, Section 3, Subsection L – Communicating with Debtors reads as follows:

Contact with the debtor is essential because contact provides the debtor with notification of the existence of the debt and the amount if the debtor is otherwise unaware of such elements. It also provides the debtor with the opportunity to repay the debt in full or to work out a satisfactory arrangement with the IHS. . .

It also provides written evidence of the due process in compliance with demand letters advising the debtor of the intent to use certain debt collection tools. This allows the debtor to exercise any rights to avoid the use of the debt collection tools. Although Federal agencies are not subject to the Fair Debt Collection Practices Act (FDCPA), the regulations provide valuable guidance in communicating with debtors. The following FDCPA rules of debt collection shall be followed by IHS employees. . . .

(2) Do not contact the debtor directly if you know the debtor is represented by

an attorney. *Id.*

Government contractors deemed non-responsible due to nonpayment of debt may be suspended and disbarred. Complt. at ¶ 32; *See*, 2 C.F.R. §§ 180.800(c)(3), 180.700(b). The effect of such action is, in part, to prohibit federal agencies from entering into any transaction with such contractor. *Id.*; *See, e.g.* 2 C.F.R. § 180.400(b).

Here, Defendants' failure to notice the Tribe of its demand for repayment in 2016, or of the CDA claim brought against the Tribe on that same demand in 2017, deprived the Santee Sioux Nation of due process. Despite communicating with the Tribe through its attorneys for four years on the very issue forming the subject of the agency's demand and 2017 Claim, IHS failed to notify the Tribe or its attorneys on either the demand or the claim. This deprived Tribe of the "essential" components of due process: "contact with the debtor . . . [to provide] notification of the existence [and amount] of the debt" IHS Manual, *supra*. This denied the Tribe the right to exercise any rights it has to avoid the use of debt collection tools such as treasury offsets which IHS unlawfully resorted to and, in turn, avoid the catastrophic effects of unlawful offsets of more than \$17 million dollars and the attendant fall out from being locked out of its Payment Management System account and denied access to its federal grant and program funding.

2. Second Claim for Relief: APA Violations for Overcollection of Alleged Debt.

As noted above, in September 2016 the Tribe entered into a Settlement Agreement with IHS to resolve the Tribe's contract support cost shortfall claims and deal with the inclusion of depreciation in the Tribe's indirect contract support cost pool. Complt. at ¶ 45-49. That Settlement Agreement required that fiscal years 2015 and 2016 overpayments for depreciation would be negotiated by the parties and repaid, "over not less than four (4) fiscal years," and that, "Both Parties are equally responsible for ensuring" that these provisions were met. *Id.* at ¶ 49.

Immediately thereafter, the Tribe performed its obligation under the Settlement Agreement

by negotiating reduced indirect cost reimbursements for its ISDEAA contracts that totaled \$2,357,787.00. *Id.* at ¶ 50. But someone at IHS apparently did not get the memo, as two months later, in November, 2016, the Tribe again repaid the alleged overpayments via a unilateral modification of the Tribe's ISDEAA contract funding (Modification 33) that reduced its three-year contract funding in the amount of \$3,244,061.00. Noonan Decl. ¶ 5. The contract reduction amount was solely for the purpose of carrying out the Tribe's repayment obligation contained in the Settlement Agreement. However, unbeknownst to the Tribe, IHS almost immediately proceeded to prepare its 2017 Claim against the Tribe. *See*, Compl. at ¶ 59. In fact, through the Defendants' arbitrary actions, to date they have collected (and not restored) a total of at least \$6,352,967.00 on an alleged debt that, according to IHS' November 16, 2016 demand letter, amounted to \$3,244,061.00. This resulted in an effective overpayment of \$3,108,906.00. *Id.* at ¶ 107.

But IHS was not finished with its overzealous, arbitrary and capricious overcollection activities. Instead of withdrawing its 2017 Claim, it continued on (again, without providing notice to the Tribe or its attorneys that it was doing so). Because the Tribe did not appeal the 2017 Claim (nor could it, as it had repaid the debt that forms the basis for the claim, and was not provided notice of the claim), IHS proceeded to refer the claim to Transworld and to USDOT-BFS for collection. Compl. at ¶ 70. By the time this collection activity ensued, the amount of principal plus interest calculated by IHS amounted to \$5,750,004.52. Compl. at ¶ 93. Thereafter, the Tribe presented IHS with irrefutable evidence that the original debt had not only been paid, but overpaid. However, much like the Federal Indian Agent in 1862, Defendants have continued to unlawfully seize the Tribe's federal funding – funding that is essential to the health and wellbeing of the Tribe and its members. Clearly, IHS has “entirely failed to consider an important aspect of the problem,

offered an explanation for its decision that runs counter to evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," *Motor Veh. Mfrs. Ass'n, supra*, and as such, the actions of both IHS and USDOT-BFS are arbitrary, capricious and contrary to law. The Tribe is likely to succeed on the merits of its Second Claim for Relief.

3. Third Claim for Relief: Failure to Implement the Settlement Agreement.

As noted above, for purposes of APA review, final agency action may consist of agency inaction. *See* 5 U.S.C. 706(1); *SUWA*, 542 U.S. at 61, 64. Here, IHS was required by the Settlement Agreement to "ensure" that the alleged debt owed by the Tribe be repaid, "over not less than four (4) fiscal years." Compl. at ¶ 49. The Settlement Agreement also carries forward each parties' right to enforce the terms of the agreement. *Id.* However, IHS has unlawfully failed and refused – and continues to fail and refuse – to honor its obligations under the Settlement Agreement. Despite the Tribe effectively overpaying the alleged debt that was the subject of the Settlement Agreement, IHS continues to refuse to withdraw its illegitimate 2017 Claim, and continues to instruct DOT-BFS to offset the Tribe's ISDEAA, grant and program funding for a debt that has been fully satisfied. Clearly, IHS has failed to perform its mandatory, nondiscretionary duty under the Settlement Agreement, and has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," *Motor Veh. Mfrs. Ass'n, supra*, and as such, the actions of both IHS and USDOT-BFS are arbitrary, capricious and contrary to law. The Tribe is likely to succeed on the merits of its Third Claim for Relief.

4. Fourth Claim for Relief: Failure to Terminate the Debt or Collection Activity on the Debt

Defendants exceeded their authority by continuing to collect on a debt that has already been overcollected, a debt the existence and amount of which was unknown by the Tribe due to IHS's failure to provide notice. For these reasons, the Tribe is likely to succeed on its fourth claim for relief.

Here, Defendants' failure to notify the Tribe of its demand for repayment in 2016, or of the Contract Disputes Act claim brought against on that same demand in 2017, deprived the Santee Sioux Nation of due process. Despite communicating with the Tribe through its attorneys for four years on the very issue forming the subject of the agency's 2016 demand and 2017 Claim, IHS failed to notify the Tribe or its attorneys on either the demand or the 2017 Claim. This deprived Tribe of the "essential" components of due process: "contact with the debtor . . . [to provide] notification of the existence [and amount] of the debt" IHS Manual, *supra*. This denied the Tribe the right to exercise any rights it has to avoid the use of debt collection tools such as treasury offsets which IHS unlawfully resorted to and, in turn, avoid the catastrophic effects of unlawful offsets of more than \$17 million dollars and the attendant impacts from being locked out of its Payment Management System account and denied access to its federal grant and program funding.

Not only was notice ineffective on IHS's demand and 2017 Claim, in violation of federal law as incorporated in the IHS manual and regulations, the offsets springing from that 2017 Claim were unlawful. IHS initiated two rounds of offsets of the Tribe's ISDEAA contract payments. The first round of unlawful offsets of the Tribe's ISDEAA payments occurred in November, 2022 and totaled \$5,665,335.00. Compl. at ¶ 72. Those funds were not reimbursed to the Tribe until four months later, on or about March 23, 2023. *Id.* The second round of unlawful offsets of the Tribe's ISDEAA payments occurred on October 12, 2023 and totaled approximately \$5,930,155.72. *Id.* at ¶ 73. Those funds were partially reimbursed to the Tribe on or about October 27, 2023. *Id.* Both

of these offsets violated 31 U.S.C. § 3716(c)(3)(B), which exempts payments made pursuant to the ISDEAA from treasury offsets. *See* Treasury Offset Program, Payments Exempt from Offset by Disbursing Officials, (last visited Nov. 14, 2023) <https://fiscal.treasury.gov/files/debt-management/dmexmpt.pdf> (listing Tribal Law 93-638 Contract/Compacts as payments exempt from offset).

On learning in 2022 of the 2017 Claim and resulting unlawful offsets, the Tribe informed IHS of the failure to notify the Tribe on the 2017 Claim and of the overpayment of the alleged debt. *See* Compl. Ex. L. Defendants, however, have not terminated the debt or collection activity on the debt. Fenner Decl. at ¶ 7.

Defendants exceed their authority by continuing to collect on a debt that has been fully satisfied. The effects of this are devastating to the Tribe's most vulnerable members, depriving them of essential life-saving health care and social welfare programs and critically-needed wages. Defendants continue to divert and seize the Tribe's federal grant funding, seizing at least \$751,119.00 in federal health care, social services and agricultural funds from the Tribe over the past five months alone. Compl. at ¶ 74. As such, the actions of Defendants are arbitrary, capricious and contrary to law and the Tribe is likely to succeed on the merits of its Fourth Claim for Relief.

5. Fifth Claim for Relief: Procedural Due Process

The Eighth Circuit engages in a two-part analysis when “addressing a procedural due process argument, asking, first, whether the plaintiffs have a protected interest at stake, and if so, what process is due.” *Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir. 1997).

Here Defendants have deprived the Tribe of property in the form of ISDEAA health care funding and grant funds it uses to provide essential health care, social service and other life-sustaining benefits to its members. Such funding is a constitutionally protected property interest. *See Goldberg v. Kelly*, 397 U.S. 254 (1970).

In such a circumstance, the need for “adequate notice is also settled law. Adequate notice is integral to the due process right to a fair hearing, for the ‘right to be heard has little reality or worth unless one is informed.’” *Bliek*, 102 F.3d at 1475 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). “Adequate notice,” the Eighth Circuit has held, “is that which is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Bliek*, 102 F.3d at 1475 (internal quotations omitted). “Further, the notice must ‘apprise the affected individual of, and permit adequate preparation for, an impending hearing.’” *Id.* (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978)).

If the government has bound itself to certain rules and regulations it must follow before it may deprive a person of property, then, at a minimum, it must comply with those rules and regulations. *E.g.*, *Patterson v. Coughlin*, 761 F.2d 886, 891 (2d Cir. 1985).

Here, the Tribe was not provided adequate notice as it was not apprised of the pendency of the 2017 Claim or an opportunity to object to that claim. Despite communicating with the Tribe through its attorneys for four years on the very issue forming the subject of the agency’s 2016 demand and 2017 Claim, IHS failed to provide notice of the same to the Tribe or its attorneys. Compl. at ¶ 86.

This failure violated IHS’s own rules and regulations. Specifically, Indian Health Manual Part 9, Chapter 4 – Debt Management, Section 3, Subsection L recognizes that contact with the debtor is “essential . . . [to] due process” and requires the agency officials to “not contact the debtor directly if you know the debtor is represented by an attorney.” In addition, IHS rules require the debtor to be allowed to “inspect and copy IHS records related to the debt . . . and request a review with in [sic] the IHS to the determination of indebtedness.” *Id.* at § D. Here, the Tribe was not

allowed an opportunity to inspect IHS records related to the debt or request review prior to Defendants unlawfully offsetting the Tribe's federal contract, grant and program funding – funding that is necessary to provide essential health care, social services and other benefits to its members. Here the Tribe was not provided notice of its appeal rights, such as the deadline to file and location where an appeal must be brought. The Tribe is likely to succeed on the merits of its Fifth Claim for Relief alleging a violation of due process.

6. Sixth Claim for Relief: Violation of 25 C.F.R. § 900.217

25 C.F.R. § 900.217 requires the Federal government to attempt to resolve all contract disputes by agreement at the awarding official's level instead of filing a claim under the Contract Disputes Act. The regulations also express the intent of Congress that ISDEAA and contracts thereunder “shall be liberally construed for the benefit of the tribes” 25 C.F.R. §900.3(a)(5) and the policy of the Secretary to “continue to discharge the trust responsibility to protect and conserve the trust resources of Indian tribes” contracting under the statute. 25 C.F.R. §900(b)(4).

To attempt to resolve disputes at the awarding official's level, notice must be given by the Federal government to the contractor with whom the dispute exists. *See* Indian Health Manual Part 9, Chapter 4 – Debt Management, Section 3, Subsection L – Communicating with Debtors.

Here, the IHS' demand dated November 16, 2016, was not received by the Tribe and, regardless, was not sent to the Tribe's attorneys. Compl. at ¶ 53. Additionally, IHS made no attempt to contact the Tribe's attorneys related to this matter from November 16, 2016, through June 19, 2017, the date of IHS's contract disputes act claim against the Tribe. *Id.* at ¶ 124.

This failure by the Federal government to attempt to resolve this dispute at the awarding official's level denied the Tribe the ability to exercise any rights it had to avoid the use of the Defendants' debt collection tools and has caused irreparable harm to the Tribe through denying the Tribe access its grant and program funding necessary to keep its social welfare and agricultural

programs operational due to the offsets. Because IHS failed to attempt to resolve its contract dispute with the Tribe at the awarding official's level, causing irreparable harm to the Tribe, the Tribe is likely to succeed on its seventh claim for relief.

7. The Tribe is Likely to Succeed on its Claim for Restitution of Funds Unlawfully Seized/Offset.

The Tribe is also likely to succeed on the merits of its request for restitution of funds over-collected by IHS and USDOT-BFS. While the APA does not waive the federal government's sovereign immunity for an award of damages, restitution is an equitable remedy that is available under the APA. *See, e.g., Bowen v. Massachusetts*, 487 U.S. 879 (1988). In *Bowen*, the Supreme Court distinguished between specific monetary relief and substitutionary monetary relief for purposes of interpreting section 702 of the APA. The Court found that section 702 invokes a distinction between "damages" (which the Court defined as "substitutionary" relief that affords the plaintiff compensation) and "specific remedies" which "are not substituted remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." *Id.* at 895 (quoting *Md. Dept. of Human Res. v. Dept. of Health & Human Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985)) (internal citations omitted). The Court in *Bowen* concluded that the monetary relief sought in the case – reimbursement from the federal government of expenditures made by Massachusetts under the Medicaid program – constituted a specific remedy available under the APA. *Id.*

Similarly, in *America's Community Bankers v. FDIC*, 200 F.3d 822 (D.C. Cir. 2000), the court held that relief seeking restoration of funds wrongfully taken from Plaintiffs by the FDIC was permissible equitable relief under the APA. There the court noted that, "Not all forms of monetary relief are money damages. Rather, money damages represent compensatory relief, an award given to a plaintiff as a substitute for that which has been lost; specific relief in contrast represents an attempt to restore to the plaintiff that to which it was entitled from the beginning."

Id. at 829 (citations omitted). *America's Community Bankers* involved the FDIC's invocation of sovereign immunity after plaintiffs sued the agency under the APA for allegedly "retain[ing] funds" that it had "improperly collected." *Id.* at 830. Plaintiffs brought suit to "get their money back," and the D.C. Circuit squarely held that this requested remedy could not be characterized as "money damages" and therefore fell under the APA's relatively broad waiver of sovereign immunity. *Id.* Indeed, because such a remedy would simply restore the plaintiffs to their original position, the relief was "equitable, ... not compensatory." *Id.* at 831. *Accord, Steele v. United States*, 200 F.Supp.3d 217, 223-24 (D.D.C. 2016) (holding that restitution of funds that the IRS had unlawfully collected is a permissible remedy under the APA).

In this case, the Tribe does not seek compensatory damages, but instead seeks an order of restitution requiring the Defendants to restore the Tribe's funds that Defendants unlawfully seized/offset. Compl. at ¶ 1. As in *America's Community Bankers*, here the Tribe simply seeks to be restored to its original position prior to the unlawful seizures/offsets. Indeed, the very word "restitution" means restoration. Dan B. Dobbs, *Handbook on the Law of Remedies* § 4.1(1), at 365 (2d ed. 1993). "Restitution is a return or restoration of what the defendant has gained in a transaction. It may be a return of a specific thing or it may be a 'return' of a money substitute for that thing." *Id.* Also, restitution restores the plaintiff to his or her original position by recapturing the gains the defendant unjustly procured in a particular transaction. See *Restatement of Restitution* § 1 (1937). "Although an award of restitution may in fact provide compensation for the plaintiff in some cases, the restitutionary goal is different. The restitutionary goal is to prevent unjust enrichment of the defendant by making him give up what he wrongfully obtained from the plaintiff. So restitution is measured by the defendant's gains, not by the plaintiff's losses." Nora J. Pasman-Green & Alexis Derrossett, *Twenty Years After Bowen v. Massachusetts-Damages or*

Restitution: When Does It Still Matter? When Should It?, 69 La. L. Rev. 749, 760 (2009) (citations omitted).

Accordingly, the Tribe's request for restitution of funds unlawfully seized is a remedy available under the APA.

C. The Tribe will Suffer Irreparable Harm in the Absence of Emergency Injunctive Relief.

“Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages.” *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th Cir. 2009). The Tribe does not perceive any way it may calculate an award of damages from the government Defendants for their unlawful seizure of the Tribe's funding for its health care, social services, and agriculture programs. These are essential tribal government programs for the health and welfare of all of the Tribe's 2,856 members. “Not only is harm to tribal self-government not easily subject to valuation but also, and perhaps more important, monetary relief might not be available to the tribe because of the [government's] sovereign immunity.” *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1251 (10th Cir. 2001). *Accord, Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994) (injury to plaintiff tribe found irreparable because damages award unavailable due to the defendants' 11th Amendment immunity). Here, while the Tribe is entitled to restitution of the funds unlawfully seized by Defendants, it cannot obtain damages against Defendants for injuries to its right of self-government due to the Defendants' sovereign immunity to a suit for damages. As set forth in the Verified Complaint, at the direction of IHS, ***DOT has offset a total of \$11,663,229 in contract funding needed to operate the Tribe's Health and Wellness Center.*** Compl. at ¶ 68. That funding is utilized for salaries of physicians and staff and for life-sustaining health care supplies and services. *See* Compl. at ¶ 18. Without such funding,

the Tribe's entire health care system will be insolvent and unable to provide for the critical health care needs of the tribal members and others that receive health care services at the Health and Wellness Center. Although the IHS eventually replaced these funds, the Tribe sustained uncompensable injuries it sustained while being forced to operate its health care program for nearly 5 months without such essential funding.

In addition, at the direction of IHS, USDOT-BFS has also offset funds for other critical social welfare programs that the Tribe provides to its members. ***These funds have not been reimbursed by IHS.*** *Id.* at ¶ 64. In total, between October 1, 2023, and November 17, 2023, the IHS and USDOT-BFS have offset over ***\$682,000.00*** in funding that is needed to operate these critical programs. *Complt.* at ¶ 72. Without the above-referenced funds that were unlawfully offset by the USDOT-BFS, the Tribe is currently unable to operate the federally-funded social service programs referenced above, and hundreds of tribal members, including impoverished families with children, will suffer immediate and irreparable injury. In addition, the offset funds are needed to pay the wages of dozens of tribal employees, whose families rely on such wages for essential needs, including food, housing, transportation and heating fuel. *Complt.* at ¶ 77.

In addition, since June 9, 2023, at the direction of IHS, DOT has offset at least ***\$69,119.00*** in federal funding needed by the Tribe to operate its agriculture operations. *Id.* at ¶ 76. ***These funds have also not been reimbursed by IHS.*** *Id.* at ¶ 64. Without such funding the Tribe will be unable to pay its agricultural employees, feed its livestock, maintain its equipment, and the Tribe will default on loans used to purchase land utilized for crops and livestock. *Id.* at ¶ 77. And the offsets are increasing and expanding literally by the day. *See, Id.* at ¶ 1. Not only have Defendants' unlawful offsets caused incalculable injury to the Tribe's sovereign right of self-government, and to the Tribal members' ability to obtain essential governmental services and benefits, but the Tribe

cannot obtain damages for those injuries due to the Defendants sovereign immunity from a suit for damages. Clearly the Tribe has sustained, and will continue to sustain, irreparable injury unless an order enjoining the offsets is entered immediately.

D. The Balance Between the Harm and Injury that Granting this Motion Will Inflict on the Defendants and the Harm that Plaintiff Will Suffer if it is Denied, and the Public Interest, Support Granting the Requested Relief.

The balance of harms and the public interest clearly favor the Tribe. When the federal government or agency is the defendant, the final two *Dataphase* factors, the balance of harms and the public interest, can “merge” into one. *Nken v. Holder*, 556 U.S. 418, 435 (2009). If the temporary restraining order and preliminary injunction is issued, the Defendants and the public will sustain no injury at all. The injunctive relief requested by the Tribe will simply pause the unlawful offsets of the Tribe’s federal funding – funding used for the essential health care and social welfare needs of the Tribe and its members – and reimburse the Tribe for the unlawful offsets that have occurred to date. The requested injunctive relief will thus preserve the status quo that existed prior to when the unlawful offsets began. In the unlikely event that Defendants succeed on the merits in a final decision in this case, Defendants can simply re-instate the offsets against future federal funding that the Tribe receives from the federal government. In any single year, those amounts far exceed the amount of the unlawfully-alleged debt. *See Noonan Decl.* at ¶ 5 (Tribe’s annual contract funding amount in FY 2017 was over \$27 Million). The balance of harms and the public interest clearly favor the Tribe.

Dated: November 29, 2023

SANTEE SIOUX NATION,
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